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IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

FAIRHOLME FUNDS, INC., ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, THE FAIRHOLME FUND, ANDREW T. BARRETT,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Cross-Appellant.

2020-1912, -1914

Appeals from the United States Court of Federal Claims in No. 1:13-cv-00465-MMS, Chief Judge Margaret M. Sweeney.

OWL CREEK ASIA I, L.P., OWL CREEK ASIA II, L.P., OWL CREEK I, L.P., OWL CREEK II, L.P., OWL CREEK ASIA MASTER FUND, LTD., OWL CREEK CREDIT OPPORTUNITIES MASTER FUND, L.P., OWL CREEK OVERSEAS MASTER FUND, LTD., OWL CREEK SRI MASTER FUND, LTD.,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

2020-1934

Appeal from the United States Court of Federal Claims in No. 1:18-cv-00281-MMS, Chief Judge Margaret M. Sweeney.

MASON CAPITAL L.P., MASON CAPITAL MASTER FUND L.P.,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

2020-1936

Appeal from the United States Court of Federal Claims in No. 1:18-cv-00529-MMS, Chief Judge Margaret M. Sweeney.

AKANTHOS OPPORTUNITY FUND, L.P.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

2020-1938

Appeal from the United States Court of Federal Claims in No. 1:18-cv-00369-MMS, Chief Judge Margaret M. Sweeney.

APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, PALOMINO MASTER LTD., AZTECA PARTNERS LLC, PALOMINO FUND LTD.,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

2020-1954

Appeal from the United States Court of Federal Claims in No. 1:18-cv-00370-MMS, Chief Judge Margaret M. Sweeney.

CSS, LLC,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellant.

2020-1955

Appeal from the United States Court of Federal Claims in No. 1:18-cv-00371-MMS, Chief Judge Margaret M. Sweeney.

ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED,
Plaintiffs-Appellants,
v.
UNITED STATES,
Defendant-Appellee.
2020-2020

Appeal from the United States Court of Federal Claims in No. 1:13-cv-00698-MMS, Chief Judge Margaret M. Sweeney.

JOSEPH CACCIAPALLE,
Plaintiff-Appellant,
MELVIN BAREISS, on Behalf of Themselves and All Others Similarly Situated, BRYNDON FISHER, BRUCE REID, ERICK SHIPMON, AMERICAN EUROPEAN INSURANCE COMPANY, FRANCIS J. DENNIS,
Plaintiffs
v.
UNITED STATES,
Defendant- Appellee.
2020-2037

Appeal from the United States Court of Federal Claims in No. 1:13-cv-00466-MMS, Chief Judge Margaret M. Sweeney.

PLAINTIFF-APPELLANT PRIVATE SHAREHOLDERS' NON-CONFIDENTIAL JOINT APPENDIX

The Plaintiff-Appellant Private Shareholders are: Fairholme Funds, Inc., Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Continental Western Insurance Company, Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, Preferred Employers Insurance Company, The Fairholme Fund, Andrew T. Barrett, Owl Creek Asia I, L.P., Owl Creek Asia II, L.P., Owl Creek I, L.P., Owl Creek II, L.P., Owl Creek Asia Master Fund, Ltd., Owl Creek Credit Opportunities Master Fund, L.P., Owl Creek Overseas Master Fund, Ltd., Owl Creek SRI Master Fund, Ltd., Mason Capital L.P., Mason Capital Master Fund L.P., Akanthos Opportunity Fund, L.P., Appaloosa Investment Limited Partnership I, Palomino Master Ltd., Azteca Partners LLC, Palomino Fund Ltd., CSS, LLC, Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, Financial Structures Limited, and Joseph Cacciapalle

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NOTE ON CONFIDENTIAL MATERIAL OMITTED

Pursuant to Federal Circuit Rule 25.1(c)(1), material subject to the Third Amended Protective Order entered in *Fairholme Funds, Inc. et al., v. United States*, Case No. 13-465 (Ct. Fed. Cl.) [ECF 417] (the "Protective Order"), has been redacted from this non-confidential version of the Joint Appendix.

The material on Appx429, Appx430, Appx435, Appx436, Appx446, and Appx447 (*Fairholme* Second Amended Complaint); Appx868 (email between Treasury officials); Appx872–873 (Treasury proposal regarding PSPAs); Appx875–876 (email between Treasury and White House officials); Appx880–882 (Freddie Mac Board Minutes); Appx883–887 (Fannie Mae Board Minutes); and Appx902–906 (deposition transcript of Jeffrey Foster), has been redacted pursuant to the government's request that the information remain subject to the Protective Order. The Private Shareholders take no position on whether the information should be confidential.

In the United States Court of Federal Claims

No. 13-465C
(Filed Under Seal: December 6, 2019)
(Reissued for Publication: December 13, 2019)*
(Reissued Following Motion to Certify Interlocutory Appeal: March 9, 2020)**

FAIRHOLME FUNDS, INC. et al.,	*	Motion to Dismiss; RCFC 12(b)(1); RCFC 12(b)(6); Jurisdiction; Standing; Derivative Claim; Direct Claims; Instrumentalities; Coercion; Agent; Collateral Estoppel; Issue Preclusion; Conservators; Conflict of Interest; Third-Party Beneficiaries; Stock; Shareholders; Fannie; Freddie; FHFA; Certification of Interlocutory Appeal
Plaintiffs,	*	
v.	*	
THE UNITED STATES,	*	
Defendant.	*	

Charles J. Cooper, Washington, DC, for plaintiffs.

Kenneth M. Dintzer, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiffs in this case challenge the actions of the United States during the conservatorships of the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie"). Specifically, plaintiffs take issue with the conservator for Fannie and Freddie (collectively, the "Enterprises") amending a funding agreement between the Enterprises and the United States Department of the Treasury ("Treasury"). Based on the revisions to that agreement, plaintiffs seek the return of money illegally exacted, damages for breach of contract and breach of fiduciary duty, and compensation for a taking pursuant to the Fifth Amendment to the United States Constitution ("Constitution"). Defendant moves to dismiss plaintiffs' complaint, arguing that the court lacks subject-matter jurisdiction over

* The court initially issued this Opinion and Order under seal with instructions for the parties to propose any redactions. The parties informed the court that no redactions were necessary to the Opinion and Order.

** Following the issuance of this opinion, the parties moved to certify the opinion for interlocutory appeal. The court granted that motion on March 6, 2020, and explained in that order that it would amend the opinion to incorporate the necessary language to certify the opinion. The language is set forth in Part VIII, supra.

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plaintiffs' claims, plaintiffs lack standing to pursue certain claims, and plaintiffs fail to state a claim upon which relief may be granted. For the reasons stated below, the court grants in part and denies in part defendant's motion to dismiss.

I. BACKGROUND

A. The Enterprises are private companies that are under the control of a conservator.

1. The Enterprises operated independently before the financial crisis.

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities that are sold to investors. 2d Am. Compl. ¶ 36. Congress chartered Fannie in 1938 and established Freddie in 1980. Id. ¶ 37. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. Id. Freddie is organized under Virginia law, and Fannie is organized under Delaware law. Id. ¶¶ 33-34. The Enterprises, consistent with the applicable state laws, issued their own common and preferred stock. Id. ¶ 38. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. Id. ¶ 42. Those owning preferred stock acquired the right to receive dividends and a liquidation preference. Id. ¶ 41.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. Id. ¶ 43. Although the Enterprises recorded losses in 2007 and the first two quarters of 2008, the Enterprises continued to generate sufficient cash to pay their debts and retained sufficient capital to operate. Id. ¶ 44. Otherwise stated, the Enterprises were not in financial distress or otherwise at risk of insolvency. Id. ¶¶ 45, 64.

2. Congress created the Federal Housing Finance Agency to regulate the Enterprises and authorized the agency to serve as a conservator for each Enterprise.

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency ("FHFA") and provided it with supervisory and regulatory authority over the Enterprises. See 12 U.S.C. § 4511(a)-(b) (2018).[1] Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator ("FHFA-C") for each Enterprise to reorganize, rehabilitate, or wind up its affairs.[2] Id.

[1] Congress has not amended the relevant portions of HERA since enacting the law in 2008. The court, therefore, refers to the most recent version of the United States Code.

[2] To avoid any ambiguity, the court reiterates that it is using "FHFA" to refer to the agency acting in its regulatory role and "FHFA-C" when discussing the agency acting as a conservator.

§ 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its obligations. Id. § 4617(a)(3).[3] The conservator, once appointed, functions independently; it is not "subject to the direction or supervision of any other agency of the United States or any State in the exercise of [its] rights, powers, and privileges . . . ." Id. § 4617(a)(7).

Congress also delineated the scope of the FHFA-C's powers in HERA. See generally id. § 4617. As soon as it is appointed, the FHFA-C "immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . . ." Id. § 4617(b)(2)(A). Congress also conferred the conservator with the power to "[o]perate the [Enterprise]." Id. § 4617(b)(2)(B). Pursuant to that power, the conservator "may," among other things, "perform all functions of the [Enterprise]," "preserve and conserve the assets and property of the [Enterprise]," and "provide by contract for assistance in fulfilling any function . . . of the [conservator]." Id. The conservator "may" also "take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise]." Id. § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator "may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]" and "take any action authorized by [12 U.S.C. § 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA]." Id. § 4617(b)(2)(J). By describing the FHFA-C's role primarily in terms of what powers it "may" exercise, see generally id. § 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its powers, see United States v. Rodgers, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."). Simply stated, the FHFA has "extraordinarily broad flexibility to carry out its role as conservator." Perry Capital LLC v. Mnuchin, 864 F.3d 591, 606 (D.C. Cir. 2017) ("Perry II"), cert. denied, 138 S. Ct. 978 (2018).

3. Congress authorized Treasury to purchase securities issued by the Enterprises.

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(g) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. Id. §§ 1455(*l*)(4), 1719(g)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the availability of mortgage finance, and protect taxpayers. Id. §§ 1455(*l*)(1)(B), 1719(g)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

(i) The need for preferences or priorities regarding payments to the Government.

[3] Congress enticed the Enterprises to consent to a conservatorship by insulating their board members from any liability to shareholders or creditors for agreeing in good faith to the FHFA's appointment of a conservator. 12 U.S.C. § 4617(a)(6).

> (ii) Limits on maturity or disposition of obligations or securities to be purchased.
>
> (iii) The [Enterprise's] plan for the orderly resumption of private market funding or capital market access.
>
> (iv) The probability of the [Enterprise] fulfilling the terms of any such obligation or other security, including repayment.
>
> (v) The need to maintain the [Enterprise's] status as a private shareholder-owned company.
>
> (vi) Restrictions on the use of [Enterprise] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

Id. §§ 1455(*l*)(1)(C), 1719(g)(1)(C).

4. The FHFA became the conservator for each Enterprise.

After Congress enacted HERA, Treasury "urg[ed]" the FHFA to place each Enterprise into conservatorship. 2d Am. Compl. ¶ 4. The FHFA and Treasury subsequently sought to persuade each Enterprise's board of directors to consent to conservatorship. Id. ¶ 64. The FHFA and Treasury told each Enterprise's board that the FHFA would seize the Enterprises if the board did not consent to the conservatorship. Id. Around the same time, the FHFA made an offer to each board: consent to a conservatorship in exchange for the FHFA-C aiming to preserve and conserve the Enterprises' assets, attempting to restore the Enterprises to sound and solvent condition, and terminating the conservatorships when those goals were achieved. Id. ¶ 260. Each Enterprise's board accepted that offer and consented to a conservatorship on September 6, 2008, with an understanding that the FHFA-C would operate in the aforementioned limited ways. Id. ¶¶ 64, 67; see also id. ¶¶ 259-63 (discussing the purported offer and acceptance). The FHFA, soon thereafter, issued statements echoing each board's understanding. Id. ¶¶ 66, 261.

The conservatorships became effective on September 6, 2008, upon each Enterprise's board's consent. See id. ¶¶ 64 (discussing the timing of the Enterprises' consent), 259 (alleging that, prior to becoming conservator, the FHFA had not made any of the findings under 12 U.S.C. § 4617(a)(3) that would permit conservatorships without the Enterprises' consent); see also 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when "[t]he [Enterprise], by resolution of its board of directors or its shareholders or members, consents to the appointment").

5. The FHFA-C contracted with Treasury to obtain funding for the Enterprises.

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement ("PSPA") with Treasury for each Enterprise. 2d Am. Compl. ¶ 68. Treasury entered into the agreements pursuant to its authority under HERA to buy the Enterprises' securities. Id. ¶ 69. The PSPA for each Enterprise is materially identical. Id. ¶ 72. Under the PSPAs, Treasury committed to provide up to $100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. Id. If an Enterprise's liabilities exceeded its assets, then the Enterprise could draw on Treasury's funding commitment in an amount equal to the difference between the Enterprise's liabilities and assets. Id.

In return for Treasury's funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their respective common stock at a nominal price. Id. ¶ 73. Treasury's preferred stock had an initial liquidation preference of $1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury's funding commitment. Id. ¶ 74. In the event of a liquidation, Treasury was entitled to recover the full liquidation value of its shares before any other shareholder would receive compensation. Id. Second, Treasury bargained for the right to a quarterly cash dividend equal to 10% of its liquidation preference. Id. ¶ 76. An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. Id. Those in-kind payments, however, did not count as a draw from Treasury's funding commitment. Id. ¶ 80. Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. Id. ¶ 81. If Treasury did not waive the fee, the Enterprise could elect to pay the amount in cash or make an in-kind payment by increasing the liquidation preference. Id. Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. Id. ¶ 82.

The FHFA-C and Treasury amended each Enterprise's PSPA on May 6, 2009, to increase Treasury's funding commitment to each Enterprise from $100 billion to $200 billion. Id. ¶ 84. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed $200 billion. Id.

6. The Enterprises' finances improved during their conservatorships.

In the early stages of the conservatorships, each Enterprise's net worth decreased as it reported losses. The bulk of the losses resulted from the FHFA-C writing down the value of deferred tax assets and designating large loan loss reserves.[4] Id. ¶ 85. Notwithstanding those on-paper losses, the Enterprises' cash receipts consistently exceeded their expenses; they maintained net operating revenue in excess of their net operating expenses from the onset of the

[4] A loan loss reserve is an entry on a company's balance sheet that reduces its net worth to reflect anticipated losses on mortgages that it owns. 2d Am. Compl. ¶ 87. A deferred tax asset is an asset that may be used to offset future tax liability. Id. ¶ 86. A company must write down the value of that deferred asset if it is unlikely to be used to offset future taxable profits. Id. This write down occurs, for example, if a company predicts it will not be profitable in the future. Id.

conservatorships under the PSPAs and through the first two amendments to the agreements. Id. ¶ 91.

By 2012, the Enterprises' financial outlooks were promising. In addition to an improvement in the housing market, the Enterprises began generating consistent profits and anticipated losing less money on their newer mortgages. Id. ¶¶ 92, 94-95. They were positioned to further improve their financial condition by settling lawsuits brought by each Enterprise, id. ¶ 109, and revising their valuations of (1) deferred tax assets because of growing profits and (2) loan loss reserves because losses were less than expected, id. ¶¶ 98-99. The FHFA-C and Treasury were aware of those forthcoming changes and the Enterprises' improving outlooks. Id. ¶¶ 94-104. In August 2012, Treasury noted that the Enterprises would post "[r]ecord earnings," id. ¶ 98 (alteration in original) (quoting Treasury document), and Treasury received projections reflecting that the Enterprises would have positive comprehensive income between 2012 and 2022, id. ¶ 101. The FHFA-C had similar information; in July 2012, it circulated, within the FHFA, comparable projections and meeting minutes in which Fannie's treasurer was reported as stating that that the next eight years were likely to be "the golden years of [the Enterprises'] earnings." Id. ¶ 103 (quoting the minutes). Otherwise stated, the FHFA-C and Treasury knew, by early August 2012, that the Enterprises were poised to generate profits in excess of their respective dividend obligations to Treasury. Id. ¶ 97.

7. Treasury and the FHFA-C agreed to a third amendment to the PSPAs.

At an unspecified time prior to August 2012, the Treasury and the FHFA-C began considering a third amendment to each PSPA. Treasury was the driving force behind the initiative to amend the PSPAs' terms. Id. ¶ 147. Indeed, an FHFA official reported in early August 2012 that Treasury was making a "renewed push" to implement a new amendment. Id. ¶ 146 (quoting the FHFA official). The FHFA-C learned of the proposed changes before the Enterprises; Treasury informed the Enterprises that the new terms were forthcoming and announced the changes to the Enterprises at a subsequent meeting. Id. ¶ 147. Treasury officials who were involved with the process do not recall Treasury making any backup or contingency plans in the event that the FHFA-C rejected the proposed terms. Id. The FHFA-C accepted the changes without advocating for different terms. Id.

Treasury and the FHFA-C decided to announce the changed terms in mid-August 2012 because, according to Treasury, the Enterprises would be reporting earnings exceeding their dividend obligation at the beginning of that month. Id. ¶ 133. On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA ("PSPA Amendment"). Id. ¶ 112. A key component of the amended PSPAs is the requirement—referred to as the "Net Worth Sweep"—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise's net worth (except for a small capital reserve amount) rather than a dividend based on a set percentage of the liquidation preference.[5] Id. ¶ 113. Additionally, under the amended PSPAs, the Enterprises are not obligated to pay a periodic commitment fee. Id. ¶ 115.

[5] The capital reserve for each Enterprise started at $3 billion and was set to decrease to $0 by January 2018, but the Enterprises and Treasury agreed in December 2017 to reset the capital reserve amount to $3 billion in the first quarter of 2018. 2d Am. Compl. ¶ 105.

a. Treasury wanted to ensure that it benefited from the new terms.

With the PSPAs, Treasury sought to secure a more beneficial arrangement for itself, as a representative for taxpayers. During the lead-up to the PSPA Amendments, a Treasury official acknowledged in a December 2010 memorandum to the Treasury Secretary that the government was "committ[ed] to ensur[ing] existing common equity holders will not have access to any positive earnings from the [Enterprises] in the future." Id. ¶ 118 (quoting the memorandum). In another Treasury document, an official noted that the amended PSPAs would put the taxpayer "in a better position" because, rather than having "Treasury's upside . . . capped at the 10% dividend, now the taxpayer will be the beneficiary of any future earnings produced by the [Enterprises]." Id. ¶ 130 (quoting the document); accord id. ¶ 133 (quoting a Treasury official as stating that the Net Worth Sweep would place the taxpayers "in a better position"). Treasury recognized its goal of obtaining all of the Enterprises' profits by executing the PSPA Amendments; when the changes were announced, it noted that "every dollar of earnings that [the Enterprises] generate will be used to benefit taxpayers." Id. ¶ 118 (quoting a Treasury press release).

b. The FHFA-C agreed to changes that benefit Treasury.

For its part, the FHFA-C was operating under the belief that Treasury would benefit from the PSPA Amendments. An internal Treasury communication indicates that Treasury anticipated that its receipts under the PSPA Amendments would "'exceed the amount that would have been paid if the 10% [dividend] was still in effect' and that the changes would lead to 'a better outcome' for Treasury." Id. ¶ 130 (quoting the communication). Moreover, Mel Watts—a former FHFA Director—confirmed that he was concerned with how decisions affect the taxpayers. Id. ¶ 119. During an interview conducted while he was Director, he stated that he does not "'lay awake at night worrying what's fair to the shareholders' but rather focuses on 'what is responsible for the taxpayers.'" Id. (quoting the interview).

c. Treasury and the FHFA understood that the PSPA Amendments would not facilitate the Enterprises exiting conservatorship.

Treasury was aware that the new terms of the PSPAs were not conducive to the Enterprises exiting conservatorship. When announcing the PSPA Amendments, Treasury openly acknowledged that the new terms would "expedite the wind down of Fannie Mae and Freddie Mac." Id. ¶ 134 (quoting a Treasury press release). Treasury further explained that the new deal would ensure that the Enterprises "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." Id.; accord id. ¶ 114 (explaining that Treasury noted that, "[b]y taking all of their profits going forward, we are making clear that [the Enterprises] will not ever be allowed to return to profitable entities"). Indeed, a White House official sent a message to a Treasury official on the day the deal was announced noting that "we've closed off [the] possibility that [the Enterprises] ever[] go (pretend) private again." Id. ¶ 138 (alterations in original) (quoting the message); accord id. (noting in a separate message that a quotation "in Bloomberg" was "exactly right on substance and intent" when describing the deal as depriving the Enterprises of the capital they needed to go private).

The FHFA shared a similar sentiment. The FHFA's former Acting Director, Edward DeMarco, testified before the United States Senate that the PSPA Amendments "reinforce the notion that the [Enterprises] will not be building capital as a potential step to regaining their former corporate status." Id. ¶ 135 (quoting the testimony). He also stated that he had no intention of returning the Enterprises to private control under their existing charters, while another FHFA official testified that the agency's objective "was not for Fannie and Freddie . . . to emerge from conservatorship." Id. ¶ 136 (quoting the testimony). Indeed, the FHFA explained in its 2012 report to Congress that the agency had begun "prioritizing [its] actions to move the housing industry to a new state, one without Fannie and Freddie . . . ." Id. ¶ 135 (quoting the report). Consistent with those actions, the FHFA acknowledged that it would continue to serve as conservator until "Congress determines the future of Fannie Mae and Freddie Mac and the housing finance market." Id. ¶ 136 (quoting an FHFA statement).

d. Treasury has benefited from the PSPA Amendments at the expense of the Enterprises and other shareholders.

There are four significant effects that flowed from the PSPA Amendments. First, plaintiffs lost their economic interests in the Enterprises because, under the new terms, private shareholders can never receive dividends or liquidation distributions. Id. ¶ 117; see also id. (alleging that, in the event of liquidation, private shareholders will receive nothing because an Enterprise will never have enough money to pay Treasury's dividend and liquidation preferences). Second, Treasury acquired plaintiffs' economic interests in the Enterprises because Treasury now "has the right to all residual profits, and it hence owns all the equity." Id. ¶ 120. Third, Treasury reaped a windfall of $124 billion in comparison to what it would have received absent changes to the PSPAs. Id. ¶ 123; see id. ¶¶ 122-23 (alleging that the Enterprises paid Treasury $223.7 billion under the PSPA Amendments but would have only paid Treasury $95.5 billion under the previous terms). Fourth, the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink of insolvency. Id. ¶ 125.

8. Treasury and the FHFA are committed to ending the conservatorships.

On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the Treasury Secretary to develop, "as soon as practicable," a plan for "[e]nding the conservatorships of the [Enterprises] upon the completion of specified reforms . . . ."[6]

[6] The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source, the Federal Register. See Murakami v. United States, 46 Fed. Cl. 731, 739 (2000) (noting that the court may take judicial notice of government documents), aff'd, 398 F.3d 1342, 1354-55 (Fed. Cir. 2005); see also Democracy Forward Found. v. White House Office of Am. Innovation, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) ("[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum."). See generally Fed. R. Evid. 201 (discussing judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the court may consider facts derived from sources subject to judicial notice without converting the

Memorandum on Federal Housing Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must include proposals for "[s]etting the conditions necessary for the termination of the conservatorships" and outlined some of those conditions. Id. at 12,480. Subsequently, Treasury issued a plan in which it advocated for "begin[ning] the process of ending the [Enterprises'] conservatorships."[7] U.S. Dep't of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf [https://perma.cc/RGH8-N385]; accord id. at 26 ("It is, after 11 years, time to bring the conservatorships to an end."). As part of the plan to end the conservatorships, Treasury proposed that it and the FHFA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. Id. at 26-27.

The FHFA shares Treasury's goals with respect to the conservatorships. Mark Calabria, the current FHFA Director, testified during his confirmation hearing that he wanted to end the conservatorships.[8] 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony). See generally Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs, 116th Cong. 10-40, 74-75, 148-85 (2019) [hereinafter Calabria Testimony] (documenting Mr. Calabria's testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that each Enterprise retains. Calabria Testimony, supra, at 150; see also id. at 25 ("I support the idea of having significantly more capital at the [Enterprises].").

B. Plaintiffs own or owned Fannie and Freddie stock.

There are three categories of plaintiffs in this case. The first category consists of Andrew Barrett, an individual who has continually owned common stock of both Fannie and Freddie since September 2008. 2d Am. Compl. ¶ 31. The second category consists of Fairholme Funds, Inc.—on behalf of its series, The Fairholme Fund—and The Fairholme Fund, a series of Fairholme Funds, Inc., which owns preferred stock in both Enterprises. Id. ¶ 19. The third category consists of W.R. Berkley Corporation ("Berkley") and ten other plaintiffs that Berkley directly or indirectly owns: Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Continental Western Insurance Company, Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, and Preferred Employers Insurance Company (collectively, with Berkley, "Berkley Companies"). Id. ¶ 20. One of the Berkley Companies, Berkley Insurance Company, has owned preferred stock in

motion into one for summary judgment. Sebastian v. United States, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

[7] The court takes judicial notice of Treasury's reform plan because it is a government record available from a reliable source, Treasury's website. See supra note 6.

[8] The court takes judicial notice of the relevant testimony because the statements are recorded in government documents. See supra note 6.

Fannie since 2005 and Freddie since 2009. Id. ¶ 40. The other Berkley Companies acquired preferred stock in both Enterprises before and after August 2012, and many of those shares were later transferred to Berkley Insurance Company.[9] Id.

II. PROCEDURAL HISTORY

Plaintiffs filed their complaint on July 9, 2013.[10] Defendant moved to dismiss the complaint on December 9, 2013. Eleven days later, plaintiffs moved to stay briefing on defendant's motion and requested permission to conduct fact discovery for the purpose of responding to defendant's motion. On February 26, 2014, the court granted plaintiffs' motion, and the parties spent the next four years engaged in discovery.

While discovery was ongoing, Michael Sammons filed a motion to intervene in this case. In his motion, Mr. Sammons alleged that he owned Fannie and Freddie preferred stock and sought to intervene for the limited purpose of challenging this court's jurisdiction. He argued that only a court established under Article III of the Constitution can hear Fifth Amendment takings claims and therefore, the United States Court of Federal Claims ("Court of Federal Claims"), as a court established under Article I of the Constitution, is constitutionally barred from entertaining the takings claims at issue in this case. Mr. Sammons further argued that the principle of sovereign immunity does not apply to claims asserted under the Takings Clause of the Fifth Amendment. The court denied Mr. Sammons's motion, and he appealed to the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). On appeal, the Federal Circuit affirmed the denial of Mr. Sammons's motion to intervene based on his failure to satisfy the requirements of Rule 24(a) of the Rules of the United States Court of Federal Claims ("RCFC"). See Fairholme Funds, Inc. v. United States, 681 F. App'x 945, 948-49 (Fed. Cir. 2017) (per curiam). The Federal Circuit, however, did not address Mr. Sammons's argument that the Court of Federal Claims, as an Article I court, is precluded from adjudicating claims arising under the Takings Clause. See id. at 949. Rather, it directed this court to address the argument. See id. at 949-50 ("That argument, to the extent it is a jurisdictional one, must be addressed by the Court of Federal Claims . . . even if Mr. Sammons is not a party and even if no party makes the argument he makes.").

Following the Federal Circuit's decision and the completion of discovery related to defendant's motion to dismiss, plaintiffs filed an amended complaint on March 3, 2018, and a second amended complaint on August 3, 2018. In their most recent complaint, plaintiffs plead twelve claims: four direct claims in their individual capacities and eight derivative claims on behalf of the Enterprises. With respect to the direct claims, which are brought by all plaintiffs, plaintiffs first assert that the Net Worth Sweep constitutes a Fifth Amendment taking (count I) of their economic interests in their stock. Plaintiffs next assert that the Net Worth Sweep

[9] With the exception of Berkley Insurance Company, it is unclear whether each (or just some) of the Berkley Companies owned stock in the Enterprises before August 2012. See 2d Am. Compl. ¶ 40.

[10] At that time, Mr. Barrett was not a plaintiff. He was added as a plaintiff in the first amended complaint, which was filed on March 3, 2018.

constitutes an illegal exaction (count IV) of those same economic interests because the (1) FHFA was operating unconstitutionally and (2) FHFA-C and Treasury exceeded their statutory and regulatory authority when they approved the PSPA Amendments. Plaintiffs also plead a breach-of-fiduciary-duty claim ("fiduciary duty claim") (count VII) premised on the Net Worth Sweep being unfair; constituting waste, self dealing, gross overreach, and gross abuse of discretion; and failing to further a valid business purpose or reflect a good faith business judgment. Additionally, plaintiffs assert a breach-of-implied-contract claim (count X) based on a purported agreement by which the Enterprises consented to the conservatorship in exchange for the FHFA agreeing to preserve the Enterprises' assets with the goal of making them safe and solvent. Specifically, plaintiffs assert that each dividend payment under the Net Worth Sweep constitutes a breach because it depletes the Enterprises' assets in a manner that undermines the goals of conservatorship. Finally, Mr. Barrett asserts substantively the same claims as derivative claims on behalf Fannie (counts II, V, VIII, XI) and Freddie (counts III, VI, IX, XII).

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case and eleven related cases before the undersigned.[11] The plaintiffs in each of the twelve cases filed a response brief on their respective dockets; some of the plaintiffs relied on a joint brief, while others filed a joint brief and a supplemental response brief. Defendant filed its omnibus reply brief in each of the cases on May 6, 2019. At the court's request, defendant filed a statement in which it identified which claims were the subject of each argument in its motion to dismiss ("notice of arguments"). The parties have fully briefed defendant's motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiffs in this case have adopted the favorable arguments made by the plaintiffs in the related cases to the extent that such arguments are relevant.[12] Defendant's motion to dismiss is now ripe for adjudication.

III. STANDARD OF REVIEW

In ruling on a motion to dismiss a complaint pursuant to RCFC 12(b)(1) and RCFC 12(b)(6), the court generally assumes that the allegations in the complaint are true and construes

[11] The eleven related cases are Washington Federal v. United States, No. 13-385C; Cacciapalle v. United States, No. 13-466C; Fisher v. United States, No. 13-608C; Arrowood Indemnity Company v. United States, No. 13-698C; Reid v. United States, No. 14-152C; Rafter v. United States, No. 14-740C; Owl Creek Asia I, L.P. v. United States, No. 18-281C; Akanthos Opportunity Master Fund, L.P. v. United States, No. 18-369C; Appaloosa Investment Limited Partnership I v. United States, No. 18-370C; CSS, LLC v. United States, No. 18-371C; and Mason Capital L.P. v. United States, No. 18-529C.

[12] Given that the plaintiffs in this case are arguing that they alleged both direct and derivative claims, the court does not infer that they adopted the Reid and Fisher plaintiffs' argument that "the shareholder claims asserted in connection with the [PSPA Amendments] are properly asserted as derivative claims." Reid Supp'l Mem. in Opp'n to Def.'s Omnibus Mot. to Dismiss 2; accord Fisher Supp'l Mem. in Opp'n to Def.'s Omnibus Mot. to Dismiss 2.

those allegations in the plaintiff's favor. Trusted Integration, Inc. v. United States, 659 F.3d 1159, 1163 (Fed. Cir. 2011). With respect to RCFC 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of the evidence, that the court possesses subject-matter jurisdiction. Id. The allegations in the complaint must include "the facts essential to show jurisdiction." McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936). And, if such jurisdictional facts are challenged in a motion to dismiss, the plaintiff "must support them by competent proof." Id.; accord Land v. Dollar, 330 U.S. 731, 735 & n.4 (1947) ("[W]hen a question of the District Court's jurisdiction is raised, . . . the court may inquire by affidavits or otherwise, into the facts as they exist." (citations omitted)). If the court finds that it lacks subject-matter jurisdiction, it must, pursuant to RCFC 12(h)(3), dismiss the complaint.

A claim that survives a jurisdictional challenge remains subject to dismissal under RCFC 12(b)(6) if it does not provide a basis for the court to grant relief. Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002) ("A motion to dismiss . . . for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy."). To survive a motion to dismiss under RCFC 12(b)(6), a plaintiff must include in the complaint "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Indeed, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 814-19 (1982).

IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a "threshold matter." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998). Subject-matter jurisdiction cannot be waived or forfeited because it "involves a court's power to hear a case." Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it is "an inflexible matter that must be considered before proceeding to evaluate the merits of a case." Matthews v. United States, 72 Fed. Cl. 274, 278 (2006); accord K-Con Bldg. Sys., Inc. v. United States, 778 F.3d 1000, 1004-05 (Fed. Cir. 2015). Either party, or the court sua sponte, may challenge the court's subject-matter jurisdiction at any time. Arbaugh, 546 U.S. at 506; see also Jeun v. United States, 128 Fed. Cl. 203, 209-10 (2016) (collecting cases).

The ability of the Court of Federal Claims to entertain suits against the United States is limited. "The United States, as sovereign, is immune from suit save as it consents to be sued." United States v. Sherwood, 312 U.S. 584, 586 (1941). The waiver of immunity "may not be inferred, but must be unequivocally expressed." United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003). Any such waiver must be narrowly construed. Smith v. Orr, 855 F.2d 1544, 1552 (Fed. Cir. 1988). The Tucker Act, the principal statute governing the jurisdiction of this court, waives sovereign immunity for claims against the United States, not sounding in tort, that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (2018); White Mountain, 537 U.S. at

472. However, the Tucker Act is merely a jurisdictional statute and "does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 298 (1976). Instead, the substantive right must appear in another source of law, such as a "money-mandating constitutional provision, statute or regulation that has been violated, or an express or implied contract with the United States." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc).

Defendant challenges the court's jurisdiction to entertain plaintiffs' claims on a number of bases. Specifically, defendant argues that 28 U.S.C. § 1500 bars plaintiffs' claims, plaintiffs have not asserted claims against the United States, and that the court lacks jurisdiction over the subject matter of certain claims. The court addresses each of these contentions and Mr. Sammons's argument that the court lacks jurisdiction over Fifth Amendment takings claims.

A. Plaintiffs are not barred by 28 U.S.C. § 1500 from litigating their claims in this court.

The court first addresses defendant's argument that the court lacks jurisdiction to consider plaintiffs' claims because plaintiffs initiated lawsuits in other courts after filing their complaint in this court. Specifically, defendant asserts that the claims are barred by 28 U.S.C. § 1500, which provides:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Defendant acknowledges that, under binding precedent, § 1500 is not a bar in this case because the limitation only applies "when the suit shall have been commenced in the other court before the claim was filed in [the Court of Federal Claims]." Tecon Eng'rs, Inc. v. United States, 343 F.2d 943, 949 (Ct. Cl. 1965). Nonetheless, defendant asserts that the court should reinterpret § 1500 as creating a jurisdictional bar regardless of the timing of the filings. Plaintiffs counter that the court cannot disregard the binding precedent.

As defendant acknowledges, its argument is foreclosed by binding precedent: the jurisdictional limitation in § 1500 does not apply in this case because plaintiffs filed their complaint in this court before seeking redress in other jurisdictions. See Tecon, 343 F.2d at 949; see also Res. Invs., Inc. v. United States, 785 F.3d 660, 670 (Fed. Cir. 2015) (noting that Tecon remains good law in this circuit). Compare Compl. (filed July 9, 2013), with Compl., Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency, No. 13-1053 (D.D.C. July 10, 2013). Although defendant urges the court to reconsider the rule set forth in Tecon, the court cannot do so because it is bound by that precedent. See Coltec Indus., Inc. v. United States, 454 F.3d 1340, 1353 (Fed. Cir. 2006) ("There can be no question that the Court of Federal Claims is required to follow the precedent of . . . our court, and our predecessor court, the Court of Claims."). Plaintiffs' claims, therefore, are not barred by § 1500.

B. Plaintiffs have asserted claims against the United States.

The court next considers whether plaintiffs have asserted claims against the United States, a necessary element of jurisdiction in the Court of Federal Claims. As set forth in their second amended complaint, plaintiffs' Fifth Amendment takings, illegal exaction, and breach-of-implied-contract claims are premised on actions taken by the FHFA-C and Treasury, while plaintiffs' fiduciary duty claims are premised on the FHFA-C's actions. Defendant argues that the court lacks jurisdiction to consider any claims premised on the FHFA-C's or Treasury's conduct. In response, plaintiffs contend that they have asserted claims against the government because (1) Treasury was involved in the challenged conduct, (2) the FHFA-C exercised nontraditional conservator powers such that its actions must be deemed those of the government, (3) the FHFA-C was the government's agent, (4) the FHFA-C was coerced by the government, and (5) the FHFA-C is a government actor. The court addresses each contention in turn.

1. The court cannot exercise jurisdiction based on allegations of Treasury's involvement.

Plaintiffs initially argue that the court has jurisdiction over their Fifth Amendment takings and illegal-exaction claims because they have alleged the involvement of Treasury—indisputably a part of the federal government—in the action underlying these claims, i.e., the Net Worth Sweep. Defendant counters that Treasury alone could not have implemented the PSPA Amendments, and Treasury's role as a counterparty to the voluntary agreement with the Enterprises is not sufficient to establish jurisdiction over plaintiffs' takings claims. Defendant further asserts that the court's order allowing jurisdictional discovery reflects that plaintiffs' allegations concerning Treasury alone are insufficient to confer jurisdiction.

The parties' dispute on the import of allegations concerning Treasury is ultimately immaterial in light of the court's determination, explained below, that the FHFA-C—the other party involved in the PSPA Amendments—is the United States. Nonetheless, the court notes, as defendant asserts, that it implicitly acknowledged in its February 26, 2014 discovery order that the allegations concerning Treasury alone were insufficient to support jurisdiction. In that order, the court permitted plaintiffs to conduct fact discovery on whether the FHFA-C was "the 'United States' for purposes of the Tucker Act." Fairholme Funds, Inc. v. United States, 114 Fed. Cl. 718, 721 (2014). The aforementioned discovery would have been unnecessary (and unwarranted) if, as plaintiffs assert, the court has jurisdiction over plaintiffs' claims based on their allegations concerning Treasury.

2. The FHFA-C exercised its statutory conservatorship powers when it approved the PSPA Amendments for each Enterprise.

Plaintiffs next argue that the FHFA-C must be considered the United States because the FHFA-C acted beyond its authority when it expropriated the Enterprises' assets for the government's benefit. Defendant counters that, irrespective of the "expropriation" label assigned by plaintiffs, the FHFA-C's execution of the PSPA Amendments was consistent with its statutory authority and purpose.

The FHFA-C is the United States for any claims challenging the conservator's conduct that exceeded the applicable statutory authority. Cf. Slattery v. United States, 583 F.3d 800, 827-28 (Fed. Cir. 2009) (noting that the Federal Deposit Insurance Company ("FDIC") as receiver is the United States for claims premised on allegations that the receiver failed to distribute funds as required by statute). Thus, resolving the parties' dispute requires determining whether the FHFA-C had statutory authority to enter into the PSPA Amendments. The answer depends on HERA. Under HERA, the FHFA-C has exceptionally broad powers. See Jacobs v. Fed. Hous. Fin. Agency, 908 F.3d 884, 889 (3d Cir. 2018) (noting that the FHFA-C's "powers are many and mostly discretionary"); see also Saxton v. Fed. Hous. Fin. Agency, 901 F.3d 954, 960 (8th Cir. 2018) (Stras, J., concurring) ("Congress came close to handing a blank check to the FHFA."). The FHFA-C wields complete control over the Enterprises; it succeeds to the rights and powers of the Enterprises as well as their shareholders, directors, and officers. 12 U.S.C. § 4617(b)(2)(A)(i). The FHFA-C may (but is not required to) use that power to, among other things, further the FHFA's interests, carry on the Enterprises' business, preserve and conserve the Enterprises' assets, and place the Enterprises in sound and solvent condition.[13] Id. § 4617(b)(2)(B), (D), (J) (noting actions that the FHFA-C "may" undertake); see also Roberts v. Fed. Hous. Fin. Agency, 889 F.3d 397, 403 (7th Cir. 2018) (explaining that Congress's use of "may" reflects that the FHFA-C has discretionary authority).

Congress's broad grant of power to the FHFA-C colors the analysis of whether the FHFA-C became the United States by approving the PSPA Amendments. As an initial matter, plaintiffs' contention that the FHFA-C exceeded its statutory authority by expropriating the Enterprises' assets for the government is unavailing because the FHFA-C is authorized to act in its own interest without regard for the effects on the Enterprises. Moreover, the FHFA-C's approval of the PSPA Amendments is in accordance with its authority to operate the Enterprises and preserve their assets. As operating businesses, the Enterprises needed to "secure ongoing access to capital, manage debt loads, control cash flow, and decide whether and how to pay dividends." Jacobs, 908 F.3d at 890. The FHFA-C achieved those goals with the PSPA Amendments, which are, "in essence[,] a renegotiation of an existing lending agreement." Id. By agreeing to the PSPA Amendments, the FHFA-C eliminated the risk of the Enterprises consuming all of their financial lifeline (Treasury's funding commitment) through cash-dividend payments or entering a cycle of an ever-increasing liquidation preference.[14] Roberts, 889 F.3d at

[13] The conclusion that the FHFA-C has some discretionary powers is buttressed by the fact that Congress stated the conservator "may" do certain things but "shall" do others. See Huston v. United States, 956 F.2d 259, 262 (Fed. Cir. 1992) ("When, within the same statute, Congress uses both 'shall' and 'may,' it is differentiating between mandatory and discretionary tasks."). Compare 12 U.S.C. § 4617(b)(2)(D) ("The [FHFA] may, as conservator, take such action as may be . . . necessary to put the regulated entity in sound and solvent condition . . . ." (emphasis added)), with id. § 4617(b)(14)(A) ("The [FHFA] as conservator or receiver shall . . . maintain a full accounting of each conservatorship and receivership or other disposition of a[n Enterprise] in default." (emphasis added)).

[14] If, under the terms of the PSPAs before the PSPA Amendments, the Enterprises chose to make their dividend payment by increasing Treasury's liquidation preference, the future dividends would be more expensive because the dividends were a set percentage of the liquidation preference. Making future dividends more expensive would, in turn, increase the

404-05; see also Jacobs, 908 F.3d at 890 (noting that the Enterprises increased their future obligations and reduced their available funds by drawing funds from Treasury to pay the dividend); Saxton, 901 F.3d at 962 (Callas, J., concurring) ("Crushing dividend payments could have led the entities toward insolvency."). The FHFA-C, with the amendments, also protected the Enterprises against future financial downturns.[15] See Jacobs, 908 F.3d at 890 ("The [PSPA Amendments] insured the [Enterprises] against downturns and 'death spirals,' preventing unpayable dividends from ratcheting up their debt loads to unsustainable levels."); see also Roberts, 889 F.3d at 405 (noting that the Enterprises fared better in some years and worse in other years under the terms of the PSPA Amendments as compared to the previous agreements).

In light of the above, the FHFA-C's execution of the PSPA Amendment for each Enterprise was a "quintessential conservatorship task[]" that is appropriate under HERA. Perry II, 864 F.3d at 607. Although "stockholders no doubt disagree about the necessity and fiscal wisdom of the [PSPA Amendments] . . . , Congress could not have been clearer about leaving those hard operational calls to the FHFA's managerial judgment." Id. In sum, the court joins the growing consensus that the FHFA-C acted within its statutory authority when it entered into the PSPA Amendments. See Jacobs, 908 F.3d at 894; Saxton, 901 F.3d at 963; Roberts, 889 F.3d at 403; Robinson v. Fed. Hous. Fin. Agency, 876 F.3d 220, 231 (6th Cir. 2017); Perry II, 864 F.3d at 606. But see Collins v. Mnuchin, 938 F.3d 553, 582 (5th Cir. 2019) (en banc) (holding, over the dissent of seven judges, that the plaintiffs stated a plausible claim that the FHFA-C exceeded its statutory authority). Thus, plaintiffs' theory that the FHFA-C is the United States because the FHFA-C exceeded its statutory authority is not persuasive.

3. The FHFA-C was not coerced into approving the PSPA Amendments.

Plaintiffs also argue that the FHFA-C is the United States because the FHFA-C was coerced into approving the PSPA Amendments by Treasury. Plaintiffs assert that Treasury coerced the FHFA-C into approving the PSPA Amendments because (1) Treasury drove the amendment process, (2) Treasury did not plan for the possibility that the FHFA-C would reject the amendments, and (3) the FHFA-C did not propose any alternatives to the amendments. In the alternative, plaintiffs contend that the FHFA, in its role as regulator, coerced the FHFA-C to approve the amendments because the two entities were not acting independently. Specifically, plaintiffs aver that the lines between the FHFA and the FHFA-C were blurred because (1) the FHFA's consent was required for any dividend payment and (2) the FHFA-C approved the amendments to achieve governmental objectives.

likelihood that the Enterprises would again need to rely on increasing Treasury's liquidation preference rather than making a cash payment. The end result is a cycle in which the Enterprises continue to increase Treasury's liquidation preference.

[15] Although the FHFA-C anticipated continued profitability for the Enterprises in the near term, this fact does not undermine the propriety of the PSPA Amendments because ensuring the continued functioning of a company includes guarding against long-term risks. These long-term outlooks are especially important given the indefinite nature of the FHFA-C's role.

Defendant counters that the FHFA-C was not coerced by Treasury because the FHFA-C had a choice of whether to accept or reject the PSPA Amendments. Defendant asserts that there is no coercion if a party has a choice, regardless of however difficult refusal of a particular option may be. With respect to Treasury's involvement, defendant contends that plaintiffs fail to proffer any allegations that Treasury required the FHFA-C to enter into the agreements against its will. Defendant further asserts that other courts have declined to conclude that the FHFA-C felt compelled to follow Treasury based on allegations that Treasury invented the amendment concept or led the process. Defendant also argues that the FHFA-C was not coerced by the FHFA in the latter's role as regulator because there were clear statutory lines delineating the FHFA's authority in each role.[16]

a. The court has jurisdiction over claims based on actions that resulted from government coercion.

The court has jurisdiction over claims premised on the FHFA-C's actions if Treasury's "influence over the" FHFA-C "was coercive rather than merely persuasive." A & D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1154 (Fed. Cir. 2014). The line between coercion and persuasion "is highly fact-specific." Id. Federal Circuit precedent frames the contours of the inquiry. In Langenegger v. United States, the plaintiffs pleaded that the United States coerced El Salvador by threatening to withhold financial and military assistance unless El Salvador passed legislation expropriating private property. 756 F.2d 1565, 1567 (Fed. Cir. 1985). The Federal Circuit disagreed with the plaintiffs' characterization of the threats because "[d]iplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of [coercion], however difficult refusal may be as a practical matter." Id. at 1572. Similarly, the Federal Circuit concluded in B & G Enterprises, Ltd. v. United States that California was not coerced into enacting restrictions on smoking, notwithstanding the federal government conditioning grants on states enacting such limits. 220 F.3d 1318, 1321, 1325 (Fed. Cir. 2000); see also A & D Auto, 748 F.3d at 1155 (explaining that "coercion was not established" in B & G). The court explained that "it was California's decision to create [the] restrictions[;] . . . Congress may have provided the bait, but California decided to bite." B & G, 220 F.3d at 1325. In A & D Auto, the Federal Circuit addressed coercion in the context of the government allegedly conditioning vital financial assistance to bankrupt automobile companies on those companies terminating some of their franchise agreements. 748 F.3d at 1145. Unable to resolve the issue due to gaps in the record, the court noted in dicta that a relevant consideration was "whether the government financing was essential to the companies." Id.

A common thread runs through the Federal Circuit's decisions: the importance of choice. A nonfederal actor is not coerced when it can choose to go against the wishes of the United States, even if doing so will cause significant hardships, Langenegger, 756 F.2d at 1567, or result in a loss of prospective benefits, id.; B & G, 220 F.3d at 1325. But there is no choice, in any meaningful sense, when there is only one realistic option. A & D Auto, 748 F.3d at 1145 (noting

[16] Defendant frames its argument as addressing whether the FHFA-C acted as an agent for the FHFA in its role as regulator, but defendant is responding to plaintiffs' coercion argument.

the importance of considering whether the companies could survive without accepting the government's offer); cf. Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) (noting that, with respect to Congress's spending powers, "the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions"). Put differently, the nonfederal actor must make a voluntary decision, which it cannot do if there is only one realistic option. See BMR Gold Corp. v. United States, 41 Fed. Cl. 277, 282 (1998) (finding that the "the necessary element of coerciveness" for a taking was missing because the plaintiff granted the military permission to cross his land); accord Henn v. Nat'l Geographic Soc., 819 F.2d 824, 826 (7th Cir. 1987) (noting that hard choices remain voluntary when they are not akin to "Don Corelone's 'make him an offer he can't refuse'"). In sum, the FHFA-C was not coerced if it voluntarily chose to enter into the PSPA Amendments.

b. Plaintiffs have not established that Treasury coerced the FHFA-C into approving the PSPA Amendments.

In support of their contention that Treasury coerced the FHFA-C into approving the PSPA Amendments, plaintiffs allege that Treasury proposed the terms of the amendments, and the FHFA-C did not make a counteroffer. Those allegations are not enough to establish coercion. First, given the Enterprises' improving financial condition and Treasury's existing funding commitment, the FHFA-C's decision to execute the PSPA Amendments was voluntary because it could reject the deals without imperiling the Enterprises. The facts here, therefore, are diametrically opposed to the circumstances in A & D Auto that the Federal Circuit suggested may support coercion because the automobile dealers faced insolvency if they did not accede to the financing terms. See 748 F.3d at 1145. Second, the FHFA-C's lack of protestation is informative. "[T]he very fact that FHFA[-C] itself [did] not br[ing] suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA[-C] was an independent, willing participant in its negotiations with the Treasury." Robinson v. Fed. Hous. Fin. Agency, 223 F. Supp. 3d 659, 668 (E.D. Ky. 2016), aff'd, 876 F.3d at 220. The court's conclusion is bolstered by the fact that another court has held that materially similar allegations to those at issue here did not "come close to a reasonable inference that [the] FHFA[-C] considered itself bound to do whatever Treasury ordered." Perry Capital LLC v. Lew, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) ("Perry I"), aff'd in part, rev'd in part sub nom. 864 F.3d at 591. This court agrees with the reasoning in Perry I: the PSPA Amendments were executed by sophisticated parties, and many agreements arise from a party's proposal being accepted by the other party. Id.

c. Plaintiffs have not established that the FHFA coerced the FHFA-C into approving the PSPA Amendments.

Plaintiffs also have not alleged facts reflecting that the FHFA coerced the FHFA-C into agreeing to the PSPA Amendments. As an initial matter, plaintiffs have not alleged that the FHFA unduly influenced the FHFA-C's decision-making process with respect to the proposed agreements. They merely allege that the FHFA did not silo its regulatory and conservator roles. The lack of a firewall (without more), however, does not indicate that the FHFA deprived the FHFA-C of meaningful choice. Moreover, plaintiffs' focus on the FHFA-C allegedly pursuing government objectives when it approved the PSPA Amendments is a red herring. The purported pursuit of government objectives is not germane to the coercion inquiry because it does not suggest that the FHFA-C lacked any choice in the matter. Even if it was relevant to coercion (or to some other theory for jurisdiction), plaintiffs would not prevail because Congress permitted the FHFA-C to act in the interests of the government. See 12 U.S.C. § 4617(b)(2)(J) (allowing the FHFA-C to "take any action" that "is in the interests of the [Enterprises] or the [FHFA]"). The mere pursuit of government objectives, therefore, would not reflect a blending of any roles but rather the FHFA-C using powers afforded to it by Congress.

In conclusion, plaintiffs have not established that the FHFA-C was coerced into approving the PSPA Amendments by Treasury or the FHFA.

4. The FHFA-C is not Treasury's agent.

Plaintiffs further argue that that the FHFA-C's actions are attributable to the United States because the FHFA-C is Treasury's agent. Plaintiffs assert that the FHFA-C is a government agent because (1) Treasury, by virtue of the PSPAs, had a major role in conservator decisions; (2) the FHFA-C approved the PSPA Amendments for the taxpayers' benefit; and (3) the FHFA-C could not have approved the amendments absent statutory authority. Defendant counters that plaintiffs have not pleaded an agency relationship because Treasury does not control the FHFA-C's operations and is statutorily barred from exercising such control.

The United States is subject to claims in this court for the actions of a third party "if [that] party is acting as the government's agent . . ." A & D Auto, 748 F.3d at 1154. "An essential element of agency is the principal's right to control the agent's actions." Hollingsworth v. Perry, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01, cmt. f (Am. Law. Inst. 2005)); accord O'Neill v. Dep't of Hous. & Urban Dev., 220 F.3d 1354, 1360 (Fed. Cir. 2000) (acknowledging that the common-law meaning of agency requires, among other things, that the principal has the right to control the agent's conduct); see also Preseault v. United States, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (concluding that a state's actions were attributable to the United States when the state acted pursuant to the Interstate Commerce Commission's order); Hendler v. United States, 952 F.2d 1364, 1378-79 (Fed. Cir. 1991) (attributing a state's actions to the United States when the state acted under authority flowing from an Environmental Protection Agency order). The facts, as alleged, do not reflect that Treasury controlled the FHFA-C's actions because Congress explicitly precluded the FHFA-C from being subservient to another agency, 12 U.S.C. § 4617(a)(7) (providing that the FHFA-C cannot be subject to the "direction or supervision" of any other agency), and plaintiffs have not alleged facts indicating that Treasury exercised such control notwithstanding the statutory bar. Although the FHFA-C was required by the PSPAs to obtain Treasury's approval for certain actions (e.g., issuing dividends), the PSPAs did not provide Treasury with the right to unilaterally order amendments. Moreover, plaintiffs describe an FHFA-C that made decisions independently; Treasury "urg[ed]" the FHFA to pursue conservatorship and "push[ed]" for the PSPA Amendments. 2d Am. Compl. ¶¶ 4, 146. Simply stated, plaintiffs have not alleged facts establishing that Treasury exercised the control over the FHFA-C that is necessary for an agency relationship.

5. The FHFA-C is the United States because the FHFA-C retains the FHFA's governmental character.

Finally, plaintiffs contend that the FHFA-C is itself a government actor. Defendant disagrees. First, relying on O'Melveny & Myers v. FDIC, 412 U.S. 79 (1994), defendant argues that the FHFA-C is not the United States because the FHFA-C stands in the Enterprises' shoes. Specifically, defendant asserts that Congress's decision to have the FHFA-C succeed to the Enterprises' rights reflects that Congress intended that the FHFA-C step into the Enterprises' private shoes and shed its government character. Second, defendant argues that the FHFA-C's exercise of nontraditional conservatorship powers is immaterial because Congress can expand the conservator's role without transforming it into it into a government actor. Third, defendant argues that the Enterprises are not government instrumentalities—which means that the FHFA did not step into the shoes of a government actor when it became the Enterprises' conservator—because the government does not retain permanent authority to appoint the Enterprises' directors. Defendant contends that the government only has temporary, albeit indefinite, control over the Enterprises because conservatorships are not permanent.

In response, plaintiffs dispute the premise of defendant's argument that, pursuant to O'Melveny, the FHFA becomes the Enterprises when acting as conservator. Plaintiffs assert that O'Melveny does not concern whether an entity is the United States or, if the decision can be read as addressing that issue, is distinguishable because it concerns receivers or is limited to conservators exercising traditional conservator powers. Second, plaintiffs argue that the FHFA has not shed its government status, even if it has stepped into the Enterprises' shoes, when it acts as conservator. Specifically, plaintiffs assert that the FHFA-C retains the FHFA's government status because (1) the FHFA-C has acted beyond the traditional conservator powers and (2) Congress expressed its intention for that result by precluding the conservator from being subject to the supervision of "any other agency." 12 U.S.C. § 4617 (emphasis added). Third, plaintiffs argue that their claims are against the United States, even if the FHFA-C steps into the shoes of the Enterprises, because the Enterprises are government instrumentalities.[17]

In short, the parties disagree over the government status of the FHFA-C. The FHFA is indisputably the United States, see 12 U.S.C. § 4511(a) (establishing the FHFA as an "independent agency of the Federal Government"), and so the only question is whether the FHFA sheds that status when it acts as conservator. In other jurisdictions, courts have held (with near unanimity) that the FHFA loses its government status pursuant to O'Melveny. In O'Melveny, the United States Supreme Court ("Supreme Court") explained that the FDIC "steps

[17] The court notes that, with respect to the derivative claims, the parties fail to address a critical implication of plaintiffs' government instrumentality argument: there is only one party if the Enterprises are government instrumentalities. The defendant would be the United States because the FHFA-C, according to plaintiffs, stepped into the shoes of government instrumentalities—the Enterprises. The plaintiffs would also be the United States because the Enterprises are the real plaintiffs for any derivative claims. Simply stated, if the Enterprises are government instrumentalities, the defendant and derivative plaintiffs would both be the United States, which could pose justiciability issues. The court, however, does not consider such issues because it concludes that the Enterprises are not government instrumentalities.

into [the] shoes" of a private company when acting as receiver and sheds its government character because the FDIC "succeed[s] to . . . all rights, titles, powers, and privileges of the [entity in receivership] . . . ." 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); see also AG Route Seven P'ship v. United States, 57 Fed. Cl. 521, 534 (2003) (citing O'Melveny for the proposition that the FDIC as receiver is a "private party, and not the government per se" because it "is merely standing in the shoes . . . of the defunct thrift"). The courts drawing from O'Melveny have concluded that the FHFA steps into the shoes of the Enterprises and sheds its government character when acting as conservator because Congress provided that the FHFA-C exercises the same rights with respect to the Enterprises as Congress granted to the FDIC as receiver. See, e.g., Herron v. Fannie Mae, 861 F.3d 160, 169 (D.C. Cir. 2017); cf. Ameristar Fin. Servicing Co. v. United States, 75 Fed. Cl. 807, 811 (2007) (concluding, with respect to the FDIC, that the step-into-the-shoes principle set forth in O'Melveny also applies in the conservator context).

a. The FHFA-C is not the United States if the FHFA steps into the Enterprises' shoes when acting as conservator.

Plaintiffs initially contend that defendant's reliance on O'Melveny is a red herring because, assuming that O'Melveny applies, the FHFA-C is the United States even though it steps into the Enterprises' shoes. Specifically, plaintiffs assert that the FHFA-C is the United States under the facts alleged because (1) the FHFA-C exercises nontraditional conservator powers, (2) Congress intended that the FHFA-C retain the FHFA's government status, and (3) the FHFA-C steps into the shoes of a government instrumentality. The court addresses each assertion in turn.

First, the FHFA-C did not become a government actor by exercising powers beyond those traditionally afforded to a conservator. As a threshold matter, plaintiffs have not alleged facts reflecting that the FHFA-C used such powers; the execution of the PSPA Amendments was a "quintessential conservatorship" function. Perry II, 864 F.3d at 607; see also supra Section IV.B.2 (discussing the FHFA-C's exercise of its powers). More importantly, however, plaintiffs would not prevail even if the FHFA-C exercised nontraditional conservatorship powers in agreeing to the PSPA Amendments. When this argument was pressed in other jurisdictions, it was rejected:

> It may well be true that FHFA's actions would not be allowed under traditional principles of corporate or conservatorship law, but it does not follow that those actions are therefore governmental. Legislatures can expand conservatorship and similar powers without transforming conservators into agents of the government. Cf. Pegram v. Herdrich, 530 U.S. 211, 225-26 (2000) (explaining that the Employee Retirement Income Security Act altered the common law of trusts to permit certain actions that would otherwise violate the trustee's fiduciary duties).

Bhatti v. Fed. Hous. Fin. Agency, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (footnote omitted). The court agrees with that reasoning, and plaintiffs provide no authority that supports a contrary result. Although plaintiffs state that the United States Court of Appeals for the

District of Columbia Circuit ("D.C. Circuit") decision in Waterview Management Co. v. FDIC, 105 F.3d 696 (D.C. Cir. 1997), supports their position, they are mistaken. Waterview is not on point because the D.C. Circuit did not hold that a conservator is per se the United States when acting pursuant to a congressional grant of broad powers. Rather, it held that, as a matter of statutory interpretation, the existence of a receivership did not preempt a prereceivership contract. Id. at 699-702.

Second, Congress's instruction that the FHFA-C is not subject to the supervision of any other agency does not reflect congressional intent for the FHFA to retain its government status when acting as conservator even if it steps into the shoes of the Enterprises. Because the court only reaches this issue by assuming that O'Melveny is instructive, the statutory language concerning supervision of the FHFA-C does not support a finding of jurisdiction because the same language is present in the statute that the Supreme Court addressed in O'Melveny. See 512 U.S. at 85-86 (discussing 12 U.S.C. § 1821). Compare 12 U.S.C. § 1821(c)(3)(C) ("When acting as conservator or receiver . . . , [the FDIC] shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC's] rights, powers, and privileges."), with id. § 4617(a)(7) ("When acting as conservator or receiver, the [FHFA] shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the [FHFA].").

The third argument advanced by plaintiffs—that the FHFA-C is the United States because it steps into the shoes of a government instrumentality—also is not meritorious. A government instrumentality's actions are attributable to the United States for purposes of the Tucker Act. See Corr v. Metro. Wash. Airports Auth., 702 F.3d 1334, 1336 (Fed. Cir. 2012) (noting that a claim against a government instrumentality is a claim against the United States for purposes of the Little Tucker Act, 28 U.S.C. § 1346(a)(2)). The Supreme Court established in Lebron v. National Railroad Passenger Corp. that a company is a government instrumentality when (1) it is created by "special law," (2) it is established "for the furtherance of governmental objectives," and (3) the federal government "retains for itself permanent authority to appoint a majority of the [company's] directors . . . ." 513 U.S. 374, 400 (1995). After Lebron, the Supreme Court clarified that, for purposes of the instrumentality test, "the practical reality of federal control and supervision prevails over Congress' disclaimer of the [the entity's] governmental status." Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1233 (2015).

There is no dispute that the Enterprises satisfy the first two prongs of the Lebron test; Congress created the Enterprises by special law to achieve governmental objectives related to the housing market. See 12 U.S.C. § 4501; see also Herron, 861 F.3d at 167 (addressing claims involving Fannie and noting that "[t]his case satisfies the first two Lebron criteria"); Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 75 F.3d 1401, 1406-07 (9th Cir. 1996) (reaching same conclusion for Freddie). The status of the Enterprises, therefore, turns on the third prong: whether the government retains permanent authority to appoint a majority of the Enterprises' directors.

The Federal Circuit has not addressed the government-control prong with respect to the Enterprises, but courts in other jurisdictions have done so. Those decisions provide a starting point for the court. It appears that every court to consider the issue, with the exception of one district court, has held that the government does not exercise permanent control over the Enterprises. Sisti v. Fed. Hous. Fin. Agency, 324 F. Supp. 3d 273, 279 (D.R.I. 2018) (concluding that the government retains permanent authority to control the Enterprises after noting that "[t]he non-controlling precedent to date" has reached the opposite conclusion). Most of the courts that concluded that the government lacks permanent control over the Enterprises issued their decisions before the Supreme Court in Association of American Railroads emphasized the importance of evaluating the practical reality over nomenclature, and the other courts focused on the statutory purpose for the conservatorships rather than the Enterprises' actual situation. E.g., Herron, 861 F.3d at 169 (relying on the notion that a conservatorship is fundamentally temporary). In other words, the courts adopting the prevailing view considered the issue of control without regard for the Supreme Court's instruction to focus on the practical reality. The court, therefore, does not find those decisions persuasive.

The crux of the inquiry, as the Supreme Court mandates, is on the practical reality of the government's control over the Enterprises. Ass'n of Am. R.Rs., 135 S. Ct. at 1233. It is of no import that Congress nominally authorized a facially temporary conservatorship, see 12 U.S.C. § 4617(a) (permitting the FHFA to act as conservator to "reorganiz[e]" or "rehabilitat[e]" the Enterprises), because Congress's disclaimers are no substitute for the court's obligation to assess the government's actual control, Ass'n of Am. R.Rs., 135 S. Ct. at 1233. The court focuses on the length of the conservatorship because the FHFA-C wields complete control over the Enterprises so long as they are in conservatorship. See generally 12 U.S.C. § 4617.

Plaintiffs allege that the Enterprises will remain undercapitalized—and thus subject to conservatorship pursuant to 12 U.S.C. § 4617(a)(3)(J)—until the PSPAs, in their current form, are changed because the Enterprises cannot accumulate any capital under the existing terms of the PSPAs. Although the PSPAs could be further amended, plaintiffs' allegations reflect that Treasury and the FHFA-C will not do so because the purpose of the PSPA Amendments is to prevent the Enterprises from accumulating the necessary capital to become independent companies. Plaintiffs, in short, have alleged that the government intended, and has taken steps to ensure, that the conservatorships never end. Those facts, viewed in isolation, would support a conclusion that the practical reality is that the Enterprises are under permanent government control. The court's inquiry, however, is not limited to plaintiffs' allegations because it has taken judicial notice of relevant facts reflecting that the status quo has changed: the Treasury Secretary and the FHFA Director are now both committed to ending the conservatorships. Moreover, the idea that the Enterprises are permanently subject to government control because they can never accumulate the capital needed to exit the conservatorships is undermined by recent developments. Indeed, Treasury proposed amending the Net Worth Sweep to allow the Enterprises to retain more capital, and the FHFA Director testified during his confirmation hearing that, if confirmed, he would seek to increase the amount of capital that the Enterprises retain. Simply stated, the practical reality is that the Enterprises are not subject to permanent government control because the relevant parties are working to terminate the conservatorships.[18]

[18] Plaintiffs may disagree with the court's conclusion that events occurring after the PSPA Amendments are relevant to determining whether the Enterprises were under permanent government control during the events discussed in plaintiffs' complaint. Even if the court agreed that events occurring after the PSPA Amendments are not germane, plaintiffs still would not

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In sum, the FHFA-C does not become the United States if the FHFA steps into the Enterprises' shoes when serving as conservator.

b. The FHFA-C retains the FHFA's government character because the FHFA-C does not step into the Enterprises' shoes.

The key inquiry, therefore, is whether the FHFA steps into the shoes of the Enterprises when acting as conservator. Defendant argues that the FHFA-C sheds its government character and assumes the identity of the Enterprises based on the reasoning in O'Melveny. Defendant's reliance on O'Melveny is misplaced. O'Melveny concerns a receiver stepping into the shoes of a failed bank. 512 U.S. at 86. The roles of a conservator and receiver are meaningfully different. In a recent decision, the United States District Court for the District of Rhode Island artfully explained the differences and their import for assessing whether the FHFA-C is the government:

> The O'Melveny Court held that FDIC, when acting as a receiver for a private entity, steps into the shoes of that private entity for state law claims. This holding makes sense given the purpose of receivership: "to preserve a company's assets, for the benefit of creditors, in the face of bankruptcy." When FDIC is appointed receiver, it must dispose of the received entity's assets, resolving obligations and claims made against the entity. Notably, "[i]n receivership, the receiver owes fiduciary duties to the creditors, which the corporation would otherwise owe to creditors during a period of insolvency." It logically follows, then, that the receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity.
>
> Conservatorship, in contrast, serves a different function. FHFA has described the purpose of conservatorship is "to establish control and oversight of a company to put it in a sound and solvent condition." Conservators, unlike receivers, have a fiduciary duty running to the corporation itself.
>
> This is "critically distinct" from the fiduciary duties owed as a receiver—the receiver does indeed "step into the shoes" of the entity by assuming the fiduciary duties of the entity, but the conservator does not: it remains distinct, and rather owes a duty to the entity. Given the difference in fiduciary duties, O'Melveny's "steps into the shoes" holding makes sense in the context of receivership, but not in the context of conservatorship.

prevail because they allege that the conservatorships began as temporary measures. See 2d Am. Compl. ¶¶ 66 ("FHFA also emphasized that the conservatorship was temporary: 'Upon the [FHFA] Director's determination that the [FHFA-C's] plan to restore the [Enterprises] to safe and solvent condition has been completed, the Director will issue an order terminating the conservatorships'" (quoting FHFA publication)), 110 (noting that, when the conservatorships were imposed, the FHFA Director "vowed" that the Enterprises would "exit conservatorship" and "return to normal business operations"). Thus, the Enterprises were not under permanent government control before the PSPA Amendments.

Sisti, 324 F. Supp. 3d at 282-83 (citations and footnotes omitted). See generally Brian Taylor Goldman, The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State-Action, 17 J. Bus. & Sec. L. 11, 23-30 (2016). The district court, relying on the above analysis, declined to treat the FHFA-C as a private actor. Sisti, 324 F. Supp. 3d at 284. This court agrees with the reasoning and conclusion in Sisti: the FHFA does not shed its government character when acting as conservator because it does not step into the shoes of the Enterprises. Otherwise stated, the FHFA-C is the United States because it retains the FHFA's government character. Plaintiffs' claims, therefore, are against the United States for purposes of the Tucker Act.

C. The court has jurisdiction over takings claims.

The court next addresses, as instructed by the Federal Circuit, whether the Court of Federal Claims lacks jurisdiction to entertain takings claims because it is not an Article III tribunal. See Fairholme Funds, 681 F. App'x at 949-50.

1. The judges on this court do not exercise Article III power.

Article III, § 1, of the Constitution states 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." Article III judges "hold their Offices during good Behaviour" and receive compensation "for their Services, . . . which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1; see also Ortiz v. United States, 138 S. Ct. 2165, 2176 (2018) (noting that the United States Court of Appeals for the Armed Forces is not an Article III court because, among other reasons, "its members lack the tenure and salary protections that are the hallmarks of the Article III judiciary" (citing 10 U.S.C. § 942 (2018)); Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1938 (2015) (observing that "bankruptcy and magistrate judges . . . do not enjoy the protections of Article III," namely, "life tenure and pay that cannot be diminished"). It is well settled that Congress cannot confer the Article III judicial power on non-Article III courts. See Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1372-73 (2018); Stern v. Marshall, 564 U.S. 462, 484 (2011); see also Stern, 564 U.S. at 484 ("[I]n general, Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" 564 U.S. at 484 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855))).

Congress expressly established the Court of Federal Claims "under article I of the Constitution of the United States." 28 U.S.C. § 171(a). And, although judges of the Court of Federal Claims enjoy the salary protections of Article III judges, see id. § 172(b) ("Each judge shall receive a salary at the rate of pay, and in the same manner, as judges of the district courts of the United States."), they do not enjoy the life tenure of Article III judges, see id. §§ 172(a) ("Each judge . . . shall be appointed for a term of fifteen years."), 176 (allowing for the removal from office by the Federal Circuit). Consequently, the court's judges do not exercise Article III judicial power.

2. Court of Federal Claims judges can adjudicate public rights.

Although Court of Federal Claims judges cannot adjudicate the same panoply of issues as Article III judges, the judges on this court may adjudicate a category of cases involving what the Supreme Court has denominated "public rights." See Oil States, 138 S. Ct. at 1373. "When determining whether a proceeding involves an exercise of Article III judicial power, [the Supreme Court's] precedents have distinguished between 'public rights' and 'private rights.' Those precedents have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts." Id.; accord N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67-68 (1982) (plurality opinion) ("[T]his Court has upheld the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving 'public rights.'").

While the Supreme Court "has not 'definitively explained' the distinction between public and private rights," Oil States, 138 S. Ct. at 1373 (quoting N. Pipeline, 458 U.S. at 69), "and its precedents applying the public-rights doctrine have 'not been entirely consistent,'" id. (quoting Stern, 564 U.S. at 488), public rights include, at a minimum, those "matters 'which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,'" id. (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)). "In other words, the public-rights doctrine applies to matters 'arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.'" Id. (quoting Crowell, 285 U.S. at 50).

In addition, if an action cannot be brought absent the government's waiver of sovereign immunity, then the case involves a public right. See Stern, 564 U.S. at 489 ("The challenge in Murray's Lessee . . . fell within the 'public rights' category of cases, because it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity."). In other words, "Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all." Id.; see N. Pipeline, 458 U.S. at 67 (explaining that the rationale for the public rights exception stems in part from "the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued").

3. The right to compensation for a taking is a public right subject to adjudication in the Court of Federal Claims.

The right to just compensation enshrined in the Takings Clause of the Fifth Amendment is a public right for three reasons. The court addresses each reason in turn.

The first reason a takings claim concerns a public right relates to the parties involved. A takings claim is an allegation, by a private party, that the government is liable to it for just compensation. In other words, a takings claim necessarily "arise[s] between the Government and persons subject to its authority." Oil States, 138 S. Ct. at 1373 (quoting Crowell, 285 U.S. at 50). To this court's knowledge, the Supreme Court has never held that such a dispute between private persons and the United States must be heard in an Article III court. Instead, it has implied that such disputes fall squarely within the public rights exception. See Stern, 564 U.S. at 490 (noting that it has "rejected the limitation of the public rights exception to actions involving the Government as a party"); see also N. Pipeline, 458 U.S. at 70 ("[C]ontroversies [between the government and others] may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination.").

The second reason a takings claim concerns a public right relates to the nature of the alleged liability—namely, just compensation. The Takings Clause requires that the government pay "just compensation" for "private property" that is "taken for public use." U.S. Const. amend. V. When the federal government takes private property for public use, the payment of just compensation is authorized by Congress in its exercise of its Article I power to pay the United States' debts. See Ex parte Bakelite Corp., 279 U.S. 438, 452 (1929) ("[E]xamining and determin[ing] claims for money against the United States . . . is a function [that] belongs primarily to Congress as an incident of its power to pay the debts of the United States."); see also U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power . . . to pay the Debts . . . of the United States . . . ."). Only Article III courts may exercise the judicial power, but Congress may exercise its Article I powers "through judicial as well as non-judicial agencies." Sherwood, 312 U.S. at 587. Therefore, takings claims "arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the . . . legislative department[]," Crowell, 285 U.S. at 50, i.e., the payment of a debt with money from the United States treasury. Accord Brott v. United States, 858 F.3d 425, 435 (6th Cir. 2017) (holding that plaintiffs pursuing takings claims are not constitutionally entitled to have those claims adjudicated in an Article III forum, and providing that compensation "claims are made by private individuals against the government in connection with the performance of a historical and constitutional function of the legislative branch, namely, the control and payment of money from the treasury"), cert. denied, 138 S. Ct. 1324 (2018).

The third reason a takings claim concerns a public right relates to the nature of the defendant. "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." United States v. Mitchell, 463 U.S. 206, 212 (1983). In other words, the United States must waive its sovereign immunity for suits against it to proceed. Id.

"[T]he Fifth Amendment does not provide a self-executing waiver of sovereign immunity" for takings claims. Sammons v. United States, 860 F.3d 296, 300 (5th Cir. 2017); accord Brott v. United States, No. 1:15-CV-38, 2016 WL 5922412, at *4 (W.D. Mich. Mar. 28, 2016) ("Plaintiffs' argument that the Fifth Amendment's guarantee of just compensation is 'self-executing' and not dependent on a congressional waiver of sovereign immunity is contrary to long-standing clear precedent, by which this Court is bound."), aff'd, 858 F.3d at 425. Indeed, the self-executing character of the Takings Clause relates to the right it provides, not the means to enforce that right:[19]

[19] Mr. Sammons relied on footnote nine in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), to argue that the principle of sovereign immunity is inapplicable to claims brought under the "self-executing" Takings Clause. The Supreme Court's comments in this footnote, however, merely reinforce the understanding that the Takings Clause is self-executing in providing a right to a remedy. See id. at 316 n.9 ("[I]t is

> The suits [on appeal] were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States.

Jacobs v. United States, 290 U.S. 13, 16 (1933); accord First English, 482 U.S. 315 ("[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 . . . ." (quoting United States v. Clarke, 445 U.S. 253, 257 (1980))). In other words, the Takings Clause is self-executing in providing a remedy, but is not self-executing in providing a means to enforce that remedy. See Lynch v. United States, 292 U.S. 571, 581 (1934) ("The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, and to those arising from some violation of rights conferred upon the citizen by the Constitution. The character of the cause of action . . . may be important in determining (as under the Tucker Act (24 Stat. 505)) whether consent to sue was given. Otherwise it is of no significance." (citations omitted)); see also Webster v. Doe, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) ("The doctrine of sovereign immunity . . . is a monument to the principle that some constitutional claims can go unheard. No one would suggest that, if Congress had not passed the Tucker Act, . . . courts would be able to order disbursements from the Treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation.").

The Tucker Act provides a means to enforce the remedy set forth in the Takings Clause.[20] See 28 U.S.C. § 1491(a)(1). As noted above, the Tucker Act allows plaintiffs to bring monetary claims against the United States founded upon the Constitution, including Fifth Amendment takings claims. See id. ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution . . . ."); Knick v. Twp. of Scott, 139 S. Ct. 2162, 2170 (2019) ("We have held that '[i]f there is a taking, the claim is "founded upon the Constitution" and within the jurisdiction of the Court of Claims to hear and determine.'" (quoting United States v. Causby, 328 U.S. 256, 267 (1946))). This allowance constitutes a waiver of sovereign immunity. See Mitchell, 463 U.S. at 212

the Constitution that dictates the remedy for interference with property rights amounting to a taking." (emphasis added)).

[20] The remedy can also be enforced under the Little Tucker Act, which provides federal district courts with jurisdiction concurrent with that of the Court of Federal Claims for claims not exceeding $10,000, 28 U.S.C. § 1346(a)(2), and the Indian Tucker Act, which provides the Court of Federal Claims with jurisdiction to adjudicate claims brought by American Indian tribes, bands, or groups, id. § 1505. Neither statute is applicable in this case.

("[B]y giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims."). In short, because this waiver of sovereign immunity over takings claims is necessary for suits against the United States to proceed, such claims implicate public rights that can be adjudicated in a non-Article III forum.

This conclusion is confirmed by historical practice. Prior to 1855, persons seeking to enforce claims for money damages against the United States were not able to obtain judicial redress. See United States v. Bormes, 568 U.S. 6, 12 (2012) (describing "[t]he Tucker Act's jurisdictional grant[] and accompanying immunity waiver" as a "missing ingredient for an action against the United States for the breach of monetary obligations not otherwise judicially enforceable"). Instead, "claimants routinely petitioned Congress for private bills to recover money owed." Id. at 11. If the Fifth Amendment waives sovereign immunity, those claimants could have instead proceeded in Article III courts, even in the absence of any statutory authorization. Mr. Sammons did not identify, and the court has not located, any example of such a case being filed between 1791 and 1855.

In sum, a takings claim implicates a public right because such a claim consists of a dispute between a private party and the United States, involves Congress's obligation to pay a debt, and requires the waiver of sovereign immunity. Accordingly, the Court of Federal Claims constitutionally can adjudicate claims under the Takings Clause.[21]

D. The court lacks jurisdiction over plaintiffs' claim that sounds in tort.

1. Plaintiffs' direct fiduciary duty claim sounds in tort.

Turning back to the parties' contentions, defendant argues that the court lacks jurisdiction over plaintiffs' direct fiduciary duty claims because the United States does not owe to each Enterprise's shareholders a fiduciary duty that is grounded in a statute or contract.[22] Defendant asserts that such a fiduciary duty cannot be based on (1) HERA because, pursuant to the statute, the FHFA-C is only required to act in the government's and the Enterprises' best interests; or (2) the PSPAs because plaintiffs are not parties to those contracts. Plaintiffs counter that their claim is based on a fiduciary duty rooted in both HERA and the PSPAs. As to HERA, plaintiffs

[21] Mr. Sammons did not argue that plaintiffs are entitled to a jury trial but, for the sake of completeness, the court notes that the Supreme Court has held that "when Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.'" Oil States, 138 S. Ct. at 1379 (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53-54 (1989)). Therefore, the rejection of Mr. Sammons's Article III challenge would also resolve a Seventh Amendment challenge. See id.

[22] In its notice of arguments, defendant explains that it is arguing in its motion to dismiss for the dismissal of plaintiffs' direct and derivative fiduciary duty claims. After reviewing the motion, it is apparent that defendant only presented argument concerning the direct claim. The court, therefore, reserves judgment on whether it has jurisdiction over the derivative claims.

assert that Congress made the FHFA-C a fiduciary by authorizing it to control the Enterprises, entrusting it with duties that are at the core of what it means to be a fiduciary, and using terminology—"conservator"—associated with a fiduciary. Additionally, plaintiffs contend that recognizing that Treasury owes a fiduciary duty to shareholders is the only way to give meaning to Congress's mandate in HERA that Treasury protect taxpayers by considering, before purchasing securities, the need to maintain the Enterprises as privately owned entities. With respect to the PSPAs, plaintiffs argue that Treasury owes a fiduciary duty to the shareholders because it acquired control rights under the contract.[23]

The court, pursuant to the Tucker Act, lacks jurisdiction over tort claims. 28 U.S.C. § 1491(a)(1). A breach of fiduciary duty is generally classified as a tort. Newby v. United States, 57 Fed. Cl. 382, 294 (2003). A fiduciary duty claim, however, does not sound in tort for purposes of the Tucker Act when the fiduciary relationship is founded on a money-mandating statute or a contractual provision between the claimant and United States. See Hopi Tribe v. United States, 782 F.3d 662, 667 (Fed. Cir. 2015) (statute); Cleveland Chair Co. v. United States, 557 F.2d 244, 246 (Ct. Cl. 1977) (contract); see also 28 U.S.C. § 1491(a)(1) (providing jurisdiction over claims "founded upon . . . any Act of Congress . . . or contract with the United States").

The initial issue is whether HERA establishes a fiduciary relationship between the FHFA-C and the Enterprises' shareholders. The court begins with the language of the statute. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). "If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect." Rosete v. Office of Pers. Mgmt., 48 F.3d 514, 517 (Fed. Cir. 1995); accord Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Congress provided in HERA that the FHFA-C is only required to act in the interests of itself or the Enterprises. 12 U.S.C. § 4617(b)(2)(J). That statement reflects a clear intent: the FHFA-C does not owe a fiduciary duty to shareholders because the conservator is not required to consider shareholders' interests.[24] See id.; see also Collins, 938 F.3d at 580 (noting that HERA "may permit" the FHFA-C to pursue actions that are "inconsistent with fiduciary duties"). The plain language controls, and therefore the court does not consider the peripheral considerations urged by plaintiffs such as the implications of the

[23] Plaintiffs' contention that Treasury owes them a fiduciary duty does not appear in the second amended complaint.

[24] The court's interpretation of HERA's plain language is buttressed by the fact that Congress seemingly made a deliberate decision to exclude shareholder interests from the FHFA-C's considerations. Congress modeled HERA on the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Jacobs, 908 F.3d at 893. Under FIRREA, Congress permitted the FDIC as conservator to consider the best interests of a bank, its depositors, or the FDIC. 12 U.S.C. § 1821(d)(2)(J)(ii). Although Congress permitted the FDIC to take into consideration the interests of its depositors, Congress omitted the analogue of depositors—shareholders—from the list of germane interests that the conservator can consider when acting pursuant to HERA. Compare id. (FIRREA), with 12 U.S.C. 4617(b)(2)(J) (HERA). The omission is telling.

word "conservator," the FHFA-C's control over the Enterprises, or the FHFA-C's other powers. In sum, plaintiffs cannot establish jurisdiction for their direct fiduciary duty claim by relying on HERA.

The next issue is whether Treasury owes a fiduciary duty to shareholders because it purchased securities pursuant to HERA.[25] Plaintiffs contend that Treasury assumed such a duty when it agreed to the PSPAs because of the determinations that Congress required the Treasury Secretary to make prior to buying the securities. Before purchasing securities pursuant to HERA, the Secretary is required to determine that the purchase is necessary to protect taxpayers and evaluate various considerations in connection with protecting the taxpayers. 12 U.S.C. §§ 1455(*l*)(1)(B)-(C), 1719(g)(1)(B)-(C). One of those considerations is the need to maintain the Enterprises as privately owned companies. Id. §§ 1455(*l*)(1)(C), 1719(g)(1)(C). At no point, however, did Congress direct (or even suggest) that the Secretary must protect the shareholders. The court declines to stretch the statutory language to support a fiduciary relationship based on any incidental benefit shareholders may derive from the Secretary considering the need to keep the Enterprises privately owned in the context of protecting taxpayers. Simply stated, Treasury did not assume any fiduciary obligations to the Enterprises' shareholders by virtue of HERA.

Finally, the court turns to whether Treasury owed a fiduciary duty to the Enterprises' other shareholders because it acquired control rights by agreeing to the PSPAs. Plaintiffs' argument is premised on the state-law principle (which they term "general corporate law") that a controlling shareholder owes a fiduciary duty to the minority shareholders. The court is not convinced. First, plaintiffs' allegation of a fiduciary relationship is not founded on a contract within the meaning of the Tucker Act. Plaintiffs are not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs. They invoke the contracts solely to establish that Treasury is a controlling shareholder and rely on that conclusion to argue that it has a fiduciary duty based on state law. The contract, otherwise stated, is one step removed from the purported genesis of the fiduciary duty—the application of state-law principles. That gap is too much in light of the court's obligation to narrowly construe the Tucker Act's waiver of sovereign immunity. See Smith, 855 F.2d at 1552 (noting that the Tucker Act is narrowly construed); see also Perry II, 864 F.3d at 619-20 (rejecting the legal theory that the Enterprises' shareholders' need to reference the PSPAs for their fiduciary duty claim was enough to conclude that the claim was rooted in a contract for purposes of the Tucker Act).

[25] The gravamen of plaintiffs' direct fiduciary duty claim is that the FHFA-C owed a fiduciary duty to plaintiffs. See 2d Am. Compl. ¶¶ 223-33. Indeed, plaintiffs state in their complaint that the "FHFA violated its fiduciary duty," id. ¶¶ 233, and make no similar allegation with regard to Treasury. Although plaintiffs have not alleged that their direct fiduciary duty claim is premised on Treasury's actions, the court nonetheless considers the parties' arguments on whether such a claim would be within the court's jurisdiction for two reasons. First, the parties have fully briefed the issue without noting the discrepancy between plaintiffs' arguments and the allegations in their complaint. Second, the court's resolution of the issue is immaterial to the ultimate outcome because, as discussed below, plaintiffs lack standing to pursue their direct claims.

Second, plaintiffs fail to demonstrate the applicability of the state-law principles underlying their theory for why Treasury assumed fiduciary duties. Federal law governs the obligations Treasury incurred by entering into the PSPAs. See Boyle v. United Techs. Corp., 487 U.S. 500, 519 (1988) ("The proposition that federal common law continues to govern the 'obligations to and rights of the United States under its contracts' is nearly as old as Erie [v. Tompkins, 304 U.S. 64 (1938),] itself."). Although courts may shape federal law by drawing from state-law principles, plaintiffs do not explain why doing so is appropriate in this instance.

Third, plaintiffs do not prevail even if their fiduciary duty claim could be founded on a contract and federal common law incorporates the state-law principles regarding controlling shareholders' fiduciary obligations. Under Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders. See Ivanhoe Partners v. Newmont Min. Corp., 535 A.2d 1334, 1344 (Del. 1987); Parsch v. Massey, 79 Va. Cir. 446 (2009); see also Quadrant Structured Prod. Co. v. Vertin, 102 A.3d 155, 183 (Del. Ch. 2014) (acknowledging that those "who effectively control a corporation" owe a fiduciary duty to others).[26] To have the requisite level of control, the controlling shareholder must (1) be able to exercise a majority of the corporation's voting power or (2) direct the corporation without owning a majority of stock. Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1113 (Del. 1994). The latter, effective exercise of control, "is not an easy test to satisfy; the individual or group must be, "as a practical matter, . . . no differently situated than if they had majority voting control." In re PNB Holding Co. S'holders Litig., No. CIV.A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006). Plaintiffs have not established that Treasury meets either control test. First, plaintiffs do not allege that Treasury owns any of the Enterprises' voting stock. Treasury purchased preferred stock and acquired the right to buy common (i.e., voting) stock, but there is no indication that Treasury exercised its warrants or otherwise acquired common stock.[27] Second, plaintiffs do not demonstrate that Treasury exercised effective control over the Enterprises. Although Treasury acquired the right to preclude the Enterprises from taking certain actions, Treasury did not control the Enterprises because it could not direct any action—it could only respond to certain requests made by the Enterprises. As a practical matter, therefore, Treasury is situated differently than if it had majority voting power.

In sum, plaintiffs' direct fiduciary duty claim is a tort claim because plaintiffs have not established that the FHFA-C or Treasury owed shareholders a fiduciary duty based on a statute

[26] The court refers to Delaware and Virginia law because Fannie is a Delaware corporation, and Freddie is a Virginia corporation. When evaluating Virginia law, the court also looks to Delaware state court decisions because Virginia courts do so to resolve unsettled issues in the Commonwealth. E.g., U.S. Inspect Inc. v. McGreevy, No. 160966, 2000 WL 33232337, at *4 (Va. Cir. Ct. Nov. 27, 2000).

[27] Even if Treasury had exercised its option to buy a majority of the voting stock, it would not be a controlling shareholder because the FHFA-C succeeded to all of the shareholders' rights. See 12 U.S.C. § 4617(b)(2)(A) (noting that the FHFA-C, by operation of law, succeeds to all rights and powers of any Enterprise shareholder). Treasury, therefore, would have no voting power.

or contract. The court, therefore, dismisses count VII—breach of fiduciary duty—because it lacks jurisdiction over tort claims.

2. Plaintiffs' takings and illegal-exaction claims do not sound in tort.

Defendant also argues that plaintiffs' Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the FHFA-C. Plaintiffs counter that they have pleaded the predicates for takings and illegal-exaction claims, which means that it is irrelevant whether they also alleged facts that are germane to tortious actions.

When a party pleads the predicates for a takings claim or illegal-exaction claim, the court possesses jurisdiction to entertain such claims. See Hansen v. United States, 65 Fed. Cl. 76, 80-81 (2005) ("[S]o long as there is some material evidence in the record that establishes the predicates for a [claim covered by the Tucker Act,] . . . a plaintiff succeeds in demonstrating subject matter jurisdiction in this court . . . ."). Those claims, at a basic level, are contentions that the government expropriated private property lawfully (takings) or unlawfully (illegal exaction). See Orient Overseas Container Line (UK) Ltd. v. United States, 48 Fed. Cl. 284, 289 (2000) ("Takings claims arise because of a deprivation of property that is authorized by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation." (citation omitted)). If a party alleges the necessary predicates for these claims, the court is not deprived of jurisdiction even if the complaint contains allegations that could support a tort claim. See El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1353 (Fed. Cir. 2004) ("That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims."); Rith Energy, Inc. v. United States, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that this court has jurisdiction over a takings claim "even if the government's action was subject to legal challenge on some other ground"). Here, plaintiffs plead the predicates for takings and illegal-exaction claims by alleging, in essence, that they were forced to give their property to the government because of lawful or unlawful government conduct. Therefore, it is of no import to the court's jurisdiction whether plaintiffs have alleged facts that would also support a tort claim.

E. The court lacks jurisdiction over plaintiffs' direct implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract.

Defendant argues next that the court lacks jurisdiction to entertain plaintiffs' direct implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract.[28] Specifically, defendant asserts that plaintiffs have not established that they are intended beneficiaries independent of their status as shareholders and that any benefit that is related to their status as shareholders is insufficient for jurisdiction. Plaintiffs counter that they

[28] In its notice of arguments, defendant explains that it is arguing in its motion to dismiss that plaintiffs' direct and derivative contract claims should be dismissed. But, after a review of that motion, it is apparent that defendant limited its argument to plaintiffs' direct contract claim, count X. The court, therefore, only considers that issue and reserves judgment on whether it has jurisdiction over the derivative contract claims.

are intended third-party beneficiaries of implied contracts, between the FHFA and each Enterprise's board, in which the boards consented to the conservatorships in exchange for the FHFA-C operating the Enterprises as a fiduciary and returning them to sound condition. Specifically, plaintiffs assert that the intent to benefit the shareholders is evident from (1) the boards' consent to the conservatorships because shareholders would benefit from a conservator focused on returning the Enterprises to a better condition, and (2) the government acknowledging that the Enterprises' stock would remain outstanding while the Enterprises were in conservatorship.

The court's jurisdiction over contract claims is limited by the Tucker Act. Ransom v. United States, 900 F.2d 242, 244 (Fed. Cir. 1990). Of particular import here, ordinarily, a plaintiff must be in privity of contract with the United States to invoke this court's jurisdiction over a contract claim against the government. Fid. & Guar. Ins. Underwriters, Inc. v. United States, 805 F.3d 1082, 1087 (Fed. Cir. 2015). But privity is not required if "the plaintiff can demonstrate that it was an intended third-party beneficiary under the contract." Pac. Gas & Elec. Co. v. United States, 838 F.3d 1341, 1361 (Fed. Cir. 2016).

"Third party beneficiary status is an 'exceptional privilege.'" Glass v. United States, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (quoting German All. Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 230 (1912)). The conditions for attaining such status are "stringent." Anderson v. United States, 344 F.3d 1343, 1352 (Fed. Cir. 2003). "[S]hareholders seeking status to sue as third-party beneficiaries of an allegedly breached contract must 'demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.'" Castle v. United States, 301 F.3d 1328, 1338 (Fed. Cir. 2002) (quoting Glass, 258 F.3d at 1354). Specifically, "the contract must express the intent of the promissor to benefit the shareholder personally, independently of his or her status as shareholder." Glass, 258 F.3d at 1353-54. As a practical matter, the shareholder does not personally benefit independent of its status as a shareholder when the contractual promises pertain only to the treatment of the company. See FDIC v. United States, 342 F.3d 1313, 1320 (Fed. Cir. 2003) (noting that the broken promises concerned the treatment of the company such that the plaintiffs did not benefit independent of their status as shareholders); accord Maher v. United States, 314 F.3d 600, 605 (Fed. Cir. 2002) (concluding that the plaintiffs were not third-party beneficiaries when they failed to "establish[] that the government took on any obligations in the merger agreement for [the plaintiffs'] personal benefit, or even that the merger agreement contains any provisions pertaining to [the plaintiffs] personally").

As plaintiffs are not parties to the alleged implied contracts between the FHFA and the Enterprises, the relevant issue is whether plaintiffs are third-party beneficiaries of those agreements. They are not. First, it is of no import that the Enterprises, as plaintiffs argue, purportedly agreed to the conservatorships because that would serve the interests of shareholders. Indeed, "every action of a corporation is supposed to benefit its shareholders," but the "law has not viewed this general benefit as making every shareholder a third-party beneficiary." Suess v. United States, 33 Fed. Cl. 89, 94 (1995). Second, plaintiffs' allegations reflect that they only benefit from the alleged implied contracts by virtue of their shareholder status. The relevant promises concerned how the FHFA-C would operate the Enterprises; the crux of the purported agreements was the FHFA-C promising to operate the Enterprises as a fiduciary to preserve their assets and return them to sound condition. Because the promises in the alleged implied contracts were directed at the Enterprises, plaintiffs cannot be third-party beneficiaries of the alleged contract. See FDIC, 342 F.3d at 1320. Third, plaintiffs have not demonstrated that the FHFA intended that plaintiffs benefit independently of their status as shareholders even if they did so benefit. Plaintiffs rely on the FHFA's statements that private stock would remain outstanding and shareholders would continue to hold an economic interests in their stock. Those factual statements, however, do not reflect that the FHFA intended to confer any specific benefit on plaintiffs independent of their role as shareholders. Because plaintiffs have not alleged facts reflecting that the FHFA intended to confer a personal benefit on them, they are not third-party beneficiaries. See Glass, 258 F.3d at 1353-54. In sum, the court lacks jurisdiction to entertain plaintiffs' direct implied-contract claim because plaintiffs are neither parties to a contact with the government nor third-party beneficiaries of any such agreement. Therefore, the court dismisses count X.

V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiffs' claims, defendant challenges plaintiffs' standing to pursue their claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. Starr Int'l Co. v. United States, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is "assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties." Kowalski v. Tesmer, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that control. See Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted."), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014). Thus, in a suit brought by shareholders, it is the substance of the allegations and not the label assigned to the allegations—i.e., direct or derivative—that matters. See Starr, 856 F.3d at 966-67; see also In re Sunrise Sec. Litig., 916 F.2d 874, 882 (3d Cir. 1990) ("Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties."). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based on the rights of the company. See Starr, 856 F.3d at 966-67; see also Weir v. Stagg, No. 09-21745-CIV, 2011 WL 13174531, at *9 (S.D. Fla. Feb. 7, 2011) ("Shareholders do not have standing to bring a direct action for injuries suffered by a corporation, but rather, must bring a derivative action."). A shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the corporation's injuries—to have standing to litigate those claims. See Starr, 856 F.3d at 966-67.

The parties disagree on whether plaintiffs have standing to litigate any of their claims. Defendant argues that plaintiffs who purchased stock after the PSPA Amendments lack standing to litigate their Fifth Amendment takings claims, all plaintiffs lack standing to litigate what they assert as direct claims because the underlying rights belong to the Enterprises, and Mr. Barrett lacks standing for his derivative claims because the right to bring such claims was transferred to the FHFA-C. The court addresses each argument in turn.

A. Plaintiffs who purchased stock after the PSPA Amendments lack standing to litigate their direct takings claim.

Defendant first argues that plaintiffs who did not own stock in the Enterprises at the time of the PSPA Amendments lack standing to pursue direct or derivative takings claims.[29] Plaintiffs counter that the court does not need to resolve the standing issue now because a case can proceed if one of the claimants has standing, and some of the plaintiffs indisputably have standing by virtue of buying stock before the execution of the PSPA Amendments. Plaintiffs also argue that they all have standing regardless of when they bought the shares. Relying on Bailey v. United States, 78 Fed. Cl. 239 (2007), plaintiffs contend that postamendment purchasers have standing because the government effectuated a permanent regulatory taking that it can transform into a temporary taking by changing the terms of the PSPAs. Plaintiffs also assert that they have standing regardless of the stock purchase date because each payment under the PSPA Amendments constitutes a new taking. In its reply, defendant asserts that the court should address standing now to conserve judicial resources, read Bailey as limited to regulatory takings of real property, and conclude that the only potential taking occurred on the date of the PSPA Amendments.

As an initial matter, it is appropriate to address at this time whether plaintiffs who purchased stock after the PSPA Amendments have standing even if those who purchased stock before the PSPA Amendments have standing. Although courts occasionally reserve judgment on standing issues when at least one claimant has standing, they only do so when each plaintiff is seeking the same relief. See, e.g., Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 52 & n.2 (2006) (seeking invalidation of a statute); Bowsher v. Synar, 478 U.S. 714, 721 (1986) (same); Doe v. Bolton, 410 U.S. 179, 189 (1973) (same); Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1118 n. 1 (9th Cir. 2001) (holding that the question of a husband's standing to sue based on his community property interest was irrelevant because his wife "unquestionably has standing to sue, and [his] presence as a plaintiff has no effect on the relief available"). Otherwise stated, the existence of one party with standing is sufficient when the standing of the other parties has no effect on the merits of the claims. See Ry. Labor Executives' Ass'n v. United States, 987 F.2d 806, 810 (D.C. Cir. 1993) ("[T]he Supreme Court has repeatedly held that if one party has standing in an action, a court need not reach the issue of the

[29] Defendant also purports to argue that plaintiffs lack standing to pursue illegal-exaction and breach-of-contract claims if they did not own stock in the Enterprises at the time of the PSPA Amendments. But defendant presents no argument with respect to the illegal-exaction claims and fails to substantively develop an argument as to the breach-of-contract claims. Indeed, defendant merely asserts with respect to the contract claim that a plaintiff cannot bring such a claim until it is a party to a contract. This single sentence in defendant's motion to dismiss, coupled with its failure to address the issue in its reply, is not enough to form a substantive argument given that plaintiffs allege that they are parties to a contract. Simply stated, defendant fails to develop any argument as to why plaintiffs who acquired stock after the PSPA Amendments lack standing to pursue illegal-exaction or breach-of-contract claims. The court, therefore, declines to consider the nominal arguments. See SmithKline Beecham Corp. v. Apotex Corp., 439 F.3d 1312, 1320 & n.9 (Fed. Cir. 2006) (noting that the court has discretion on whether to consider undeveloped arguments).

standing of other parties when it makes no difference to the merits of the case."). Here, a determination of standing affects the merits of plaintiffs' claims because each plaintiff is seeking its own monetary relief, and a plaintiff is not entitled to such relief if it lacks standing. Therefore, the court will address the standing dispute.

The court begins with the derivative takings claims. A derivative claim, as noted above, is a claim that is brought on behalf of the corporation. It is of no import, therefore, when a shareholder asserting a derivative claim bought the stock so long as the real party in interest—the corporation—had a property interest at the time of the alleged taking. Thus, in this case, so long as the Enterprises had a property interest in their net worth on the date of the PSPA Amendments (and there is no suggestion they did not), then any shareholder could have standing to pursue a derivative claim. Moreover, plaintiffs have alleged that Mr. Barrett—the plaintiff asserting the derivative claims—owned stock at the time of the alleged taking.

The court next turns to plaintiffs' direct takings claim. Assuming that plaintiffs have properly asserted a direct takings claim, the issue is whether those plaintiffs who acquired stock after the date of the alleged taking have standing to pursue a takings claim. Plaintiffs acknowledge that a claimant must ordinarily own the property at the time of a taking to have standing. They assert, however, that the court should follow the conclusion in Bailey that a different standard applies in the context of a regulatory taking. Plaintiffs' reliance on Bailey, a decision issued by another judge on this court, is ill-considered. The Federal Circuit, when presented, post-Bailey, with an alleged regulatory taking, explained that "[i]t is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation." Reoforce, Inc. v. United States, 853 F.3d 1249, 1263 (Fed. Cir. 2017) (quoting Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001)); accord id. ("[P]recedent requires that the property owner prove its ownership at the time of the alleged taking . . . ."); Wyatt, 271 F.3d at 1096 (addressing regulatory takings). It follows that a "plaintiff [who] own[s] no shares of the subject stock on the date of taking . . . maintains no standing to sue." Maniere v. United States, 31 Fed. Cl. 410, 421 (1994); cf. Reoforce, 853 F.3d at 1263 (concluding that the plaintiff had standing for a takings claim despite relinquishing property owned on the date of the purported taking before filing the lawsuit). Applying that principle, the court concludes that any plaintiff who did not own stock at the time of the alleged taking lacks standing to assert a direct takings claim.[30]

Having concluded that plaintiffs only have standing to pursue a direct takings claim if they owned stock at the time of the purported taking, the next issue is determining when the taking occurred. Plaintiffs contend that a new takings claim accrues with each payment under the PSPA Amendments, and defendant counters that a takings claim accrued only when the FHFA-C agreed to the PSPA Amendments.[31] The court agrees with defendant. There is only

[30] Plaintiffs' approach would provide them with a windfall: They would acquire the stock at a price that reflects a discount for the property taken by the government and then obtain compensation from the government for the diminishment in value of their stock. That result is incompatible with the notion of just compensation that underlies the Fifth Amendment's Takings Clause.

[31] Although plaintiffs argue in response to defendant's motion to dismiss that each payment under the PSPA Amendments constitutes a taking, their allegations in the second

one taking when a "single governmental action causes a series of deleterious effects, even though those effects may extend long after the initial governmental [action]."[32] Boling v. United States, 220 F.3d 1365, 1373 (Fed. Cir. 2000). Here, there is one event that caused all of plaintiffs' purported losses: the execution of the PSPA Amendments. It is of no import to the accrual of plaintiffs' direct takings claim that, based on the PSPA Amendments, the Enterprises make regular payments to Treasury because those payments are just the consequences of the PSPA Amendments. Simply stated, plaintiffs' direct takings claim accrued on the date of the PSPA Amendments—August 17, 2012—and new claims do not accrue for each payment under those agreements.

In sum, Mr. Barrett's standing to litigate his derivative taking claim is not affected by when he first purchased stock in the Enterprises, and plaintiffs who did not own stock in the Enterprises on August 17, 2012, lack standing to litigate their direct takings claim. The parties, however, have not provided the court with sufficient information for it to determine which plaintiffs did not own stock in the Enterprises as of that date. Ordinarily, the court would seek additional information from the parties to resolve that issue. But the court does not do so here because, for the reasons stated below, each plaintiff's direct takings claim is subject to dismissal for another reason.

B. Plaintiffs lack standing to litigate their nominally direct claims because those claims are substantively derivative in nature.

Defendant further argues that plaintiffs lack standing to litigate the claims they styled as direct claims because, notwithstanding the labels, the claims are actually derivative in nature. Defendant contends that plaintiffs' "direct" claims are actually derivative because, to prevail, plaintiffs would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises. Plaintiffs counter that they assert direct claims because the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises' capital structure to plaintiffs' detriment, which renders the claims for such conduct both direct and derivative under the dual-nature exception.[33] Defendant replies that the Federal Circuit rejected the notion that a plaintiff states a direct claim by alleging it was targeted by the challenged

amended complaint reflect a theory of taking premised on the execution of the PSPA Amendments. See 2d Am. Compl. ¶¶ 166-74. Nonetheless, the court considers their argument for standing as if they did allege that each payment constitutes a taking.

[32] For example, in Fallini v. United States, landowners asserted a taking based on a statute that required them to allow wild horses to drink water that was kept on their property. 56 F.3d 1378, 1383 (Fed. Cir. 1995). The landowners argued that each drink taken by a horse on their property amounted to a new taking. Id. The Federal Circuit disagreed; it held that the takings claim accrued once, when the relevant statute was enacted. Id.

[33] Plaintiffs also assert that their claims must be construed as direct claims to vindicate important federal policies if shareholders cannot assert derivative claims because of HERA. The court does not consider this argument because, as explained below, plaintiffs can assert derivative claims.

action. Defendant also contends that the dual-nature exception is not applicable because Treasury was not a controlling shareholder, the Enterprises did not issue new shares, and the PSPA Amendments did not involve the reallocation of power.

Plaintiffs do not satisfy their burden of establishing standing for the claims that they are pursuing on their own behalf (their "direct" claims). Neither theory they advance for why those claims are substantively direct, rather than derivative, is persuasive. First, it is of no import whether the government targeted shareholders with the PSPA Amendments. See Starr, 856 F.3d at 973 (noting that plaintiffs did not "sufficiently explain why the Government's subjective motivations are relevant to the inquiry into direct standing"). The direct-versus-derivative inquiry "turns on the plaintiff's injury, not the defendant's motive." Pagan v. Calderon, 448 F.3d 16, 30 (1st Cir. 2006). Second, plaintiffs have not asserted claims that qualify as both direct and derivative based on the dual-nature exception. The Federal Circuit explained that, pursuant to this exception, shareholder claims may be both direct and derivative "when a 'reduction in [the] economic value and voting power affected the minority stockholders uniquely . . . ." Starr, 856 F.3d at 968 (quoting Gentile v. Rossette, 906 A.2d 91, 99 (Del. 2006)). Specifically, shareholder claims are both direct and derivative if

> "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value," and "(2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders."

Id. (quoting Gentile, 906 A.2d at 100). The exception does not apply here because Treasury was not a controlling shareholder at the time the PSPA Amendments were executed,[34] the PSPA Amendments did not involve the issuance of new shares, and shareholder voting power was not reallocated under the PSPA Amendments. It is not enough, contrary to plaintiffs' contention, that the government allegedly exacted economic value from the other shareholders by rearranging the corporate structure. See El Paso Pipeline GP Co. v. Brinckerhoff, 152 A.3d 1248, 1264 (Del. 2016) (applying Gentile and holding a plaintiff does not state a direct claim under the dual-nature exception by pleading the "extraction of solely economic value from the minority by a controlling stockholder"). Because plaintiffs have not established that their "direct" claims are substantively direct in nature, they cannot demonstrate that they have standing to litigate those claims.

Plaintiffs fare no better if the court moves beyond their arguments for why their "direct" claims are substantively direct in nature. Federal law governs whether plaintiffs' claims are direct or derivative. See Starr, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. Id.; see also Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 97 (1991) (noting the "presumption that state law should be incorporated into federal common law"). Under Delaware law, the test for whether a shareholder's claim is derivative or

[34] Treasury is not a controlling shareholder for the reasons set forth in Section IV.D.1, supra.

direct depends on the answers to two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004) (en banc). "Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow." Gentile, 906 A.2d at 99, discussed in Starr, 856 F.3d at 965. Such claims are derivative even "though the overpayment may diminish the value of the corporation's stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend." Protas v. Cavanagh, No. CIV.A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012); see also Hometown Fin. Inc. v. United States, 56 Fed. Cl. 477, 486 (2003) ("[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to nothing more than a diminution in stock value or a loss of dividends.").

In their complaint, plaintiffs focus on the expropriation of the Enterprises' assets via compulsory payments of all profits. The gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury. Regardless of plaintiffs' label (direct or derivative) or theory (taking, illegal exaction, breach of fiduciary duty, or breach of implied contract) for their claims, the claims are substantively derivative in nature because they are premised on allegations of overpayment.[35] See Gentile, 906 A.2d at 99; see also Roberts, 889 F.3d at 409 (explaining that the plaintiffs asserted "classic derivative claims" when they alleged that "the [PSPA Amendments] illegally dissipated corporate assets by transferring them to Treasury"). Plaintiffs cannot transform their substantively derivative claims into direct claims by merely alleging that, as a result of overpayments, they were deprived of their stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiffs' purported "harms are 'merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.'" Protas, 2012 WL 1580969, at *6 (quoting Gentile, 906 A.2d at 99); see also Agostino v. Hicks, 845 A.2d 1110, 1122 (Del. Ch. 2004) ("[T]he inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation."). Because plaintiffs' claims are derivative in nature, plaintiffs lack standing to pursue those claims on their own behalf.

[35] Plaintiffs would remain unsuccessful if their allegations of waste and mismanagement (styled as self dealing, overreach, or abuse of discretion) were construed to be indicative of some action other than overpayment. Any claims premised on waste and mismanagement are derivative in nature. Kramer v. W. Pac. Indus., Inc., 546 A.2d 348, 353 (Del. 1988) (noting that "mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature"). Plaintiffs' claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. See Hometown, 56 Fed. Cl. at 486 (stock prices); In re Straight Path Commc'ns Inc. Consol. S'holder Litig., No. CV 2017-0486-SG, 2017 WL 5565264, at *4 (Del. Ch. Nov. 20, 2017) ("Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . . .").

In sum, plaintiffs have not established that they have standing to litigate the claims they label as direct because they do not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court dismisses plaintiffs' nominally direct claims on standing grounds to the extent that it has subject-matter jurisdiction over those claims.[36]

C. Mr. Barrett has standing to litigate derivative claims.

1. Mr. Barrett is not collaterally estopped from litigating whether he has standing to litigate derivative claims.

Defendant also argues that Mr. Barrett, the lone plaintiff asserting derivative claims, is collaterally estopped from litigating whether shareholders have standing to bring derivative claims because shareholders of each Enterprise previously litigated and lost that issue in Perry I.[37] Plaintiffs disagree. First, plaintiffs assert that the issue here is different than the issue in Perry I because Mr. Barrett is asserting constitutional claims (which were not pleaded in Perry I), and the district court was not bound by this jurisdiction's binding precedent. Second, plaintiffs contend that Mr. Barrett lacks privity with the Perry I plaintiffs because the district court concluded those litigants lacked capacity to sue on behalf of the Enterprises. Third, plaintiffs assert that two exceptions to collateral estoppel apply: The standing issue is a matter of general interest that has not been resolved by the Supreme Court, and there is no preclusion if the prior decision conflicts with binding precedent.

A party can be collaterally estopped from litigating "an issue if an identical issue was actually litigated and necessarily decided in a prior case where the interests of the party to be precluded were fully represented." Simmons v. Small Bus. Admin., 475 F.3d 1372, 1374 (Fed. Cir. 2007); see also In re Freeman, 30 F.3d 1459, 1467 (Fed. Cir. 1994) (acknowledging that a court may decline to apply issue preclusion when doing so would be unfair). "The party asserting issue preclusion bears the burden to establish each of these elements." Jones v. United States, 846 F.3d 1343, 1361 (Fed. Cir. 2017). As germane to the instant case, a shareholder's interests are fully represented by another shareholder litigating a derivative suit on behalf of the corporation because the corporation is the real party in interest. See, e.g., Arduini v. Hart, 774 F.3d 622, 634 (9th Cir. 2014) ("Shareholders bringing derivative suits are in privity for the purposes of issue preclusion."). A shareholder's interests, however, are not fully represented by the litigant in the earlier case if that litigant lacked capacity to sue on the corporation's behalf.[38]

[36] As explained above, the court lacks jurisdiction over plaintiffs' self-styled direct claims for breach of fiduciary duty and breach of implied contract. See supra Sections IV.D.1 (fiduciary duty), IV.E (contract).

[37] The court uses "collateral estoppel" and "issue preclusion" to refer to the same principle. See Jet, Inc. v. Sewage Aeration Sys., 223 F.3d 1360, 1366 (Fed. Cir. 2000) (noting that the terms are used interchangeably).

[38] Defendant challenges this framing of the law by relying on decisions in which courts addressed the preclusive effect of dismissals in derivative suits for litigants' failure to satisfy the requirement for demand futility. See, e.g., In re Sonus Networks, Inc, S'holder Derivative Litig., 499 F.3d 47, 64 (1st Cir. 2007). But those decisions involved litigants who, notwithstanding

See 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1840 (3d. ed. 2019) ("[A]ny dismissal or judgment that is not on the merits but that relates to the representative's capacity to bring the suit . . . will not bar other stockholders from bringing a derivative action."); see also Sonus Networks, 499 F.3d at 64 (allowing preclusion "[i]f the shareholder can sue on the corporation's behalf").

In Perry I, shareholders of both Enterprises asserted derivative, nonconstitutional claims on behalf of the Enterprises. 70 F. Supp. 3d at 229. The district court explained that Congress, via HERA, transferred shareholders' rights to bring derivative suits to the FHFA-C and an exception to the bar on shareholders bringing such suits would contravene the plain language of the statute. Id. at 230-32. Therefore, the district court concluded that the Perry I plaintiffs lacked capacity to pursue derivative claims on behalf of the Enterprises and dismissed those claims. Id. at 233.

Defendant is correct that Mr. Barrett is attempting to litigate the same issue that was actually litigated and necessarily decided in Perry I. First, the issue here is the same as the one presented in Perry I: whether, in light of HERA, shareholders of an Enterprise can litigate a derivative a claim on an Enterprise's behalf. It is of no import that Perry I concerned nonconstitutional claims, while Mr. Barrett asserts both constitutional and nonconstitutional claims. See Taylor v. Sturgell, 553 U.S. 880, 892 (2008) (noting that preclusion applies "even if the issue recurs in the context of a different claim"). Plaintiffs fare no better by arguing that the issue is different because the district court was not bound by the same precedent that applies in this court. This exception, if accepted, would swallow the rule by limiting preclusion to courts within the same circuit. Such a limitation runs contrary to the goals of collateral estoppel: "protect[ing parties] from the expense and vexation attending multiple lawsuits, conserving judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. United States, 440 U.S. 147, 153-54 (1979). Second, the issue here was actually decided in Perry I. See 70 F. Supp. 3d at 230-33. Third, the resolution of a shareholder's capacity to sue was a necessary part of that decision because defendant had moved to dismiss for lack of standing. Id. at 219.

Although defendant has established the first three elements of issue preclusion, it has not established the fourth element: whether Mr. Barrett's interests were adequately represented in the prior case.[39] As noted above, shareholders' interests are adequately represented by other

their failure to comply with the specific procedural requirements, had the capacity to sue. See generally id. at 47-71. In contrast, the district court in Perry I concluded that the shareholders in that case lacked the capacity to bring the derivative claims they asserted. 70 F. Supp. 3d at 233.

[39] The court's conclusion is buttressed by the fact that, following Perry I, other courts have adjudicated derivative claims brought by Fannie and Freddie shareholders without relying on issue preclusion. See, e.g., Saxton v. Fed. Hous. Fin. Agency, 245 F. Supp. 3d 1063, 1075 (N.D. Iowa 2017) (determining whether the plaintiffs had standing after rejecting defendant's argument to apply issue preclusion), aff'd, 901 F.3d at 954; cf. Roberts v. Fed. Hous. Fin. Agency, 243 F. Supp. 3d 950, 957-58 (N.D. Ill. 2017) (addressing the merits of plaintiffs' claims despite defendant's argument that plaintiffs lacked standing), aff'd, 889 F.3d at 397.

shareholders litigating a derivative claim when the litigating shareholders can and do sue on behalf of the company. Such litigation did not occur in Perry I; the district court concluded that the shareholders lacked capacity to litigate derivative claims on behalf of the Enterprises. Because the Perry I plaintiffs lacked capacity to represent the Enterprises, the decision affecting those litigants has no bearing on the Enterprises or the rights of the other shareholders who were not parties to that suit. Therefore, Mr. Barrett is not collaterally estopped from litigating standing in this case by the decision in Perry I.[40]

2. Mr. Barrett has standing to litigate derivative claims because the FHFA-C has a conflict of interest.

Independent of any issue preclusion, defendant argues that Mr. Barrett lacks standing to litigate derivative claims because Congress transferred to the FHFA-C the right to bring derivative claims on behalf of the Enterprises. Defendant asserts that Congress stripped the shareholders of the right to bring derivative suits by including in HERA a succession clause—a provision stating that the FHFA-C succeeds to all shareholder rights with respect to the Enterprises. Defendant further contends that the court should not recognize an exception to that rule when the FHFA-C has a conflict of interest because an exception is not supported by HERA's language and would frustrate Congress's intent to insulate the conservator from judicial scrutiny by allowing shareholders to challenge the FHFA-C's decisions. Defendant avers that the Federal Circuit's decision in First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279, 1282 (Fed. Cir. 1999), which recognized a conflict-of-interest exception in a similar statute, is inapplicable because the Federal Circuit limited its ruling to receiverships and claims that predated the receivership.

Plaintiffs counter that Mr. Barrett can maintain derivative claims on behalf of the Enterprises despite the apparent prohibition in HERA. They argue that the court cannot interpret HERA to preclude Mr. Barrett's derivative takings and illegal-exaction claims because eliminating a remedy for constitutional transgressions violates due process. They also argue, relying on First Hartford, that Mr. Barrett can assert derivative claims because the FHFA-C has a manifest conflict of interest. Plaintiffs assert that First Hartford is controlling because the Federal Circuit recognized the conflict exception in the context of a succession clause identical to the one in HERA. Plaintiffs also contend that First Hartford is not limited to (1) receivers because the Federal Circuit did not rely on any particular aspect of receivership or (2) prereceivership claims because the court's focus was on the receiver's conflict of interest.

The initial consideration here—the import of HERA's succession clause—is matter of statutory interpretation. As noted above, the court begins with the language of the statute, and if the statutory language is clear, the court's inquiry is complete. Hughes Aircraft, 525 U.S at 438. In the succession clause, Congress provided that the FHFA-C "immediately succeed[s] to" every shareholder's "rights, titles, powers and privileges . . . with respect to the [Enterprise] and the assets of the [Enterprise]." 12 U.S.C. § 4617(b)(2)(A). One of the shareholders' rights with respect to an Enterprise is the right to bring a derivative suit. See Perry II, 864 F.3d at 624; see

[40] Because defendant did not establish every element of issue preclusion, there is no need to address plaintiffs' arguments that an exception to the doctrine is applicable.

also RCFC 23.1 (limiting derivative suits to shareholders). Therefore, it is apparent that HERA contains a prohibition on shareholder derivative suits because the right to assert such claims is transferred to the FHFA-C. Indeed, other courts considering the issue have concluded that there is such a prohibition. E.g., Kellmer v. Raines, 674 F.3d 848, 850 (D.C. Cir. 2012) (concluding that Congress "plainly transfer[red] shareholders' ability to bring derivative suits . . . to FHFA"); La. Mun. Police Emps. Ret. Sys. v. Fed. Hous. Fin. Agency, 434 F. App'x 188, 191 (4th Cir. 2011) (per curiam) (same). If the court were writing on a blank slate, it would also conclude that Congress foreclosed shareholders from asserting derivative claims while the Enterprises are in conservatorship.

The court, however, is not writing on a blank slate. Rather, it must render a decision in light of existing precedent—specifically, First Hartford. In First Hartford, the FDIC was serving as the receiver for Dollar Dry Dock Bank of New York ("Dollar"), and a Dollar shareholder filed a derivative claim on the bank's behalf asserting that the FDIC breached a contract with Dollar before the receivership. 194 F.3d at 1282. A judge on this court dismissed the claim for lack of standing after explaining that the FDIC was the only entity that could bring derivative claims for Dollar because, under the relevant statute, the FDIC as receiver succeeded to all shareholder rights. Id. at 1294. The Federal Circuit disagreed. Id. It acknowledged "that, as a general proposition, the FDIC's statutory receivership authority includes the right to control the prosecution of legal claims on behalf of the [bank] now in its receivership." Id. at 1295. But the Federal Circuit, without addressing the statutory language, focused on the purpose of derivative suits: "permit[ting] shareholders to file suit on behalf of a corporation when the managers or directors of the corporation, perhaps due a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation." Id. The Federal Circuit reasoned that the plaintiff had standing because, "most significantly," of "the conflict of interest faced by the FDIC in determining whether to bring suit." Id. Indeed, "the FDIC was asked to decide on behalf of [Dollar] whether [the FDIC] should sue the federal government based upon a breach of contract, which if proven was caused by the FDIC itself." Id. Simply stated, the Federal Circuit held that a shareholder of a company could bring a derivative claim, notwithstanding a succession clause, if the company was controlled by an entity with a conflict of interest. Id. at 1283.

First Hartford is instructive because the Federal Circuit was addressing the same issue that is present in this case: whether shareholders can assert a derivative claim when there is a succession clause transferring shareholders' rights to another entity. See id. at 1294-95. First Hartford is also informative because Congress, after that case was decided, included in HERA the same succession clause that was at issue in the Federal Circuit's decision, compare 12 U.S.C. § 1821(d)(2)(A)(i) (1994) (succession clause at issue in First Hartford), with 12 U.S.C. § 4617(b)(2)(A)(i) (succession clause promulgated in HERA), and "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, Congress' intent to incorporate such interpretations as well,"[41] Bragdon v. Abbott, 524 U.S. 624, 626 (1998). But see Perry II, 864 F.3d at 625

[41] Before Congress enacted HERA, at least one other appellate court recognized a conflict-of-interest exception to the limitation on derivative suits resulting from a succession

(declining to conclude that Congress intended sub silentio to incorporate into HERA the conflict-of-interest exception recognized by two appellate courts).

The court is not swayed by defendant's arguments that First Hartford is distinguishable because it involved a receiver or claims predating the receivership. The Federal Circuit did not premise its decision on the unique attributes of receiverships or the timing of the claims; it concluded that the plaintiffs had standing "only . . . because of the FDIC's conflict of interest." Id. at 1283; accord id. at 1295 (explaining that it held that the plaintiffs had standing based on the FDIC's refusal to sue and, "most significantly, upon the conflict of interest faced by the FDIC"). Defendant fares no better with its argument that First Hartford is not instructive because the Federal Circuit limited its holding "to the situation . . . in which a government contractor with a putative claim of breach by a federal agency is being operated by that very same agency." Id. at 1295. Read in context, the Federal Circuit merely acknowledged that it was "neither infer[ring] nor express[ing] an opinion" on what other circumstances would involve the necessary conflict for a shareholder to acquire standing when there is a succession clause. Id. The Federal Circuit was not stating that the conflict-of-interest exception does not apply in other situations. Indeed, the court recognized that the exception would apply outside of the circumstance presented in First Hartford. See id. ("We stress that such standing could only occur in a narrow range of circumstances."). The court, therefore, is guided by First Hartford insofar as the necessary conflict of interest exists.

The court, having identified the relevant framework, returns its focus to Mr. Barrett's derivative claims. Those claims are premised, at least in part, on the FHFA-C's purported conduct. Similar to First Hartford, the FHFA-C would need to decide on behalf of the Enterprises whether it should sue the federal government based on claims, which, if proven, are rooted in the FHFA-C's actions. See 194 F.3d at 1295. That decision presents a conflict of interest for the FHFA-C such that Mr. Barrett has standing to litigate his derivative claims on behalf of the Enterprises.

VI. MERITS

In addition to seeking the dismissal of plaintiffs' claims for lack of subject-matter jurisdiction and standing, defendant also moves to dismiss plaintiffs' claims for failure to state a claim on which relief can be granted. Most of those arguments, however, only concern plaintiffs' direct claims. See, e.g., Def.'s Am. Omnibus Mot. to Dismiss 51 (disputing that shareholders' economic interest in their stock is a cognizable property right); 55 (contending that the government did not take shareholders' rights under their stock certificates); 59 (arguing that there was no taking because plaintiffs still own the stock at issue); 70 (asserting that the government did not illegally exact funds because shareholders did not bear any costs that the government would otherwise be obligated to pay); 72 (disagreeing with plaintiffs' theory that the FHFA owed a fiduciary duty to shareholders). But those claims are no longer at issue; the only

clause identical to the one that Congress ultimately incorporated into HERA. See Delta Sav. Bank v. United States, 265 F.3d 1017, 1022-23 (9th Cir. 2001).

claims that remain for adjudication are plaintiffs' derivative claims. Thus, the court limits its consideration to defendant's three contentions concerning plaintiffs' derivative claims.[42]

A. Plaintiffs' allegations of illegal conduct do not defeat their derivative takings claims.

Defendant first argues that plaintiffs fail to state plausible takings claims because they allege that the FHFA-C acted illegally. Specifically, defendant asserts that the claims fail because unauthorized government conduct cannot effect a taking. Plaintiffs counter that they merely pleaded in the alternative by alleging that the government is either liable for a taking (because its actions were lawful) or an illegal exaction (because it acted illegally). Notably, defendant did not return to this argument in its reply.

The court is not swayed by defendant's argument. When the government expropriates property, a plaintiff can obtain relief under either a takings theory or an illegal-exaction theory. See Orient Overseas Container Line, 48 Fed. Cl. at 289. Not both. Figueroa v. United States, 57 Fed. Cl. 488, 496 (2003), aff'd, 466 F.3d 1023 (Fed. Cir. 2006). The winning claim depends on the facts established; a takings claim requires lawful conduct, while an illegal-exaction claim is premised on unauthorized conduct. Id. Although those claims are mutually exclusive, a plaintiff can assert both and proceed past the pleading stage because a complaint can contain inconsistent claims. Id.; accord RCFC 8(d)(3) ("A party may state as many separate claims . . . as it has, regardless of consistency."). Having asserted both derivative takings and illegal-exaction claims, plaintiffs' allegations of unlawful conduct are insufficient to defeat their derivative takings claims at this stage.[43]

[42] As discussed in Part II, supra, defendant filed an omnibus motion to dismiss the claims raised by plaintiffs in this case and those raised by other plaintiffs in the related cases. The plaintiffs in the related cases raised some claims that plaintiffs in this case did not assert in their complaint. Thus, the court does not address defendant's arguments concerning those claims that are only asserted in the related cases.

[43] The court finds further support for its conclusion in the fact that plaintiffs labeled their illegal-exaction claims as "alternative" claims in the complaint. Although plaintiffs did not state in their complaint what the claims are "alternative" to, the "pleading must be construed so as to do justice." RCFC 8(e). The court affords justice here by reading the illegal-exaction claims as an alternative to the takings claims, which appears to be plaintiffs' intended result given that they asserted the illegal-exaction claims immediately after the takings claims. Cf. Figueroa, 57 Fed. Cl. at 496 (construing a takings and illegal-exaction claim as being pleaded in the alternative even though the plaintiff "did not expressly delineate its taking claim as being advanced 'in the alternative'"). That is to say, plaintiffs' decision to assert both takings claims and illegal-exaction claims is a textbook example of pleading inconsistent claims—a strategy that is explicitly contemplated by the court's rules.

B. Plaintiffs' derivative illegal-exaction claims survive because defendant does not address each theory plaintiffs proffer for why the PSPA Amendments were not authorized.

Next, defendant frames plaintiffs' illegal-exaction claims as premised on a violation of HERA and argues that plaintiffs have not alleged any unauthorized conduct because the FHFA-C and Treasury acted within their authority under HERA when they approved the PSPA Amendments. Plaintiffs counter that they identified three reasons why the revisions to the PSPAs were illegal. Specifically, plaintiffs argue that they allege that (1) the FHFA-C and Treasury exceeded their authority under HERA, (2) the FHFA-C violated its own regulations, and (3) the FHFA-C's approval of the PSPA Amendments was unconstitutional because the FHFA is structured in a manner that violates separation-of-powers principles. Plaintiffs also note that defendant failed to even address the allegations of unconstitutional conduct. Defendant uses its reply brief to double down on its argument that the FHFA-C and Treasury acted within their statutory authority and to add a contention that the FHFA-C did not violate the applicable regulations. Notably, however, defendant remains silent on the alleged constitutional violation.

An illegal-exaction claim is a demand for "money that was 'improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.'" Norman v. United States, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007 (Ct. Cl. 1967)). Defendant takes aim at a core tenant of such a claim: the requirement for an unauthorized action. But defendant presses no argument on why plaintiffs' allegations that the FHFA is unconstitutionally structured are insufficient to sustain their illegal-exaction claims. Defendant also does not present any argument recognized by the court on why the FHFA-C's purported violation of its own regulations is not sufficient to establish the necessary illegality for an illegal-exaction claim. Although defendant addresses that issue in its reply brief, it had already waived the argument by not addressing the purported regulatory violation in its motion to dismiss. See United States v. Ford Motor Co., 463 F.3d 1267, 1277 (Fed. Cir. 2006) (explaining that "[a]rguments raised for the first time in a reply brief are not properly before this court"); Ironclad/EEI v. United States, 78 Fed. Cl. 351, 358 (2007) (noting that "under the law of this circuit, arguments not presented in a party's principal brief to the court are typically deemed to have been waived"). Thus, defendant has not met its burden of establishing that plaintiffs fail to state a plausible illegal-exaction claim for each Enterprise.

C. Plaintiffs' derivative breach-of-implied-contract claims survive because defendant fails to establish that plaintiffs inadequately pleaded mutuality of intent to contract.

Finally, defendant turns to plaintiffs' breach-of-implied-contract claims, which are premised on the FHFA-C purportedly agreeing to operate the Enterprises for the benefit of the shareholders in exchange for the Enterprises' boards consenting to conservatorship. A party alleging an implied-in-fact contract with the government must plead four elements: "(1) 'mutuality of intent to contract,' (2) 'consideration,' (3) 'lack of ambiguity in offer and acceptance,' and (4) 'actual authority' of the government representative whose conduct is relied upon to bind the government." Moda Health Plan, Inc. v. United States, 892 F.3d 1311, 1329 (Fed. Cir. 2018) (quoting Lewis v. United States, 70 F.3d 597, 600 (Fed. Cir. 1995)), cert.

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granted, 139 S. Ct. 2743 (2019). Defendant focuses both of its arguments on the first element, mutuality of intent to contract.[44]

Defendant first argues that plaintiffs fail to adequately allege that the FHFA intended to contract because the FHFA had authority to place the Enterprises into conservatorship without their consent. This argument is grounded in the principle that "[a]n agency's performance of its regulatory or sovereign functions does not create contractual obligations." D & N Bank v. United States, 331 F.3d 1374, 1378-79 (Fed. Cir. 2003). For a contract to exist, "[s]omething more is necessary" than just the agency exercising its powers. Id. at 1379. Of particular import here, the FHFA Director could appoint the agency as conservator if the Enterprises consented or if other conditions were satisfied. 12 U.S.C. § 4617(a)(3). Although the FHFA had the authority to place the Enterprises into conservatorship without their consent, plaintiffs allege that the FHFA did not rely on that authority but instead sought to bargain for the Enterprises' boards' consent to place the Enterprises into conservatorship.[45] This alleged bargaining for consent is the "something more" that can support the existence of a contract. See Mola Dev. Corp. v. United States, 516 F.3d 1370, 1378 (Fed. Cir. 2008) (explaining that evidence of negotiations supports the existence of an agency intending to contract rather than exercising regulatory powers). That is to say, the fact that the FHFA had statutory authority to impose a conservatorship without the boards' consent is of no import at this juncture.

Defendant also argues that the FHFA's intent to contract cannot be inferred from plaintiffs' allegations that the FHFA encouraged or convinced the Enterprises' boards to consent. Defendant's contention is premised on the principle espoused in Suess v. United States that a government agency encouraging another entity to act is not enough to establish intent to contract. 535 F.3d 1348, 1364 (Fed. Cir. 2008). Defendant, however, proffers no analysis for why that principle concerning encouragement should be extended to an agency convincing another to act. The court, therefore, limits its inquiry to the issue of encouragement. The thrust of plaintiffs' complaint, however, is not that the FHFA encouraged the boards to consent but rather that the FHFA bargained for the boards' consent. The focus on bargaining is important because, as the Federal Circuit suggested in Suess, an agency negotiating with another entity is evidence of an intent to contract. See id.; see also Mola, 516 F.3d at 1378. Simply stated, defendant's

[44] Defendant nominally presents a third argument for why plaintiffs have not adequately alleged mutuality of intent. In that argument, between an introductory sentence and a summation sentence, defendant highlights that Congress insulated directors from liability for consenting to the conservatorship and recounts plaintiffs' allegation that the Enterprises' boards faced a Hobson's choice. Defendant, however, proffers no analysis as to why those considerations reflect that the FHFA and the boards lacked the requisite intent to contract. The court, therefore, deems waived any contentions defendant intended to raise in its third argument. See SmithKline Beecham, 439 F.3d at 1320 (declining to consider undeveloped arguments).

[45] Plaintiffs do not explain why the FHFA decided to seek the Enterprises' boards' consent, but the FHFA had a strong incentive to pursue consent because that method was less likely to lead to litigation concerning the appointment of the conservator. See 12 U.S.C. § 4617(a)(5) (permitting an Enterprise to litigate the imposition of a conservatorship).

contention is unpersuasive because it is not grounded in the relevant allegations. Accordingly, the court declines to dismiss plaintiffs' derivative breach-of-implied-contract claims.

VII. CONCLUSION

For the reasons stated above, the court dismisses plaintiffs' direct claims: the court lacks jurisdiction to entertain the direct fiduciary duty and direct implied-in-fact contract claims, and plaintiffs lack standing to pursue any of their direct claims. Further, the court declines to dismiss plaintiffs' derivative claims. The court therefore **GRANTS IN PART** defendant's motion to dismiss with respect to the claims plaintiffs label as direct (counts I, IV, VII, and X), and **DENIES IN PART** the motion with respect to the derivative claims (counts II, III, V, VI, VIII, IX, XI, XII). By no later than **Friday, January 10, 2020,** the parties shall file a joint status report proposing further proceedings and, if appropriate, a schedule for such proceedings.

The court has filed this ruling under seal. The parties shall confer to determine proposed redactions to which all the parties agree. Then, **by no later than Monday, December 16, 2019,** the parties shall file a joint status report indicating their agreement with the proposed redactions, **attaching a copy of those pages of the court's ruling containing proposed redactions, with all proposed redactions clearly indicated.**

VIII. CERTIFICATION FOR INTERLOCUTORY APPEAL

On March 6, 2020, the court granted the parties' motions to certify this opinion for interlocutory appeal. As stated in that order, the court is appending the following language to this opinion:

The court finds that this opinion involves the following controlling questions of law with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from the opinion may materially advance the ultimate termination of the litigation:

(1) Whether the court lacks subject-matter jurisdiction over plaintiffs' direct claims for breach of fiduciary duty and breach of implied-in-fact contracts.

(2) Whether plaintiffs who purchased stock in Fannie and Freddie after the PSPA Amendments lack standing to pursue their direct takings claims.

(3) Whether plaintiffs lack standing to pursue their self-styled direct claims because those claims are substantively derivative in nature.

(4) Whether plaintiffs have standing to assert derivative claims notwithstanding HERA's succession clause.

(5) Whether the FHFA-C's actions are attributable to the United States such that the court possesses subject-matter jurisdiction to entertain plaintiffs' derivative takings and illegal exaction claims.

(6) Whether plaintiffs' allegations that the FHFA entered into an implied-in-fact contract with the Enterprises to operate the conservatorships for shareholder benefit fail as a matter of law.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

In the United States Court of Federal Claims

No. 18-281C
(Filed: June 8, 2020)

OWL CREEK ASIA I, L.P. et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(1); RCFC 12(b)(6); Jurisdiction; Standing; Direct Claims; Instrumentalities; Coercion; Agent; Conservators; Conflict of Interest; Third-Party Beneficiaries; Stock; Shareholders; Fannie; Freddie; FHFA

Lawrence D. Rosenberg, Washington, DC, for plaintiffs.

Kenneth M. Dintzer, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiffs in this case challenge the actions of the United States during the conservatorships of the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie"). Specifically, plaintiffs take issue with the conservator for Fannie and Freddie (collectively, the "Enterprises") amending a funding agreement between the Enterprises and the United States Department of the Treasury ("Treasury"). Based on the revisions to that agreement, plaintiffs seek the return of money illegally exacted, damages for breach of contract and breach of fiduciary duty, and compensation for a taking pursuant to the Fifth Amendment to the United States Constitution ("Constitution"). Defendant moves to dismiss plaintiffs' amended complaint, arguing that the court lacks subject-matter jurisdiction over plaintiffs' claims, plaintiffs lack standing to pursue their claims, and plaintiffs fail to state a claim upon which relief may be granted. For the reasons stated below, the court grants defendant's motion to dismiss.

I. BACKGROUND

A. The Enterprises are private companies that are under the control of a conservator.

1. The Enterprises operated independently before the financial crisis.

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities

that are sold to investors.[1] 1st Am. Compl. ¶¶ 23-24; Fairholme II, 147 Fed. Cl. at 15. Congress chartered Fannie in 1938 and established Freddie in 1970. 1st Am. Compl. ¶¶ 23-24. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. Id. Freddie is organized under Virginia law, and Fannie is organized under Delaware law. Id. The Enterprises issued their own common and preferred stock. Id. ¶ 26. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. Fairholme II, 147 Fed. Cl. at 15. Those owning preferred stock, including plaintiffs in this suit, acquired the right to receive dividends and a liquidation preference. 1st Am. Compl. ¶ 26.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. Id. ¶ 27. Although the Enterprises began recording losses in 2007, they were stable and adequately capitalized. Id. ¶¶ 29-30. Otherwise stated, the Enterprises were not in financial distress or otherwise at risk of insolvency. Id.

2. Congress created the Federal Housing Finance Agency to regulate the Enterprises and authorized the agency to serve as a conservator for each Enterprise.

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency ("FHFA") and provided it with supervisory and regulatory authority over the Enterprises. See 12 U.S.C. § 4511(a)-(b) (2018).[2] Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator ("FHFA-C") for each Enterprise to reorganize, rehabilitate, or wind up its affairs.[3] Id. § 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its obligations. Id. § 4617(a)(3).[4] The conservator, once appointed, functions independently; it is not "subject to the direction or supervision of any other agency of the United States or any State in the exercise of [its] rights, powers, and privileges . . . ." Id. § 4617(a)(7).

[1] This background section is a less comprehensive version of the court's recitation of facts in a related case, Fairholme Funds, Inc. v. United States, 147 Fed. Cl. 1 (2019) ("Fairholme II"), motion to certify interlocutory appeal granted, 147 Fed. Cl. 126 (2020).

[2] Congress has not amended the relevant portions of HERA since enacting the law in 2008. The court, therefore, refers to the most recent version of the United States Code.

[3] To avoid any ambiguity, the court reiterates that it is using "FHFA" to refer to the agency acting in its regulatory role and "FHFA-C" when discussing the agency acting as a conservator.

[4] Congress enticed the Enterprises to consent to a conservatorship by insulating their board members from any liability to shareholders or creditors for agreeing in good faith to the FHFA's appointment of a conservator. 12 U.S.C. § 4617(a)(6).

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Congress also delineated the scope of the FHFA-C's powers in HERA. See generally id. § 4617. As soon as it is appointed, the FHFA-C "immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . . ." Id. § 4617(b)(2)(A). Congress also conferred on the conservator the power to "[o]perate the [Enterprise]." Id. § 4617(b)(2)(B). Pursuant to that power, the conservator "may," among other things, "perform all functions of the [Enterprise]," "preserve and conserve the assets and property of the [Enterprise]," and "provide by contract for assistance in fulfilling any function . . . of the [conservator]." Id. The conservator "may" also "take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise]." Id. § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator "may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]" and "take any action authorized by [12 U.S.C. § 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA]." Id. § 4617(b)(2)(J). By describing the FHFA-C's role primarily in terms of what powers it "may" exercise, see generally id. § 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its powers, see United States v. Rodgers, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."). Simply stated, the FHFA has "extraordinarily broad flexibility to carry out its role as conservator." Perry Capital LLC v. Mnuchin, 864 F.3d 591, 606 (D.C. Cir. 2017) ("Perry II"), cert. denied, 138 S. Ct. 978 (2018).

3. Congress authorized Treasury to purchase securities issued by the Enterprises.

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(g) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. Id. §§ 1455(*l*)(4), 1719(g)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the availability of mortgage finance, and protect taxpayers. Id. §§ 1455(*l*)(1)(B), 1719(g)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

> (i) The need for preferences or priorities regarding payments to the Government.
>
> (ii) Limits on maturity or disposition of obligations or securities to be purchased.
>
> (iii) The [Enterprise's] plan for the orderly resumption of private market funding or capital market access.
>
> (iv) The probability of the [Enterprise] fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the [Enterprise's] status as a private shareholder-owned company.

(vi) Restrictions on the use of [Enterprise] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

Id. §§ 1455(*l*)(1)(C), 1719(g)(1)(C).

4. The FHFA became the conservator for each Enterprise.

Around the beginning of September 2008, the FHFA and Treasury sought to persuade each Enterprise's board of directors to consent to conservatorship. 1st Am. Compl. ¶ 40. The FHFA told each Enterprise's board that conservatorship would further the interests of the shareholders. Id. Around the same time, the FHFA made an offer to each board: consent to a conservatorship in exchange for the FHFA-C aiming to preserve and conserve the Enterprises' assets, attempting to restore the Enterprises to sound and solvent condition, and terminating the conservatorships when those goals were achieved. Id. ¶¶ 5, 7; Fairholme II, 147 Fed. Cl. at 17. Each Enterprise's board accepted that offer and consented to a conservatorship on September 6, 2008, with an understanding that the FHFA-C would operate in the aforementioned limited ways. Fairholme II, 147 Fed. Cl. at 17.

The conservatorships became effective on September 6, 2008, upon each Enterprise's board's consent. 1st Am. Compl. ¶¶ 40-41; see also 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when "[t]he [Enterprise], by resolution of its board of directors or its shareholders or members, consents to the appointment").

5. The FHFA-C contracted with Treasury to obtain funding for the Enterprises.

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement ("PSPA") with Treasury for each Enterprise. 1st Am. Compl. ¶ 6. Treasury entered into the agreements pursuant to its authority under HERA to buy the Enterprises' securities. Id. ¶¶ 6, 42. Under the PSPAs, Treasury committed to provide up to $100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. Id. ¶ 42. If an Enterprise's liabilities exceeded its assets, then the Enterprise could draw on Treasury's funding commitment in an amount equal to the difference between the Enterprise's liabilities and assets. Fairholme II, 147 Fed. Cl. at 17.

In return for Treasury's funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their respective common stock at a nominal price. 1st Am. Compl. ¶ 42. Treasury's preferred stock had an initial liquidation preference of $1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury's funding commitment. Id. In the event of a liquidation, Treasury was entitled to recover the full liquidation value of its shares before any other shareholder would receive compensation. Id. Second, Treasury bargained for the right to a

quarterly cash dividend that would be equal, per annum, to 10% of its liquidation preference. Id. An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. Id. Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. Id. ¶¶ 42, 48. Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. Id. ¶ 43.

The FHFA-C and Treasury amended each Enterprise's PSPA on May 6, 2009, to increase Treasury's funding commitment to each Enterprise from $100 billion to $200 billion. Id. ¶ 50. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed $200 billion. Id. ¶ 51.

6. The Enterprises' finances improved during their conservatorships.

In the early stages of the conservatorships, each Enterprise's net worth decreased as it reported losses. Fairholme II, 147 Fed. Cl. at 18. Some of the losses resulted from the FHFA-C writing down the value of deferred tax assets.[5] Id. Notwithstanding those on-paper losses, as of late 2009, Fannie had drawn only $60 billion from Treasury, and Freddie had only drawn $51 billion. 1st Am. Compl. ¶ 52.

By 2011 and into 2012, the Enterprises' financial outlooks were promising. In addition to an improvement in the housing market, the Enterprises had improved their financial performance. Id. ¶ 57. They were positioned to further improve their financial condition by revising their valuations of deferred tax assets because of growing profits, and by increasing their earnings due to reduced credit losses. Id. The FHFA-C and Treasury were aware of those forthcoming changes and the Enterprises' improving outlooks. Id. ¶ 8. In August 2012, Treasury and FHFA-C knew that the Enterprises would soon experience improved profitability and received projections reflecting that the Enterprises would have positive comprehensive income in 2012. Id. ¶¶ 58-59. Otherwise stated, the FHFA-C and Treasury knew, by early August 2012, that the Enterprises were poised to generate profits in excess of their respective dividend obligations to Treasury. Id. ¶ 57.

7. Treasury and the FHFA-C agreed to a third amendment to the PSPAs.

At an unspecified time prior to August 2012, Treasury and the FHFA-C began considering a third amendment to each PSPA. Treasury was the driving force behind the initiative to amend the PSPAs' terms. Id. ¶¶ 63, 75. Indeed, an FHFA official reported in early

[5] A deferred tax asset is an asset that may be used to offset future tax liability. Fairholme II, 147 Fed. Cl. at 18 n.4. A company must write down the value of that deferred asset if it is unlikely to be used to offset future taxable profits. Id. This write down occurs, for example, if a company predicts it will not be profitable in the future. Id.

August 2012 that Treasury was making a "renewed push" to implement a new amendment. Id. ¶ 71 (quoting the FHFA official). The FHFA-C learned of the proposed changes before the Enterprises; Treasury informed the Enterprises that the new terms were forthcoming and announced the changes to the Enterprises. Id. ¶ 73. Treasury officials who were involved with the process do not recall Treasury making any backup or contingency plans in the event that the FHFA-C rejected the proposed terms. Fairholme II, 147 Fed. Cl. at 19. The FHFA-C accepted the changes without advocating for different terms. Id.

Treasury and the FHFA-C decided to announce the changed terms in mid-August 2012 because, according to Treasury, the Enterprises would be reporting earnings exceeding their dividend obligation at the beginning of that month. Id. On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA ("PSPA Amendment"). 1st Am. Compl. ¶¶ 2, 9, 60. A key component of the amended PSPAs is the requirement—referred to here as the "Net Worth Sweep"—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise's net worth (except for a small capital reserve amount) rather than a dividend based on a set percentage of the liquidation preference.[6] Id. ¶ 60. Additionally, under the amended PSPAs, the Enterprises are not obligated to pay a periodic commitment fee. Id. ¶ 71.

a. Treasury wanted to ensure that it benefited from the new terms.

With the PSPAs, Treasury sought to secure a more beneficial arrangement for itself, as a representative for taxpayers. During the lead-up to the PSPA Amendments, a Treasury official acknowledged in an internal communication that the government had resolved to "ensure existing common equity holders will not have access to any positive earnings from the [Enterprises] in the future." Id. ¶ 63 (emphasis removed) (quoting the document). Treasury recognized its goal of obtaining all of the Enterprises' profits by executing the PSPA Amendments; it intended to take "every dollar of earnings that [the Enterprises] generate[] . . . to benefit taxpayers." Id. ¶ 10 (quoting a Treasury announcement).

b. The FHFA-C agreed to changes that benefit Treasury.

For its part, the FHFA-C was operating under the belief that Treasury would benefit from the PSPA Amendments. The FHFA-C prioritized Treasury's interests over the fate of the Enterprises and the interests of their shareholders. Id. ¶ 83. Mel Watt—a former FHFA Director—commented at the time that he did not "lay awake at night worrying what's fair to the shareholders." Id. (quoting an interview).

c. Treasury and the FHFA understood that the PSPA Amendments would not facilitate the Enterprises exiting conservatorship.

[6] The capital reserve for each Enterprise started at $3 billion and was set to decrease to $0 by January 2018, but the Enterprises and Treasury agreed in December 2017 to reset the capital reserve amount to $3 billion in the first quarter of 2018. 1st Am. Compl. ¶ 60; Fairholme II, 147 Fed. Cl. at 19 n.5.

Treasury was aware that the new terms of the PSPAs were not conducive to the Enterprises exiting conservatorship. Treasury acknowledged that its goal was to facilitate the "wind down" of the Enterprises. Id. ¶ 63 (quoting a Treasury report). At the time of the PSPA Amendments, Treasury explained that the new deal would ensure that the Enterprises "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." Id. ¶ 76 (emphasis removed) (quoting Treasury press release).

The FHFA shared a similar sentiment. The FHFA's former Acting Director, Edward DeMarco, testified before the United States Senate that the PSPA Amendments "reinforce the notion that the [Enterprises] will not be building capital as a potential step to regaining their former corporate status." Id. ¶ 83 (emphasis removed) (quoting the testimony). Indeed, the FHFA explained to Congress that its vision for the future included a housing industry without Fannie and Freddie. Fairholme II, 147 Fed. Cl. at 20.

d. Treasury has benefited from the PSPA Amendments at the expense of the Enterprises and other shareholders.

There are four significant effects that flowed from the PSPA Amendments. First, plaintiffs lost their economic interests in the Enterprises because, under the new terms, private shareholders can never receive dividends or liquidation distributions. 1st Am. Compl. ¶¶ 2, 9, 95-96. Second, Treasury acquired plaintiffs' economic interests in the Enterprises because Treasury now possesses "the entire value" of the Enterprises. Id. ¶ 100. Third, Treasury reaped a windfall of $128.9 billion in comparison to what it would have received absent changes to the PSPAs. Id. ¶¶ 92-93 (alleging that the Enterprises paid Treasury $223.6 billion under the PSPA Amendments but would have only paid Treasury $94.7 billion under the previous terms). Fourth, the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink of insolvency. Id. ¶¶ 61, 94.

8. Treasury and the FHFA are committed to ending the conservatorships.

On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the Treasury Secretary to develop, "as soon as practicable," a plan for "[e]nding the conservatorships of the [Enterprises] upon the completion of specified reforms . . . ."[7]

[7] The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source, the Federal Register. See Murakami v. United States, 46 Fed. Cl. 731, 739 (2000) (noting that the court may take judicial notice of government documents), aff'd, 398 F.3d 1342, 1354-55 (Fed. Cir. 2005); see also Democracy Forward Found. v. White House Office of Am. Innovation, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) ("[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum."). See generally Fed. R. Evid. 201 (discussing judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the court may consider facts derived from sources subject to judicial notice without converting the motion into one for summary judgment. Sebastian v. United States, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

Memorandum on Federal Housing Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must include proposals for "[s]etting the conditions necessary for the termination of the conservatorships" and outlined some of those conditions. Id. at 12,480. Subsequently, Treasury issued a plan in which it advocated for "begin[ning] the process of ending the [Enterprises'] conservatorships."[8] U.S. Dep't of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf [https://perma.cc/RGH8-N385]; accord id. at 26 ("It is, after 11 years, time to bring the conservatorships to an end."). As part of the plan to end the conservatorships, Treasury proposed that it and the FHFA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. Id. at 26-27.

The FHFA shares Treasury's goals with respect to the conservatorships. Mark Calabria, the current FHFA Director, testified during his confirmation hearing that he wanted to end the conservatorships.[9] 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony). See generally Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs, 116th Cong. 10-40, 74-75, 148-85 (2019) [hereinafter Calabria Testimony] (documenting Mr. Calabria's testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that each Enterprise retains. Calabria Testimony, supra, at 150; see also id. at 25 ("I support the idea of having significantly more capital at the [Enterprises].").

B. Plaintiffs own Fannie and Freddie stock.

There are eight plaintiffs in this case: Owl Creek Asia I, L.P.; Owl Creek Asia II, L.P.; Owl Creek I, L.P; Owl Creek II, L.P.; Owl Creek Asia Master Fund, Ltd.; Owl Creek Credit Opportunities Master Fund, L.P.; Owl Creek Overseas Master Fund, Ltd.; and Owl Creek SRI Master Fund, Ltd. (collectively, "Owl Creek"). The first four plaintiffs listed in the amended complaint are Delaware limited partnerships; the fifth, seventh, and eighth plaintiffs are Cayman Islands exempted companies; and the sixth plaintiff is a Cayman Islands limited partnership. 1st Am. Compl. ¶¶ 13-20. Each plaintiff owned Fannie preferred stock and Freddie preferred stock at the time of the Net Worth Sweep. Id. The shares owned by these plaintiffs were primarily purchased after the conservatorships were established in 2008. Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 1.

[8] The court takes judicial notice of Treasury's reform plan because it is a government record available from a reliable source, Treasury's website. See supra note 7.

[9] The court takes judicial notice of the relevant testimony because the statements are recorded in government documents. See supra note 7.

II. PROCEDURAL HISTORY

Plaintiffs filed their complaint on February 23, 2018. This case was coordinated with similar, related cases assigned to the undersigned judge.[10] Plaintiffs filed their first amended complaint in this case on August 16, 2018. In their amended complaint, plaintiffs present four claims. Plaintiffs first assert that the Net Worth Sweep constitutes a Fifth Amendment taking (count I) of their economic interests in their stock. Plaintiffs next assert, in the alternative, that the Net Worth Sweep constitutes an illegal exaction (count II) of those same economic interests because the (1) FHFA was operating unconstitutionally and (2) FHFA-C and Treasury exceeded their statutory authority when they approved the PSPA Amendments. Plaintiffs also plead a breach-of-fiduciary-duty claim ("fiduciary duty claim") (count III) premised on the Net Worth Sweep being unreasonable, arbitrary, and contrary to the duty owed to the Owl Creek shareholders. Additionally, plaintiffs assert a breach-of-implied-contract claim (count IV) based on a purported agreement by which the Enterprises consented to the conservatorship in exchange for the FHFA agreeing to preserve the Enterprises' assets with the goal of making them safe and solvent. Specifically, plaintiffs assert that each dividend payment under the Net Worth Sweep constitutes a breach because it depletes the Enterprises' assets in a manner that undermines the goals of conservatorship.

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case and eleven related cases before the undersigned.[11] The plaintiffs in each of the twelve cases filed a response brief on their respective dockets; some of the plaintiffs relied on a joint brief filed in six of the cases, others, as is the case here, filed a joint brief for five of the cases in which the plaintiffs are all represented by the same counsel. Defendant filed its omnibus reply brief in each of the cases on May 6, 2019. The parties have fully briefed defendant's motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiffs in this case have adopted the favorable arguments made by the plaintiffs in the related cases to the extent that such arguments are relevant.[12] Defendant's motion to dismiss is now ripe for adjudication.

[10] A fuller recitation of the procedural history of this case and related cases is provided in Fairholme II, 147 Fed. Cl. at 21-23.

[11] The eleven related cases are Fairholme Funds, Inc. v. United States, No. 13-465C; Washington Federal v. United States, No. 13-385C; Cacciapalle v. United States, No. 13-466C; Fisher v. United States, No. 13-608C; Arrowood Indemnity Company v. United States, No. 13-698C; Reid v. United States, No. 14-152C; Rafter v. United States, No. 14-740C; Akanthos Opportunity Master Fund, L.P. v. United States, No. 18-369C; Appaloosa Investment Limited Partnership I v. United States, No. 18-370C; CSS, LLC v. United States, No. 18-371C; and Mason Capital L.P. v. United States, No. 18-529C.

[12] The court addresses in this opinion some arguments that were made primarily by the plaintiffs in the related cases to provide context for the resolution of defendant's motion to dismiss. In addition, to the extent that any of plaintiffs' less-developed arguments are not discussed in this opinion, the court found such arguments to be unpersuasive.

III. STANDARD OF REVIEW

In ruling on a motion to dismiss a complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), the court generally assumes that the allegations in the complaint are true and construes those allegations in the plaintiff's favor. Trusted Integration, Inc. v. United States, 659 F.3d 1159, 1163 (Fed. Cir. 2011). With respect to RCFC 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of the evidence, that the court possesses subject-matter jurisdiction. Id. The allegations in the complaint must include "the facts essential to show jurisdiction." McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936). And, if such jurisdictional facts are challenged in a motion to dismiss, the plaintiff "must support them by competent proof." Id.; accord Land v. Dollar, 330 U.S. 731, 735 & n.4 (1947) ("[W]hen a question of the District Court's jurisdiction is raised, . . . the court may inquire by affidavits or otherwise, into the facts as they exist." (citations omitted)). If the court finds that it lacks subject-matter jurisdiction, it must, pursuant to RCFC 12(h)(3), dismiss the complaint.

A claim that survives a jurisdictional challenge remains subject to dismissal under RCFC 12(b)(6) if it does not provide a basis for the court to grant relief. Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002) ("A motion to dismiss . . . for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy."). To survive a motion to dismiss under RCFC 12(b)(6), a plaintiff must include in the complaint "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Indeed, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 814-19 (1982).

IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a "threshold matter." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998). Subject-matter jurisdiction cannot be waived or forfeited because it "involves a court's power to hear a case." Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it is "an inflexible matter that must be considered before proceeding to evaluate the merits of a case." Matthews v. United States, 72 Fed. Cl. 274, 278 (2006); accord K-Con Bldg. Sys., Inc. v. United States, 778 F.3d 1000, 1004-05 (Fed. Cir. 2015). Either party, or the court sua sponte, may challenge the court's subject-matter jurisdiction at any time. Arbaugh, 546 U.S. at 506; see also Jeun v. United States, 128 Fed. Cl. 203, 209-10 (2016) (collecting cases).

The ability of the United States Court of Federal Claims ("Court of Federal Claims") to entertain suits against the United States is limited. "The United States, as sovereign, is immune from suit save as it consents to be sued." United States v. Sherwood, 312 U.S. 584, 586 (1941).

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The waiver of immunity "may not be inferred, but must be unequivocally expressed." United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003). Any such waiver must be narrowly construed. Smith v. Orr, 855 F.2d 1544, 1552 (Fed. Cir. 1988). The Tucker Act, the principal statute governing the jurisdiction of this court, waives sovereign immunity for claims against the United States, not sounding in tort, that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (2018); White Mountain, 537 U.S. at 472. However, the Tucker Act is merely a jurisdictional statute and "does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 298 (1976). Instead, the substantive right must appear in another source of law, such as a "money-mandating constitutional provision, statute or regulation that has been violated, or an express or implied contract with the United States." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc).

Defendant challenges the court's jurisdiction to entertain plaintiffs' claims on a number of bases. Specifically, defendant argues that plaintiffs have not asserted claims against the United States and that the court lacks jurisdiction over the subject matter of certain claims. The court addresses these contentions in turn.[13]

A. Plaintiffs have asserted claims against the United States.

The court first considers whether plaintiffs have asserted claims against the United States, a necessary element of jurisdiction in the Court of Federal Claims. As set forth in their amended complaint, all of plaintiffs' claims are premised on actions taken by the FHFA-C and Treasury. Defendant argues that the court lacks jurisdiction to consider any claims premised on the FHFA-C's or Treasury's conduct. In response, plaintiffs contend that they have asserted claims against the government because (1) Treasury was involved in the challenged conduct, (2) the FHFA-C was coerced by the government, (3) the FHFA-C was the government's agent, and (4) the FHFA-C, in collaboration with Treasury, is a government actor. The court addresses each contention in turn.

1. The court cannot exercise jurisdiction based on allegations of Treasury's involvement.

Plaintiffs initially argue that the court has jurisdiction over their Fifth Amendment takings and illegal-exaction claims because they have alleged the involvement of Treasury—indisputably a part of the federal government—in the action underlying these claims, i.e., the Net Worth Sweep. Defendant counters that Treasury alone could not have implemented the PSPA Amendments, and Treasury's role as a counterparty to the voluntary agreement with the Enterprises is not sufficient to establish jurisdiction over plaintiffs' takings claim. Defendant

[13] In Fairholme II, the court addressed additional jurisdictional concerns that were not raised or are not implicated in this case. See generally 147 Fed. Cl. at 24-25 (rejecting defendant's contention that the claims of the Fairholme plaintiffs were barred by 28 U.S.C. § 1500), 34-37 (rejecting the contention of a putative intervenor that the Court of Federal Claims lacks jurisdiction to entertain Fifth Amendment takings claims).

further asserts that the court's order allowing jurisdictional discovery reflects that plaintiffs' allegations concerning Treasury alone are insufficient to confer jurisdiction.

The parties' dispute on the import of allegations concerning Treasury is ultimately immaterial in light of the court's determination, explained below, that the FHFA-C—the other party involved in the PSPA Amendments—is the United States. Nonetheless, the court notes, as defendant asserts, that it implicitly acknowledged in its February 26, 2014 discovery order, issued in Fairholme and related cases, that the allegations concerning Treasury alone were insufficient to support jurisdiction. In that order, the court permitted the plaintiffs in those related cases to conduct fact discovery on whether the FHFA-C was "the 'United States' for purposes of the Tucker Act." Fairholme Funds, Inc. v. United States, 114 Fed. Cl. 718, 721 (2014). The aforementioned discovery would have been unnecessary (and unwarranted) if, as plaintiffs assert here, the court has jurisdiction over plaintiffs' claims based on their allegations concerning Treasury.

2. The FHFA-C was not coerced into approving the PSPA Amendments.

Plaintiffs also argue that the FHFA-C is the United States because the FHFA-C was coerced into approving the PSPA Amendments by Treasury. Defendant counters that the FHFA-C was not coerced by Treasury because the FHFA-C had a choice of whether to accept or reject the PSPA Amendments. Defendant asserts that there is no coercion if a party has a choice, regardless of however difficult refusal of a particular option may be. Indeed, defendant contends that plaintiffs fail to proffer any allegations that Treasury required the FHFA-C to enter into the agreements against its will. Defendant further asserts that other courts have declined to conclude that the FHFA-C felt compelled to follow Treasury based on allegations that Treasury invented the amendment concept or led the process.

a. The court has jurisdiction over claims based on actions that resulted from government coercion.

The court has jurisdiction over claims premised on the FHFA-C's actions if Treasury's "influence over the" FHFA-C "was coercive rather than merely persuasive." A & D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1154 (Fed. Cir. 2014). The line between coercion and persuasion "is highly fact-specific." Id. Precedent from the United States Court of Appeals for the Federal Circuit ("Federal Circuit") frames the contours of the inquiry. In Langenegger v. United States, the plaintiffs pleaded that the United States coerced El Salvador by threatening to withhold financial and military assistance unless El Salvador passed legislation expropriating private property. 756 F.2d 1565, 1567 (Fed. Cir. 1985). The Federal Circuit disagreed with the plaintiffs' characterization of the threats because "[d]iplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of [coercion], however difficult refusal may be as a practical matter." Id. at 1572. Similarly, the Federal Circuit concluded in B & G Enterprises, Ltd. v. United States that California was not coerced into enacting restrictions on smoking, notwithstanding the federal government conditioning grants on states enacting such limits. 220 F.3d 1318, 1321, 1325 (Fed. Cir. 2000); see also A & D Auto, 748 F.3d at 1155 (explaining that "coercion was not established" in B & G). The court explained that "it was California's decision to create [the] restrictions[;] . . . Congress may have provided the bait, but California decided to bite." B & G, 220 F.3d at 1325. In A & D Auto, the Federal Circuit addressed coercion in the context of the government allegedly conditioning vital financial assistance to bankrupt automobile companies on those companies terminating some of their franchise agreements. 748 F.3d at 1145. Unable to resolve the issue due to gaps in the record, the court noted in dicta that a relevant consideration was "whether the government financing was essential to the companies." Id.

A common thread runs through the Federal Circuit's decisions: the importance of choice. A nonfederal actor is not coerced when it can choose to go against the wishes of the United States, even if doing so will cause significant hardships, Langenegger, 756 F.2d at 1567, or result in a loss of prospective benefits, id.; B & G, 220 F.3d at 1325. But there is no choice, in any meaningful sense, when there is only one realistic option. A & D Auto, 748 F.3d at 1145 (noting the importance of considering whether the companies could survive without accepting the government's offer); cf. Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) (noting that, with respect to Congress's spending powers, "the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions"). Put differently, the nonfederal actor must make a voluntary decision, which it cannot do if there is only one realistic option. See BMR Gold Corp. v. United States, 41 Fed. Cl. 277, 282 (1998) (finding that the "the necessary element of coerciveness" for a taking was missing because the plaintiff granted the military permission to cross his land); accord Henn v. Nat'l Geographic Soc., 819 F.2d 824, 826 (7th Cir. 1987) (noting that hard choices remain voluntary when they are not akin to "Don Corleone's '[m]ake him an offer he can't refuse'"). In sum, the FHFA-C was not coerced if it voluntarily chose to enter into the PSPA Amendments.

b. Plaintiffs have not established that Treasury coerced the FHFA-C into approving the PSPA Amendments.

In support of their contention that Treasury coerced the FHFA-C into approving the PSPA Amendments, plaintiffs allege that Treasury proposed the terms of the amendments and used its influence over the FHFA-C to ensure compliance with Treasury's wishes. Those allegations are not enough to establish coercion. First, given the Enterprises' improving financial condition and Treasury's existing funding commitment, the FHFA-C's decision to execute the PSPA Amendments was voluntary because it could reject the deals without imperiling the Enterprises. The facts here, therefore, are diametrically opposed to the circumstances in A & D Auto that the Federal Circuit suggested may support coercion because the automobile dealers faced insolvency if they did not accede to the financing terms. See 748 F.3d at 1145. Second, the FHFA-C's lack of protestation is informative. "[T]he very fact that FHFA[-C] itself [did] not br[ing] suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA[-C] was an independent, willing participant in its negotiations with the Treasury." Robinson v. Fed. Hous. Fin. Agency, 223 F. Supp. 3d 659, 668 (E.D. Ky. 2016), aff'd, 876 F.3d 220 (6th Cir. 2017). The court's conclusion is bolstered by the fact that another court has held that materially similar allegations to those at issue here did not "come close to a reasonable inference that [the] FHFA[-C] considered itself bound to do whatever Treasury ordered." Perry Capital LLC v. Lew, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) ("Perry I"), aff'd in part, rev'd in part sub nom. Perry II, 864 F.3d at 591. This court agrees with the reasoning in Perry I: the PSPA Amendments were executed by sophisticated parties, and many agreements arise from a party's proposal being accepted by the other party. Id. Plaintiffs have not established that the FHFA-C was coerced into approving the PSPA Amendments by Treasury.

3. The FHFA-C is not Treasury's agent.

Plaintiffs further argue that the FHFA-C's actions are attributable to the United States because the FHFA-C is Treasury's agent. Defendant counters that plaintiffs have not pleaded an agency relationship because Treasury does not control the FHFA-C's operations. Indeed, defendant notes that Treasury is statutorily barred from exercising such control.

The United States is subject to claims in this court for the actions of a third party "if [that] party is acting as the government's agent . . . ." A & D Auto, 748 F.3d at 1154. "An essential element of agency is the principal's right to control the agent's actions." Hollingsworth v. Perry, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01 cmt. f (Am. Law. Inst. 2005)); accord O'Neill v. Dep't of Hous. & Urban Dev., 220 F.3d 1354, 1360 (Fed. Cir. 2000) (acknowledging that the common-law meaning of agency requires, among other things, that the principal has the right to control the agent's conduct); see also Preseault v. United States, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (concluding that a state's actions were attributable to the United States when the state acted pursuant to the Interstate Commerce Commission's order); Hendler v. United States, 952 F.2d 1364, 1378-79 (Fed. Cir. 1991) (attributing a state's actions to the United States when the state acted under authority flowing from an Environmental Protection Agency order). The facts, as alleged, do not reflect that Treasury controlled the FHFA-C's actions because Congress explicitly precluded the FHFA-C from being subservient to another agency, 12 U.S.C. § 4617(a)(7) (providing that the FHFA-C cannot be subject to the "direction or supervision" of any other agency), and plaintiffs have not alleged facts indicating that Treasury exercised such control notwithstanding the statutory bar. Although the FHFA-C was required by the PSPAs to obtain Treasury's approval for certain actions (e.g., issuing dividends), the PSPAs did not provide Treasury with the right to unilaterally order amendments. Moreover, plaintiffs describe an FHFA-C that made decisions independently: Treasury sought to influence the opinions of the FHFA-C's senior officials; Treasury "push[ed]" for the PSPA Amendments; and the FHFA-C agreed to the PSPA Amendments. 1st Am. Compl. ¶¶ 2, 69, 71. Simply stated, plaintiffs have not alleged facts establishing that Treasury exercised the control over the FHFA-C that is necessary for an agency relationship.

4. The FHFA-C is the United States because the FHFA-C retains the FHFA's governmental character.

In addition, plaintiffs contend that the FHFA-C is itself a government actor.[14] Defendant disagrees. First, relying on O'Melveny & Myers v. Fed. Deposit Ins. Corp., 412 U.S. 79 (1994), defendant argues that the FHFA-C is not the United States because the FHFA-C stands in the

[14] To determine whether this action is against the United States, the court need not reach plaintiffs' argument that Treasury and the FHFA-C formed a "control group." See Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 22-26.

Enterprises' shoes. Specifically, defendant asserts that Congress's decision to have the FHFA-C succeed to the Enterprises' rights reflects that Congress intended that the FHFA-C step into the Enterprises' private shoes and shed its government character. Second, defendant argues that the FHFA-C's exercise of nontraditional conservatorship powers is immaterial because Congress can expand the conservator's role without transforming it into a government actor. Third, defendant argues that the Enterprises are not government instrumentalities—which means that the FHFA did not step into the shoes of a government actor when it became the Enterprises' conservator—because the government does not retain permanent authority to appoint the Enterprises' directors. Defendant contends that the government only has temporary, albeit indefinite, control over the Enterprises because the conservatorships are not permanent.

In response, plaintiffs dispute the premise of defendant's argument that, pursuant to O'Melveny, the FHFA becomes the Enterprises when acting as conservator. Plaintiffs assert that O'Melveny does not concern whether an entity is the United States or, if the decision can be read as addressing that issue, is distinguishable because it concerns receivers or is limited to conservators exercising traditional conservator powers. Second, plaintiffs argue that the FHFA has not shed its government status, even if it has stepped into the Enterprises' shoes, when it acts as conservator. Specifically, plaintiffs assert that the FHFA-C retains the FHFA's government status because (1) the FHFA-C has acted beyond the traditional conservator powers and (2) Congress expressed its intention for that result by precluding the conservator from being subject to the supervision of "any other agency." 12 U.S.C. § 4617 (emphasis added). Third, plaintiffs argue that their claims are against the United States, even if the FHFA-C steps into the shoes of the Enterprises, because the Enterprises are government instrumentalities.

In short, the parties disagree over the government status of the FHFA-C. The FHFA is indisputably the United States, see id. § 4511(a) (establishing the FHFA as an "independent agency of the Federal Government"), and so the only question is whether the FHFA sheds that status when it acts as conservator. In other jurisdictions, courts have held (with near unanimity) that the FHFA loses its government status pursuant to O'Melveny. In O'Melveny, the United States Supreme Court ("Supreme Court") explained that the Federal Deposit Insurance Corporation ("FDIC") "steps into [the] shoes" of a private company when acting as receiver and sheds its government character because the FDIC "succeed[s] to . . . all rights, titles, powers, and privileges of the [entity in receivership] . . . ." 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); see also AG Route Seven P'ship v. United States, 57 Fed. Cl. 521, 534 (2003) (citing O'Melveny for the proposition that the FDIC as receiver is a "private party, and not the government per se" because it "is merely standing in the shoes . . . of the defunct thrift"). The courts drawing from O'Melveny have concluded that the FHFA steps into the shoes of the Enterprises and sheds its government character when acting as conservator because Congress provided that the FHFA-C exercises the same rights with respect to the Enterprises as Congress granted to the FDIC as receiver. See, e.g., Herron v. Fannie Mae, 861 F.3d 160, 169 (D.C. Cir. 2017); cf. Ameristar Fin. Servicing Co. v. United States, 75 Fed. Cl. 807, 811 (2007) (concluding, with respect to the FDIC, that the step-into-the-shoes principle set forth in O'Melveny also applies in the conservator context).

a. The FHFA-C is not the United States if the FHFA steps into the Enterprises' shoes when acting as conservator.

Plaintiffs initially contend that defendant's reliance on O'Melveny is erroneous because, assuming that O'Melveny applies, the FHFA-C is the United States even though it steps into the Enterprises' shoes. Specifically, plaintiffs assert that the FHFA-C is the United States under the facts alleged because (1) the FHFA-C exercises nontraditional conservator powers, (2) Congress intended that the FHFA-C retain the FHFA's government status, and (3) the FHFA-C steps into the shoes of a government instrumentality. The court addresses each assertion in turn.

First, the FHFA-C did not become a government actor by exercising powers beyond those traditionally afforded to a conservator. As a threshold matter, plaintiffs have not alleged facts reflecting that the FHFA-C used such powers; the execution of the PSPA Amendments was a "quintessential conservatorship" function. Perry II, 864 F.3d at 607. More importantly, however, plaintiffs would not prevail even if the FHFA-C exercised nontraditional conservatorship powers in agreeing to the PSPA Amendments. When this argument was pressed in other jurisdictions, it was rejected:

> It may well be true that FHFA's actions would not be allowed under traditional principles of corporate or conservatorship law, but it does not follow that those actions are therefore governmental. Legislatures can expand conservatorship and similar powers without transforming conservators into agents of the government. Cf. Pegram v. Herdrich, 530 U.S. 211, 225-26 (2000) (explaining that the Employee Retirement Income Security Act altered the common law of trusts to permit certain actions that would otherwise violate the trustee's fiduciary duties).

Bhatti v. Fed. Hous. Fin. Agency, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (footnote omitted). The court agrees with that reasoning, and plaintiffs provide no authority that supports a contrary result. Although plaintiffs state that the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") decision in Waterview Management Co. v. FDIC, 105 F.3d 696 (D.C. Cir. 1997), supports their position, they are mistaken. Waterview is not on point because the D.C. Circuit did not hold that a conservator is per se the United States when acting pursuant to a congressional grant of broad powers. Rather, it held that, as a matter of statutory interpretation, the existence of a receivership did not preempt a prereceivership contract. Id. at 699-702.

Second, Congress's instruction that the FHFA-C is not subject to the supervision of any other agency does not reflect congressional intent for the FHFA to retain its government status when acting as conservator even if it steps into the shoes of the Enterprises. Because the court only reaches this issue by assuming that O'Melveny is instructive, the statutory language concerning supervision of the FHFA-C does not support a finding of jurisdiction because the same language is present in the statute that the Supreme Court addressed in O'Melveny. See 512 U.S. at 85-86 (discussing 12 U.S.C. § 1821). Compare 12 U.S.C. § 1821(c)(3)(C) ("When acting as conservator or receiver . . . , [the FDIC] shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC's] rights, powers, and privileges."), with id. § 4617(a)(7) ("When acting as conservator or receiver, the [FHFA] shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the [FHFA].").

The third argument advanced by plaintiffs—that the FHFA-C is the United States because it steps into the shoes of a government instrumentality—also is not meritorious. A government instrumentality's actions are attributable to the United States for purposes of the Tucker Act. See Corr v. Metro. Wash. Airports Auth., 702 F.3d 1334, 1336 (Fed. Cir. 2012) (noting that a claim against a government instrumentality is a claim against the United States for purposes of the Little Tucker Act, 28 U.S.C. § 1346(a)(2)). The Supreme Court established in Lebron v. National Railroad Passenger Corp. that a company is a government instrumentality when (1) it is created by "special law," (2) it is established "for the furtherance of governmental objectives," and (3) the federal government "retains for itself permanent authority to appoint a majority of the [company's] directors . . . ." 513 U.S. 374, 400 (1995). After Lebron, the Supreme Court clarified that, for purposes of the instrumentality test, "the practical reality of federal control and supervision prevails over Congress' disclaimer of the [the entity's] governmental status." Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1233 (2015).

There is no dispute that the Enterprises satisfy the first two prongs of the Lebron test; Congress created the Enterprises by special law to achieve governmental objectives related to the housing market. See 12 U.S.C. § 4501; see also Herron, 861 F.3d at 167 (addressing claims involving Fannie and noting that "[t]his case satisfies the first two Lebron criteria"); Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 75 F.3d 1401, 1406-07 (9th Cir. 1996) (reaching same conclusion for Freddie). The status of the Enterprises, therefore, turns on the third prong: whether the government retains permanent authority to appoint a majority of the Enterprises' directors.

The Federal Circuit has not addressed the government-control prong with respect to the Enterprises, but courts in other jurisdictions have done so. Those decisions provide a starting point for the court. It appears that every court to consider the issue, with the exception of one district court, has held that the government does not exercise permanent control over the Enterprises. Sisti v. Fed. Hous. Fin. Agency, 324 F. Supp. 3d 273, 279 (D.R.I. 2018) (concluding that the government retains permanent authority to control the Enterprises after noting that "[t]he non-controlling precedent to date" has reached the opposite conclusion). Most of the courts that concluded that the government lacks permanent control over the Enterprises issued their decisions before the Supreme Court in Association of American Railroads emphasized the importance of evaluating the practical reality over nomenclature, and the other courts focused on the statutory purpose for the conservatorships rather than the Enterprises' actual situation. E.g., Herron, 861 F.3d at 169 (relying on the notion that a conservatorship is fundamentally temporary). In other words, the courts adopting the prevailing view considered the issue of control without regard for the Supreme Court's instruction to focus on the practical reality. The court, therefore, does not find those decisions persuasive.

The crux of the inquiry, as the Supreme Court mandates, is on the practical reality of the government's control over the Enterprises. Ass'n of Am. R.Rs., 135 S. Ct. at 1233. It is of no import that Congress nominally authorized a facially temporary conservatorship, see 12 U.S.C.

§ 4617(a) (permitting the FHFA to act as conservator to "reorganiz[e]" or "rehabilitat[e]" the Enterprises), because Congress's disclaimers are no substitute for the court's obligation to assess the government's actual control, Ass'n of Am. R.Rs., 135 S. Ct. at 1233. The court focuses on the length of the conservatorship because the FHFA-C wields complete control over the Enterprises so long as they are in conservatorship. See generally 12 U.S.C. § 4617.

Plaintiffs allege that the Enterprises will remain undercapitalized—and thus subject to conservatorship pursuant to 12 U.S.C. § 4617(a)(3)(J)—until the PSPAs, in their current form, are changed because the Enterprises cannot accumulate any capital under the existing terms of the PSPAs. Although the PSPAs could be further amended, plaintiffs' allegations reflect that Treasury and the FHFA-C will not do so because the purpose of the PSPA Amendments is to prevent the Enterprises from accumulating the necessary capital to become independent companies. Plaintiffs, in short, have alleged that the government intended, and has taken steps to ensure, that the conservatorships never end. Those facts, viewed in isolation, would support a conclusion that the practical reality is that the Enterprises are under permanent government control. The court's inquiry, however, is not limited to plaintiffs' allegations because it has taken judicial notice of relevant facts reflecting that the status quo has changed: The Treasury Secretary and the FHFA Director are now both committed to ending the conservatorships. Moreover, the idea that the Enterprises are permanently subject to government control because they can never accumulate the capital needed to exit the conservatorships is undermined by recent developments. Indeed, Treasury proposed amending the Net Worth Sweep to allow the Enterprises to retain more capital, and the FHFA Director testified during his confirmation hearing that, if confirmed, he would seek to increase the amount of capital that the Enterprises retain. Simply stated, the practical reality is that the Enterprises are not subject to permanent government control because the relevant parties are working to terminate the conservatorships.[15]

In sum, the FHFA-C does not become the United States if the FHFA steps into the Enterprises' shoes when serving as conservator.

b. The FHFA-C retains the FHFA's government character because the FHFA-C does not step into the Enterprises' shoes.

The key inquiry, therefore, is whether the FHFA steps into the shoes of the Enterprises when acting as conservator. Defendant argues that the FHFA-C sheds its government character and assumes the identity of the Enterprises based on the reasoning in O'Melveny. Defendant's

[15] Plaintiffs may disagree with the court's conclusion that events occurring after the PSPA Amendments are relevant to determining whether the Enterprises were under permanent government control during the events discussed in plaintiffs' complaint. Even if the court agreed that events occurring after the PSPA Amendments are not germane, plaintiffs still would not prevail because they allege that the conservatorships began as temporary measures. See 1st Am. Compl. ¶ 7 (noting the temporary nature of the conservatorships and quoting an FHFA publication stating that the conservatorships would be terminated once the Enterprises had been restored "to a safe and solvent condition"); id. (noting that the FHFA reassured the market that the Enterprises would return to normal business operations). Thus, the Enterprises were not under permanent government control before the PSPA Amendments.

reliance on O'Melveny is misplaced. O'Melveny concerns a receiver stepping into the shoes of a failed bank. 512 U.S. at 86. The roles of a conservator and receiver are meaningfully different. In a recent decision, the United States District Court for the District of Rhode Island artfully explained the differences and their import for assessing whether the FHFA-C is the government:

> The O'Melveny Court held that FDIC, when acting as a receiver for a private entity, steps into the shoes of that private entity for state law claims. This holding makes sense given the purpose of receivership: "to preserve a company's assets, for the benefit of creditors, in the face of bankruptcy." When FDIC is appointed receiver, it must dispose of the received entity's assets, resolving obligations and claims made against the entity. Notably, "[i]n receivership, the receiver owes fiduciary duties to the creditors, which the corporation would otherwise owe to creditors during a period of insolvency." It logically follows, then, that the receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity.
>
> Conservatorship, in contrast, serves a different function. FHFA has described the purpose of conservatorship is "to establish control and oversight of a company to put it in a sound and solvent condition." Conservators, unlike receivers, have a fiduciary duty running to the corporation itself.
>
> This is "critically distinct" from the fiduciary duties owed as a receiver—the receiver does indeed "step into the shoes" of the entity by assuming the fiduciary duties of the entity, but the conservator does not: it remains distinct, and rather owes a duty to the entity. Given the difference in fiduciary duties, O'Melveny's "steps into the shoes" holding makes sense in the context of receivership, but not in the context of conservatorship.

Sisti, 324 F. Supp. 3d at 282-83 (citations and footnotes omitted). See generally Brian Taylor Goldman, The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State-Action, 17 J. Bus. & Sec. L. 11, 23-30 (2016). The district court, relying on the above analysis, declined to treat the FHFA-C as a private actor. Sisti, 324 F. Supp. 3d at 284. This court agrees with the reasoning and conclusion in Sisti: the FHFA does not shed its government character when acting as conservator because it does not step into the shoes of the Enterprises. Otherwise stated, the FHFA-C is the United States because it retains the FHFA's government character. Plaintiffs' claims, therefore, are against the United States for purposes of the Tucker Act.

B. The court lacks jurisdiction over plaintiffs' claim that sounds in tort.

1. Plaintiffs' fiduciary duty claim sounds in tort.

Defendant next argues that the court lacks jurisdiction over plaintiffs' fiduciary duty claim because the United States does not owe to each Enterprise's shareholders a fiduciary duty that is grounded in a statute or contract. Defendant asserts that such a fiduciary duty cannot be based on (1) HERA because, pursuant to the statute, the FHFA-C is only required to act in the government's and the Enterprises' best interests; or (2) the PSPAs because plaintiffs are not parties to those contracts. Plaintiffs, in their opposition to defendant's motion to dismiss, counter that their claim is based on a fiduciary duty rooted in both HERA and the PSPAs. As to HERA, plaintiffs assert that Congress made the FHFA-C a fiduciary by authorizing it to control the Enterprises, entrusting it with duties that are at the core of what it means to be a fiduciary, and using terminology—"conservator"—associated with a fiduciary. With respect to the PSPAs, plaintiffs argue that Treasury owes a fiduciary duty to the shareholders because it, acting with the FHFA-C, acquired control rights under the contract.

The court, pursuant to the Tucker Act, lacks jurisdiction over tort claims. 28 U.S.C. § 1491(a)(1). A breach of fiduciary duty is generally classified as a tort. Newby v. United States, 57 Fed. Cl. 382, 294 (2003). A fiduciary duty claim, however, does not sound in tort for purposes of the Tucker Act when the fiduciary relationship is founded on a money-mandating statute or a contractual provision between the claimant and United States. See Hopi Tribe v. United States, 782 F.3d 662, 667 (Fed. Cir. 2015) (statute); Cleveland Chair Co. v. United States, 557 F.2d 244, 246 (Ct. Cl. 1977) (contract); see also 28 U.S.C. § 1491(a)(1) (providing jurisdiction over claims "founded upon . . . any Act of Congress . . . or contract with the United States").

The initial issue is whether HERA establishes a fiduciary relationship between the FHFA-C and the Enterprises' shareholders. The court begins with the language of the statute. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). "If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect." Rosete v. Office of Pers. Mgmt., 48 F.3d 514, 517 (Fed. Cir. 1995); accord Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Congress provided in HERA that the FHFA-C is only required to act in the interests of itself or the Enterprises. 12 U.S.C. § 4617(b)(2)(J). That statement reflects a clear intent: the FHFA-C does not owe a fiduciary duty to shareholders because the conservator is not required to consider shareholders' interests.[16] See id.; see also Collins v. Mnuchin, 938 F.3d 553, 580 (5th Cir. 2019) (en banc) (noting that HERA "may permit" the FHFA-C to pursue actions that are "inconsistent with fiduciary duties"), petitions for cert. filed, 88 U.S.L.W. 3114 (U.S. Sept. 25, 2019) (No. 19-422), 88 U.S.L.W. 3146 (U.S. Oct. 25, 2019) (No. 19-563). The plain language controls, and therefore the court does not consider the peripheral considerations urged by plaintiffs such as the implications of the word "conservator," the FHFA-C's control over the Enterprises, or the FHFA-C's other powers. In sum, plaintiffs cannot establish jurisdiction for their fiduciary duty claim by relying on HERA.

[16] The court's interpretation of HERA's plain language is buttressed by the fact that Congress seemingly made a deliberate decision to exclude shareholder interests from the FHFA-C's considerations. Congress modeled HERA on the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Jacobs v. Fed. Hous. Fin. Agency, 908 F.3d 884, 893 (3d Cir. 2018). Under FIRREA, Congress permitted the FDIC as conservator to consider the best interests of a bank, its depositors, or the FDIC. 12 U.S.C. § 1821(d)(2)(J)(ii). Although Congress permitted the FDIC to take into consideration the interests of its depositors, Congress omitted the analogue of depositors—shareholders—from the list of germane interests that the conservator can consider when acting pursuant to HERA. Compare id. (FIRREA), with 12 U.S.C. § 4617(b)(2)(J) (HERA). The omission is telling.

Next, the court turns to whether Treasury, acting together with the FHFA-C, owed a fiduciary duty to the Enterprises' other shareholders because it acquired control rights by agreeing to the PSPAs. Plaintiffs' argument is premised on the state-law principle (which they term "general corporate law") that a controlling shareholder owes a fiduciary duty to the minority shareholders. The court is not convinced. First, plaintiffs' allegation of a fiduciary relationship is not founded on a contract within the meaning of the Tucker Act. Plaintiffs are not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs. They invoke the contracts solely to establish that Treasury, with the assistance of the FHFA-C, is a controlling shareholder and rely on that conclusion to argue that it has a fiduciary duty based on state law. The contract, otherwise stated, is one step removed from the purported genesis of the fiduciary duty—the application of state-law principles. That gap is too much in light of the court's obligation to narrowly construe the Tucker Act's waiver of sovereign immunity. See Smith, 855 F.2d at 1552 (noting that the Tucker Act is narrowly construed); see also Perry II, 864 F.3d at 619-20 (rejecting the legal theory that the Enterprises' shareholders' need to reference the PSPAs for their fiduciary duty claim was enough to conclude that the claim was rooted in a contract for purposes of the Tucker Act).

Second, plaintiffs fail to demonstrate the applicability of the state-law principles underlying their theory for why Treasury assumed fiduciary duties. Federal law governs the obligations Treasury incurred by entering into the PSPAs. See Boyle v. United Techs. Corp., 487 U.S. 500, 519 (1988) ("The proposition that federal common law continues to govern the 'obligations to and rights of the United States under its contracts' is nearly as old as Erie [v. Tompkins, 304 U.S. 64 (1938),] itself."). Although courts may shape federal law by drawing from state-law principles, plaintiffs do not explain why doing so is appropriate in this instance.

Third, plaintiffs do not prevail even if their fiduciary duty claim could be founded on a contract and federal common law incorporates the state-law principles regarding controlling shareholders' fiduciary obligations. Under Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders. See Ivanhoe Partners v. Newmont Min. Corp., 535 A.2d 1334, 1344 (Del. 1987); Parsch v. Massey, 79 Va. Cir. 446 (2009); see also Quadrant Structured Prod. Co. v. Vertin, 102 A.3d 155, 183 (Del. Ch. 2014) (acknowledging that those "who effectively control a corporation" owe a fiduciary duty to others).[17] To have the requisite level of control, the controlling shareholder must (1) be able to exercise a majority of the corporation's voting power or (2) direct the corporation without owning a majority of stock. Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1113 (Del. 1994). The latter, effective exercise of control, "is not an easy test to satisfy"; the individual or group must be, "as a practical matter, . . . no differently situated than if they had majority voting control." In re PNB Holding Co. S'holders Litig., No. CIV.A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006).

[17] The court refers to Delaware and Virginia law because Fannie is a Delaware corporation, and Freddie is a Virginia corporation. When evaluating Virginia law, the court also looks to Delaware state court decisions because Virginia courts do so to resolve unsettled issues in the Commonwealth. E.g., U.S. Inspect Inc. v. McGreevy, No. 160966, 2000 WL 33232337, at *4 (Va. Cir. Ct. Nov. 27, 2000).

Plaintiffs have not established that Treasury meets either control test. First, plaintiffs do not allege that Treasury owns any of the Enterprises' voting stock. Treasury purchased preferred stock and acquired the right to buy common (i.e., voting) stock, but there is no indication that Treasury exercised its warrants or otherwise acquired common stock.[18] Second, plaintiffs do not demonstrate that Treasury exercised effective control over the Enterprises or was, in plaintiffs' terms, a "dominant shareholder." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 29 (quoting Sisti, 324 F. Supp. 3d at 283 n.9). Although Treasury acquired the right to preclude the Enterprises from taking certain actions, Treasury did not control the Enterprises because it could not direct any action—it could only respond to certain requests made by the Enterprises. As a practical matter, therefore, Treasury is situated differently than if it had majority voting power.

Having rejected the contentions advanced by plaintiffs in their opposition brief, the court turns to an argument that appears for the first time in plaintiffs' supplemental brief, which was filed at the court's request after the initial round of briefing on defendant's omnibus motion to dismiss was complete, Fairholme II was decided, and the court held a status conference regarding further proceedings in the related cases.[19] In their supplemental brief, plaintiffs contend that their fiduciary duty claim was founded on a contention that Treasury and the FHFA-C acted as a "control group," that this contention was set forth in their opposition brief in the section addressing the court's jurisdiction over their fiduciary duty claim, and that the court did not, in Fairholme II, consider this contention. But no such contention was made in plaintiffs' opposition brief.

In their opposition brief, plaintiffs explained that under state law, multiple shareholders who are legally connected can form a "control group" and be "deemed a single, majority shareholder," and then asserted that Treasury and the FHFA-C were such a control group, acting in concert as the United States. See Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 22-26. In other words, plaintiffs advanced their control group contention solely to establish that their suit was against the United States. In the portion of their opposition devoted to countering defendant's jurisdictional attack on their fiduciary duty claim, plaintiffs asserted only two bases for a fiduciary duty; each one was treated separately as governing the conduct of either Treasury or the FHFA-C. They did not argue that the fiduciary duty arose from Treasury and the FHFA-C acting as a control group. Accordingly, the court did not consider plaintiffs' control group allegation as a foundation for any fiduciary duty claim in Fairholme II, among the arguments raised by the plaintiffs in these related cases.

[18] Even if Treasury had exercised its option to buy a majority of the voting stock, it would not be a controlling shareholder because the FHFA-C succeeded to all of the shareholders' rights. See 12 U.S.C. § 4617(b)(2)(A) (noting that the FHFA-C, by operation of law, succeeds to all rights and powers of any Enterprise shareholder). Treasury, therefore, would have no voting power.

[19] As defendant notes, the court did not invite plaintiffs, after the status conference held March 5, 2020, to relitigate issues already decided in Fairholme II.

Because plaintiffs' control group contention was not raised in their opposition brief in support of their fiduciary duty claim, it is waived. See United States v. Ford Motor Co., 463 F.3d 1267, 1277 (Fed. Cir. 2006) (explaining that "[a]rguments raised for the first time in a reply brief are not properly before this court"); Ironclad/EEI v. United States, 78 Fed. Cl. 351, 358 (2007) (noting that "under the law of this circuit, arguments not presented in a party's principal brief to the court are typically deemed to have been waived"). But even if plaintiffs' argument were not waived, it is not persuasive. In Fairholme II, the court explained why neither Treasury nor the FHFA-C owed a fiduciary duty to the shareholders of Fannie and Freddie. 147 Fed. Cl. at 37-40. The court is not persuaded that a control group composed of two entities, neither of which was bound by the fiduciary duty posited by plaintiffs, would be bound by a fiduciary duty simply because the entities are alleged to have worked in concert against the interests of the other shareholders of the Enterprises. Plaintiffs' attempt to graft a state law concept of a control group of shareholders onto a Tucker Act jurisdictional inquiry is not anchored in binding or even persuasive precedent, as explained in Fairholme II. Id. at 39-40. Having considered the allegations in plaintiffs' amended complaint, the timely arguments set forth in plaintiffs' opposition brief, and the untimely argument raised in plaintiffs' supplemental brief, the court concludes that it lacks jurisdiction over plaintiffs' fiduciary duty claim because it sounds in tort. Therefore, it dismisses count III of their amended complaint.

2. Plaintiffs' takings and illegal-exaction claims do not sound in tort.

Defendant also argues that plaintiffs' Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the FHFA-C. Plaintiffs counter that they have pleaded the predicates for takings and illegal-exaction claims, which means that it is irrelevant whether they also alleged facts that are germane to tortious actions.

When a party pleads the predicates for a takings claim or illegal-exaction claim, the court possesses jurisdiction to entertain such claims. See Hansen v. United States, 65 Fed. Cl. 76, 80-81 (2005) ("[S]o long as there is some material evidence in the record that establishes the predicates for a [claim covered by the Tucker Act,] . . . a plaintiff succeeds in demonstrating subject matter jurisdiction in this court . . . ."). Those claims, at a basic level, are contentions that the government expropriated private property lawfully (takings) or unlawfully (illegal exaction). See Orient Overseas Container Line (UK) Ltd. v. United States, 48 Fed. Cl. 284, 289 (2000) ("Takings claims arise because of a deprivation of property that is authorized by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation." (citing Dureiko v. United States, 209 F.3d 1345, 1359 (Fed. Cir. 2000); Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-08 (Ct. Cl. 1967))). If a party alleges the necessary predicates for these claims, the court is not deprived of jurisdiction even if the complaint contains allegations that could support a tort claim. See El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1353 (Fed. Cir. 2004) ("That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims."); Rith Energy, Inc. v. United States, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that this court has jurisdiction over a takings claim "even if the government's action was subject to legal challenge on some other ground"). Here, plaintiffs plead the predicates for takings and illegal-exaction claims by alleging, in essence, that they were forced to give their property to the government because of lawful or unlawful government conduct. Therefore, it is of no import to the court's jurisdiction whether plaintiffs have alleged facts that would also support a tort claim.

C. The court lacks jurisdiction over plaintiffs' implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract.

Defendant argues next that the court lacks jurisdiction to entertain plaintiffs' implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract. Specifically, defendant asserts that plaintiffs have not established that they are intended beneficiaries independent of their status as shareholders and that any benefit that is related to their status as shareholders is insufficient for jurisdiction. Plaintiffs counter that they are intended third-party beneficiaries of implied contracts, between the FHFA and each Enterprise's board, in which the boards consented to the conservatorships in exchange for the FHFA-C operating the Enterprises as a fiduciary and returning them to sound condition. Specifically, plaintiffs assert that the intent to benefit the shareholders is evident from (1) the boards' consent to the conservatorships because shareholders would benefit from a conservator focused on returning the Enterprises to a better condition, and (2) the government acknowledging that the Enterprises' stock would remain outstanding while the Enterprises were in conservatorship.

The court's jurisdiction over contract claims is limited by the Tucker Act. Ransom v. United States, 900 F.2d 242, 244 (Fed. Cir. 1990). Of particular import here, ordinarily, a plaintiff must be in privity of contract with the United States to invoke this court's jurisdiction over a contract claim against the government. Fid. & Guar. Ins. Underwriters, Inc. v. United States, 805 F.3d 1082, 1087 (Fed. Cir. 2015). But privity is not required if "the plaintiff can demonstrate that it was an intended third-party beneficiary under the contract." Pac. Gas & Elec. Co. v. United States, 838 F.3d 1341, 1361 (Fed. Cir. 2016).

"Third party beneficiary status is an 'exceptional privilege.'" Glass v. United States, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (quoting German All. Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 230 (1912)). The conditions for attaining such status are "stringent." Anderson v. United States, 344 F.3d 1343, 1352 (Fed. Cir. 2003). "[S]hareholders seeking status to sue as third-party beneficiaries of an allegedly breached contract must 'demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.'" Castle v. United States, 301 F.3d 1328, 1338 (Fed. Cir. 2002) (quoting Glass, 258 F.3d at 1354). Specifically, "the contract must express the intent of the promissor to benefit the shareholder personally, independently of his or her status as shareholder." Glass, 258 F.3d at 1353-54. As a practical matter, the shareholder does not personally benefit independent of its status as a shareholder when the contractual promises pertain only to the treatment of the company. See FDIC v. United States, 342 F.3d 1313, 1320 (Fed. Cir. 2003) (noting that the broken promises concerned the treatment of the company such that the plaintiffs did not benefit independent of their status as shareholders); accord Maher v. United States, 314 F.3d 600, 605 (Fed. Cir. 2002) (concluding that the plaintiffs were not third-party beneficiaries when they failed to "establish[] that the government took on any obligations in the merger agreement for [the plaintiffs'] personal benefit, or even that the merger agreement contains any provisions pertaining to [the plaintiffs] personally").

As plaintiffs are not parties to the alleged implied contracts between the FHFA and the Enterprises, the relevant issue is whether plaintiffs are third-party beneficiaries of those agreements. They are not. First, it is of no import that the Enterprises, as plaintiffs argue, purportedly agreed to the conservatorships because that would serve the interests of shareholders. Indeed, "every action of a corporation is supposed to benefit its shareholders," but the "law has not viewed this general benefit as making every shareholder a third-party beneficiary." Suess v. United States, 33 Fed. Cl. 89, 94 (1995). Second, plaintiffs' allegations reflect that they only benefit from the alleged implied contracts by virtue of their shareholder status. The relevant promises concerned how the FHFA-C would operate the Enterprises; the crux of the purported agreements was the FHFA-C promising to operate the Enterprises as a fiduciary to preserve their assets and return them to sound condition. Because the promises in the alleged implied contracts were directed at the Enterprises, plaintiffs cannot be third-party beneficiaries of the alleged contract. See FDIC, 342 F.3d at 1320. Third, plaintiffs have not demonstrated that the FHFA intended that plaintiffs would benefit independently of their status as shareholders even if they did so benefit. Plaintiffs rely on the FHFA's statements that private stock would remain outstanding and shareholders would continue to hold an economic interest in their stock. Those factual statements, however, do not reflect that the FHFA intended to confer any specific benefit on plaintiffs independent of their role as shareholders. Because plaintiffs have not alleged facts reflecting that the FHFA intended to confer a personal benefit on them, they are not third-party beneficiaries. See Glass, 258 F.3d at 1353-54. In sum, the court lacks jurisdiction to entertain plaintiffs' implied-in-fact-contract claim because plaintiffs are neither parties to a contract with the government nor third-party beneficiaries of any such agreement. Therefore, the court dismisses count IV of their amended complaint.

V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiffs' claims, defendant challenges plaintiffs' standing to pursue their claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. Starr Int'l Co. v. United States, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is "assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties." Kowalski v. Tesmer, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that controls. See Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted."), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014). Thus, in a suit brought by shareholders, it is the substance of the allegations and not the label assigned to the allegations—i.e., direct or derivative—that matters. See Starr, 856 F.3d at 966-67; see also In re Sunrise Sec. Litig., 916 F.2d 874, 882 (3d Cir. 1990) ("Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties."). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based on the rights of the company. See Starr, 856 F.3d at 966-67; see also Weir v. Stagg, No. 09-21745-CIV, 2011 WL 13174531, at *9 (S.D. Fla. Feb. 7, 2011) ("Shareholders do not have standing to bring a direct action for injuries

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suffered by a corporation, but rather, must bring a derivative action."). A shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the corporation's injuries—to have standing to litigate those claims. See Starr, 856 F.3d at 966-67.

Defendant argues that plaintiffs lack standing because their claims, pled as direct claims, actually belong to the Enterprises and are therefore derivative in nature. The parties in this case and the related cases fully briefed and argued this issue prior to the court issuing the Fairholme II decision. The court concluded in Fairholme II that Fannie and Freddie shareholders lack standing to pursue direct claims that are derivative in nature. Thereafter, the court solicited short supplemental briefs from plaintiffs and defendant regarding the applicability of the holdings in Fairholme II to this case. In their supplemental brief, plaintiffs suggest that their allegations are materially different from those asserted in Fairholme for purposes of standing, while defendant contends in its supplemental brief that there are no material differences. All of the parties' arguments are addressed below.

A. Plaintiffs' allegations are not materially different from the allegations in Fairholme.

As an initial matter, plaintiffs contend that their allegations are materially different from those advanced in Fairholme in two respects, such that the standing inquiry would be affected. Plaintiffs first argue that the type of harm they have suffered and the type of relief they have requested distinguish their claims from the direct claims in Fairholme. In essence, plaintiffs attempt to distinguish what they characterize as the Fairholme plaintiffs' allegation of the expropriation of the Enterprises' assets from their allegation of the expropriation of their economic interests. As defendant points out, however, the direct claims in Fairholme and the claims in this case are virtually indistinguishable in nature. All four counts of the amended complaint in this case mirror, in every essential way, the direct takings, illegal-exaction, fiduciary duty, and breach-of-implied-contract claims in Fairholme. Expropriation of the shareholders' economic interests was alleged in Fairholme, just as it is alleged in the first amended complaint in this case. Compare Fairholme II, 147 Fed. Cl. at 20, 46-47, with 1st Am. Compl. ¶¶ 95, 112-114. Thus, the standing analysis in Fairholme II is fully applicable to the claims presented here.

Plaintiffs next invoke their reliance on the allegation of the existence of a "control group," formed by Treasury and the FHFA-C, that dominated the Enterprises and injured them. In their view, this factual distinction in their amended complaint is significant because it was not discussed in Fairholme II. Plaintiffs fail to explain, however, how this factual distinction gives them standing to bring their claims. Plaintiffs apparently infer a logical connection between a control group of shareholders and a controlling shareholder, but the connection is not explained in a way that is helpful to the court. Indeed, in their supplemental brief plaintiffs cite primarily to a section of their opposition brief that does not address the topic of standing at all. If plaintiffs wished to advance a standing argument that specifically relied on the state law concept of a control group of shareholders and cases discussing such a phenomenon, no such argument was made in their opposition brief. Thus, any such standing argument that plaintiffs may be attempting to make in their supplemental brief, to the extent that one could be discerned, is waived as untimely.[20] See Ironclad/EEI, 78 Fed. Cl. at 358.

B. Plaintiffs' claims actually belong to the Enterprises.

Having determined that plaintiffs' allegations do not differ materially from those advanced in Fairholme, the court turns to defendant's contention that plaintiffs lack standing to litigate their claims. Defendant's standing argument is premised on its assertion that plaintiffs' claims actually belong to the Enterprises—and are therefore derivative in nature—because, to prevail, plaintiffs would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises. Plaintiffs counter that they assert direct claims because the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises' capital structure to plaintiffs' detriment, which renders the claims for such conduct both direct and derivative under the dual-nature exception.[21] Defendant replies that the Federal Circuit rejected the notion that a plaintiff states a direct claim by alleging it was targeted by the challenged action. Defendant also contends that the dual-nature exception is not applicable because Treasury was not a controlling shareholder, the Enterprises did not issue new shares, and the PSPA Amendments did not involve the reallocation of power.

Neither theory plaintiffs advance for why their claims are substantively direct, rather than derivative, is persuasive. First, it is of no import whether the government targeted shareholders with the PSPA Amendments. See Starr, 856 F.3d at 973 (noting that the plaintiffs did not "sufficiently explain why the Government's subjective motivations are relevant to the inquiry into direct standing"). The direct-versus-derivative inquiry "turns on the plaintiff's injury, not the defendant's motive." Pagan v. Calderon, 448 F.3d 16, 30 (1st Cir. 2006). Second, plaintiffs have not asserted claims that qualify as both direct and derivative based on the dual-nature exception. The Federal Circuit explained that, pursuant to this exception, shareholder claims may be both direct and derivative "when a 'reduction in [the] economic value and voting power affected the minority stockholders uniquely . . . .'" Starr, 856 F.3d at 968 (quoting Gentile v. Rossette, 906 A.2d 91, 99 (Del. 2006)). Specifically, shareholder claims are both direct and derivative if

> "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value," and "(2) the exchange causes an increase in

[20] Even if this argument were not waived, the court agrees with defendant that the control group scenario alleged by plaintiffs also fails to satisfy the criteria for dual-natured claims that might provide standing to a shareholder plaintiff asserting direct claims. See Section V.B, infra (discussing the criteria for dual-natured claims).

[21] The plaintiffs in the related cases also asserted that their claims must be construed as direct claims to vindicate important federal policies if shareholders cannot assert derivative claims because of HERA. But as this court held in Fairholme II, the shareholders of the Enterprises, notwithstanding HERA, have standing to assert derivative claims because of the FHFA-C's conflict of interest. 147 Fed. Cl. at 49-51.

the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders."

Id. (quoting Gentile, 906 A.2d at 100). The exception does not apply here because Treasury was not a controlling shareholder at the time the PSPA Amendments were executed,[22] the PSPA Amendments did not involve the issuance of new shares, and shareholder voting power was not reallocated under the PSPA Amendments. It is not enough, contrary to plaintiffs' contention, that the government allegedly exacted economic value from the other shareholders by rearranging the corporate structure. See El Paso Pipeline GP Co. v. Brinckerhoff, 152 A.3d 1248, 1264 (Del. 2016) (applying Gentile and holding a plaintiff does not state a direct claim under the dual-nature exception by pleading the "extraction of solely economic value from the minority by a controlling stockholder"). Because plaintiffs have not established that their claims are substantively direct in nature, they cannot demonstrate that they have standing to litigate those claims.

Plaintiffs fare no better if the court moves beyond their arguments for why their claims are substantively direct in nature. Federal law governs whether plaintiffs' claims are direct or derivative. See Starr, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. Id.; see also Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 97 (1991) (noting the "presumption that state law should be incorporated into federal common law"). Under Delaware law, the test for whether a shareholder's claim is derivative or direct depends on the answers to two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004) (en banc). "Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow." Gentile, 906 A.2d at 99, discussed in Starr, 856 F.3d at 965. Such claims are derivative even "though the overpayment may diminish the value of the corporation's stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend." Protas v. Cavanagh, No. CIV.A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012); see also Hometown Fin. Inc. v. United States, 56 Fed. Cl. 477, 486 (2003) ("[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to nothing more than a diminution in stock value or a loss of dividends.").

Plaintiffs focus on the expropriation of the Enterprises' assets via compulsory payments of all profits. The gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury. Regardless of plaintiffs' label (direct) or theory (taking, illegal exaction, breach of fiduciary duty, or breach of implied contract) for their claims, the claims are substantively derivative in nature because they are

[22] Treasury is not a controlling shareholder for the reasons set forth in Section IV.B.1, supra.

premised on allegations of overpayment.[23] See Gentile, 906 A.2d at 99; see also Roberts, 889 F.3d at 409 (explaining that the plaintiffs asserted "classic derivative claims" when they alleged that "the [PSPA Amendments] illegally dissipated corporate assets by transferring them to Treasury"). Plaintiffs cannot transform their substantively derivative claims into direct claims by merely alleging that, as a result of overpayments, they were deprived of their stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiffs' purported "harms are 'merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.'" Protas, 2012 WL 1580969, at *6 (quoting Gentile, 906 A.2d at 99); see also Agostino v. Hicks, 845 A.2d 1110, 1122 (Del. Ch. 2004) ("[T]he inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation."). Because plaintiffs' claims are derivative in nature, plaintiffs lack standing to pursue those claims on their own behalf.

C. Plaintiffs' claims are direct claims, as pled, and cannot be deemed to be derivative claims.

Plaintiffs, while acknowledging that they assert only direct claims,[24] attempt to avoid a dismissal of those claims for lack of standing by contending that "[e]ven if [their] direct claims were deemed derivative, they still may assert them, under circuit precedent, because the [FHFA-C] as conservator has a manifest conflict of interest." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 39. The precedent upon which plaintiffs rely is the Federal Circuit's decision in First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279 (Fed. Cir. 1999).

[23] Plaintiffs would remain unsuccessful if their allegations of waste and mismanagement (styled as self dealing, overreach, or abuse of discretion) were construed to be indicative of some action other than overpayment. Any claims premised on waste and mismanagement are derivative in nature. Kramer v. W. Pac. Indus., Inc., 546 A.2d 348, 353 (Del. 1988) (noting that "mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature"). Plaintiffs' claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. See Hometown, 56 Fed. Cl. at 486 (stock prices); In re Straight Path Commc'ns Inc. Consol. S'holder Litig., No. CV 2017-0486-SG, 2017 WL 5565264, at *4 (Del. Ch. Nov. 20, 2017) ("Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . . .").

[24] Indeed, there is no dispute that the four claims plaintiffs assert in their amended complaint are direct claims. In each count plaintiffs emphasize that the harm to plaintiffs is direct. 1st Am. Compl. ¶¶ 115, 119, 125, 141. In addition, the relief requested by plaintiffs is for monetary relief payable to them, not to the Enterprises. Id. at 48; see also Pls.' Suppl. Br. on Outstanding Mot. to Dismiss 3-4 (arguing that payments to the Enterprises would be of no use to plaintiffs). Finally, the amended complaint contains a statement that plaintiffs' claims are direct in nature. See 1st Am. Compl. ¶ 109 ("[A]ny claim raised by Owl Creek that might be considered derivative on behalf of the Company is in fact direct, on behalf of Owl Creek itself.").

In First Hartford, the Federal Circuit held that a shareholder of a company could bring a derivative claim, notwithstanding a succession clause, if the company was controlled by an entity with a conflict of interest. Id. at 1283; accord id. at 1295 (remarking that the purpose of derivative suits was to "permit shareholders to file suit on behalf of a corporation when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation"). The court in Fairholme II concluded that pursuant to First Hartford, the plaintiff who asserted derivative claims in Fairholme had standing to litigate those claims due to the FHFA-C's conflict of interest. 147 Fed. Cl. at 49-51.

If plaintiffs had asserted derivative claims in their amended complaint, the "conflict of interest" holding in First Hartford would have aided plaintiffs in their quest to establish standing. But they did not do so. Thus, their reliance on this holding in First Hartford is misplaced.

As for plaintiffs' suggestion that their direct claims could be deemed derivative, they identify no authority for that recharacterization of their claims, even though they had the opportunity to do so in their opposition brief and their supplemental brief. The court finds plaintiffs' "direct claims deemed derivative" argument, Pls.' Suppl. Br. on Outstanding Mot. to Dismiss 5 (emphasis removed), to be unsupported by authority and unpersuasive for the purpose of establishing plaintiffs' standing to bring the claims in their amended complaint.[25]

D. Plaintiffs' standing to bring direct claims is not established by another holding in First Hartford.

Finally, the court addresses an assertion in plaintiffs' opposition brief that was not explicitly addressed in Fairholme II. Only one sentence of that sixty-page brief was devoted to the following contention included among plaintiffs' standing arguments: "[T]he Federal Circuit has repeatedly recognized a direct claim where a shareholder alleged deprivation of a contingent property interest in a bank." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 38 (citing First Hartford, 194 F.3d at 1296; Cal. Hous. Sec., Inc. v. United States, 959 F.2d 955, 957 n.2 (Fed. Cir. 1992)). Defendant, in support of its challenge to plaintiffs' standing to bring their claims, clearly relied on more recent precedent, the Federal Circuit's decision in Starr, to argue that plaintiffs' claims were derivative claims, not direct claims. Plaintiffs, notwithstanding their citation to First Hartford and a footnote in a case discussed in First Hartford, did not attempt, in any meaningful way, to explain why Starr should not be applied and followed in this case. Because plaintiffs' reliance on First Hartford as support for a shareholder's standing to bring direct claims is cursory and undeveloped, the court is within its discretion to deem this argument waived. See SmithKline Beecham Corp. v. Apotex Corp., 439 F.3d 1312, 1320 (Fed. Cir. 2006) (noting that the court has discretion on whether to consider undeveloped arguments).

Even if this argument were not waived, the Federal Circuit's Starr decision remains the binding precedent most on point. In Starr, the distinction between direct and derivative claims

[25] As defendant notes, claims brought on behalf of the Enterprises are asserted in numerous shareholder derivative claims in these related cases.

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brought by shareholders is the focus of the Federal Circuit's standing analysis. 856 F.3d at 963-73. Just as here, the plaintiffs brought takings and illegal-exaction claims related to a government intervention, during a financial crisis, affecting the future of a corporation in which they owned shares. Id. at 958-61. Starr provides the test for determining whether such claims are direct or derivative in nature and requires that nominally direct claims—that are actually derivative claims—be dismissed for lack of standing. Id. at 973.

In the face of this binding precedent, the court cannot conclude that the holding in First Hartford, which concerns direct Fifth Amendment takings claims, is more relevant. It is true that in First Hartford shareholders of a bank in receivership could pursue their takings claims as direct claims against the United States. 194 F.3d at 1287. However, First Hartford does not address the distinction between direct and derivative claims. When faced with binding precedent that addresses a crucial distinction, such as Starr, and one that does not, such as First Hartford, the court follows the precedent most on point. Cf. Union Elec. Co. v. United States, 363 F.3d 1292, 1297 (Fed. Cir. 2004) ("[W]e have repeatedly held that the disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue." (citing Boeing N. Am., Inc. v. Roche, 298 F.3d 1274, 1282 (Fed. Cir. 2002))).

In sum, plaintiffs have not established that they have standing to litigate their claims because they do not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court dismisses plaintiffs' claims on standing grounds to the extent that it has subject-matter jurisdiction over those claims.[26]

VI. CONCLUSION

For the reasons stated above, the court **GRANTS** defendant's motion to dismiss and **DISMISSES** plaintiffs' complaint because the court lacks jurisdiction to entertain their breach of fiduciary duty and implied-in-fact-contract claims, and plaintiffs lack standing to pursue any of their claims. The clerk shall enter judgment accordingly. No costs.

Furthermore, because all of plaintiffs' claims are dismissed and the parties have agreed that the court's consideration of plaintiffs' motion to amend the complaint should be deferred pending the resolution of any appeals, the court **DENIES** plaintiffs' motion for leave to amend

[26] As explained above, the court lacks jurisdiction over plaintiffs' claims for breach of fiduciary duty and breach of implied contract. See supra Sections IV.B.1 (fiduciary duty), IV.C (contract). In addition, because all of plaintiffs' claims must be dismissed for lack of standing, the court need not reach defendant's remaining arguments that these claims should be dismissed for failure to state a claim upon which relief can be granted.

their complaint to add a plaintiff, filed February 19, 2020, with leave to refile the motion should the court's ruling on defendant's motion be overturned.

In addition, the court's order of March 2, 2020, requiring the filing of a status report by the parties, is **SUPERSEDED**, as no status report is required in these circumstances.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

In the United States Court of Federal Claims

No. 18-529C
(Filed: June 8, 2020)

MASON CAPITAL L.P. et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(1); RCFC 12(b)(6); Jurisdiction; Standing; Direct Claims; Instrumentalities; Coercion; Agent; Conservators; Conflict of Interest; Third-Party Beneficiaries; Stock; Shareholders; Fannie; Freddie; FHFA

Lawrence D. Rosenberg, Washington, DC, for plaintiffs.

Kenneth M. Dintzer, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiffs in this case challenge the actions of the United States during the conservatorships of the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie"). Specifically, plaintiffs take issue with the conservator for Fannie and Freddie (collectively, the "Enterprises") amending a funding agreement between the Enterprises and the United States Department of the Treasury ("Treasury"). Based on the revisions to that agreement, plaintiffs seek the return of money illegally exacted, damages for breach of contract and breach of fiduciary duty, and compensation for a taking pursuant to the Fifth Amendment to the United States Constitution ("Constitution"). Defendant moves to dismiss plaintiffs' amended complaint, arguing that the court lacks subject-matter jurisdiction over plaintiffs' claims, plaintiffs lack standing to pursue their claims, and plaintiffs fail to state a claim upon which relief may be granted. For the reasons stated below, the court grants defendant's motion to dismiss.

I. BACKGROUND

A. The Enterprises are private companies that are under the control of a conservator.

1. The Enterprises operated independently before the financial crisis.

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities

that are sold to investors.[1] 1st Am. Compl. ¶¶ 17-18; Fairholme II, 147 Fed. Cl. at 15. Congress chartered Fannie in 1938 and established Freddie in 1970. 1st Am. Compl. ¶¶ 17-18. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. Id. Freddie is organized under Virginia law, and Fannie is organized under Delaware law. Id. The Enterprises issued their own common and preferred stock. Id. ¶ 20. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. Fairholme II, 147 Fed. Cl. at 15. Those owning preferred stock, including plaintiffs in this suit, acquired the right to receive dividends and a liquidation preference. 1st Am. Compl. ¶ 20.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. Id. ¶ 21. Although the Enterprises began recording losses in 2007, they were stable and adequately capitalized. Id. ¶¶ 23-24. Otherwise stated, the Enterprises were not in financial distress or otherwise at risk of insolvency. Id.

2. Congress created the Federal Housing Finance Agency to regulate the Enterprises and authorized the agency to serve as a conservator for each Enterprise.

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency ("FHFA") and provided it with supervisory and regulatory authority over the Enterprises. See 12 U.S.C. § 4511(a)-(b) (2018).[2] Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator ("FHFA-C") for each Enterprise to reorganize, rehabilitate, or wind up its affairs.[3] Id. § 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its obligations. Id. § 4617(a)(3).[4] The conservator, once appointed, functions independently; it is not "subject to the direction or supervision of any other agency of the United States or any State in the exercise of [its] rights, powers, and privileges . . . ." Id. § 4617(a)(7).

[1] This background section is a less comprehensive version of the court's recitation of facts in a related case, Fairholme Funds, Inc. v. United States, 147 Fed. Cl. 1 (2019) ("Fairholme II"), motion to certify interlocutory appeal granted, 147 Fed. Cl. 126 (2020).

[2] Congress has not amended the relevant portions of HERA since enacting the law in 2008. The court, therefore, refers to the most recent version of the United States Code.

[3] To avoid any ambiguity, the court reiterates that it is using "FHFA" to refer to the agency acting in its regulatory role and "FHFA-C" when discussing the agency acting as a conservator.

[4] Congress enticed the Enterprises to consent to a conservatorship by insulating their board members from any liability to shareholders or creditors for agreeing in good faith to the FHFA's appointment of a conservator. 12 U.S.C. § 4617(a)(6).

Congress also delineated the scope of the FHFA-C's powers in HERA. See generally id. § 4617. As soon as it is appointed, the FHFA-C "immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . . ." Id. § 4617(b)(2)(A). Congress also conferred on the conservator the power to "[o]perate the [Enterprise]." Id. § 4617(b)(2)(B). Pursuant to that power, the conservator "may," among other things, "perform all functions of the [Enterprise]," "preserve and conserve the assets and property of the [Enterprise]," and "provide by contract for assistance in fulfilling any function . . . of the [conservator]." Id. The conservator "may" also "take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise]." Id. § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator "may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]" and "take any action authorized by [12 U.S.C. § 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA]." Id. § 4617(b)(2)(J). By describing the FHFA-C's role primarily in terms of what powers it "may" exercise, see generally id. § 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its powers, see United States v. Rodgers, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."). Simply stated, the FHFA has "extraordinarily broad flexibility to carry out its role as conservator." Perry Capital LLC v. Mnuchin, 864 F.3d 591, 606 (D.C. Cir. 2017) ("Perry II"), cert. denied, 138 S. Ct. 978 (2018).

3. Congress authorized Treasury to purchase securities issued by the Enterprises.

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(g) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. Id. §§ 1455(*l*)(4), 1719(g)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the availability of mortgage finance, and protect taxpayers. Id. §§ 1455(*l*)(1)(B), 1719(g)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

(i) The need for preferences or priorities regarding payments to the Government.

(ii) Limits on maturity or disposition of obligations or securities to be purchased.

(iii) The [Enterprise's] plan for the orderly resumption of private market funding or capital market access.

(iv) The probability of the [Enterprise] fulfilling the terms of any such obligation or other security, including repayment.

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> (v) The need to maintain the [Enterprise's] status as a private shareholder-owned company.
>
> (vi) Restrictions on the use of [Enterprise] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

Id. §§ 1455(*l*)(1)(C), 1719(g)(1)(C).

4. The FHFA became the conservator for each Enterprise.

Around the beginning of September 2008, the FHFA and Treasury sought to persuade each Enterprise's board of directors to consent to conservatorship. 1st Am. Compl. ¶ 34. The FHFA told each Enterprise's board that conservatorship would further the interests of the shareholders. Id. Around the same time, the FHFA made an offer to each board: consent to a conservatorship in exchange for the FHFA-C aiming to preserve and conserve the Enterprises' assets, attempting to restore the Enterprises to sound and solvent condition, and terminating the conservatorships when those goals were achieved. Id. ¶¶ 5, 7; Fairholme II, 147 Fed. Cl. at 17. Each Enterprise's board accepted that offer and consented to a conservatorship on September 6, 2008, with an understanding that the FHFA-C would operate in the aforementioned limited ways. Fairholme II, 147 Fed. Cl. at 17.

The conservatorships became effective on September 6, 2008, upon each Enterprise's board's consent. 1st Am. Compl. ¶¶ 34-35; see also 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when "[t]he [Enterprise], by resolution of its board of directors or its shareholders or members, consents to the appointment").

5. The FHFA-C contracted with Treasury to obtain funding for the Enterprises.

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement ("PSPA") with Treasury for each Enterprise. 1st Am. Compl. ¶ 6. Treasury entered into the agreements pursuant to its authority under HERA to buy the Enterprises' securities. Id. ¶¶ 6, 36. Under the PSPAs, Treasury committed to provide up to $100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. Id. ¶ 36. If an Enterprise's liabilities exceeded its assets, then the Enterprise could draw on Treasury's funding commitment in an amount equal to the difference between the Enterprise's liabilities and assets. Fairholme II, 147 Fed. Cl. at 17.

In return for Treasury's funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their respective common stock at a nominal price. 1st Am. Compl. ¶ 36. Treasury's preferred stock had an initial liquidation preference of $1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury's funding commitment. Id. In the event of a liquidation, Treasury was entitled to recover the full liquidation value of its shares before any other shareholder would receive compensation. Id. Second, Treasury bargained for the right to a

quarterly cash dividend that would be equal, per annum, to 10% of its liquidation preference. Id. An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. Id. Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. Id. ¶¶ 36, 42. Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. Id. ¶ 37.

The FHFA-C and Treasury amended each Enterprise's PSPA on May 6, 2009, to increase Treasury's funding commitment to each Enterprise from $100 billion to $200 billion. Id. ¶ 44. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed $200 billion. Id. ¶ 45.

6. The Enterprises' finances improved during their conservatorships.

In the early stages of the conservatorships, each Enterprise's net worth decreased as it reported losses. Fairholme II, 147 Fed. Cl. at 18. Some of the losses resulted from the FHFA-C writing down the value of deferred tax assets.[5] Id. Notwithstanding those on-paper losses, as of late 2009, Fannie had drawn only $60 billion from Treasury, and Freddie had only drawn $51 billion. 1st Am. Compl. ¶ 46.

By 2011 and into 2012, the Enterprises' financial outlooks were promising. In addition to an improvement in the housing market, the Enterprises had improved their financial performance. Id. ¶ 51. They were positioned to further improve their financial condition by revising their valuations of deferred tax assets because of growing profits, and by increasing their earnings due to reduced credit losses. Id. The FHFA-C and Treasury were aware of those forthcoming changes and the Enterprises' improving outlooks. Id. ¶ 8. In August 2012, Treasury and FHFA-C knew that the Enterprises would soon experience improved profitability and received projections reflecting that the Enterprises would have positive comprehensive income in 2012. Id. ¶¶ 52-53. Otherwise stated, the FHFA-C and Treasury knew, by early August 2012, that the Enterprises were poised to generate profits in excess of their respective dividend obligations to Treasury. Id. ¶ 51.

7. Treasury and the FHFA-C agreed to a third amendment to the PSPAs.

At an unspecified time prior to August 2012, Treasury and the FHFA-C began considering a third amendment to each PSPA. Treasury was the driving force behind the initiative to amend the PSPAs' terms. Id. ¶¶ 57, 69. Indeed, an FHFA official reported in early

[5] A deferred tax asset is an asset that may be used to offset future tax liability. Fairholme II, 147 Fed. Cl. at 18 n.4. A company must write down the value of that deferred asset if it is unlikely to be used to offset future taxable profits. Id. This write down occurs, for example, if a company predicts it will not be profitable in the future. Id.

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August 2012 that Treasury was making a "renewed push" to implement a new amendment. Id. ¶ 65 (quoting the FHFA official). The FHFA-C learned of the proposed changes before the Enterprises; Treasury informed the Enterprises that the new terms were forthcoming and announced the changes to the Enterprises. Id. ¶ 67. Treasury officials who were involved with the process do not recall Treasury making any backup or contingency plans in the event that the FHFA-C rejected the proposed terms. Fairholme II, 147 Fed. Cl. at 19. The FHFA-C accepted the changes without advocating for different terms. Id.

Treasury and the FHFA-C decided to announce the changed terms in mid-August 2012 because, according to Treasury, the Enterprises would be reporting earnings exceeding their dividend obligation at the beginning of that month. Id. On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA ("PSPA Amendment"). 1st Am. Compl. ¶¶ 2, 9, 54. A key component of the amended PSPAs is the requirement—referred to here as the "Net Worth Sweep"—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise's net worth (except for a small capital reserve amount) rather than a dividend based on a set percentage of the liquidation preference.[6] Id. ¶ 54. Additionally, under the amended PSPAs, the Enterprises are not obligated to pay a periodic commitment fee. Id. ¶ 65.

a. Treasury wanted to ensure that it benefited from the new terms.

With the PSPAs, Treasury sought to secure a more beneficial arrangement for itself, as a representative for taxpayers. During the lead-up to the PSPA Amendments, a Treasury official acknowledged in an internal communication that the government had resolved to "ensure existing common equity holders will not have access to any positive earnings from the [Enterprises] in the future." Id. ¶ 57 (emphasis removed) (quoting the document). Treasury recognized its goal of obtaining all of the Enterprises' profits by executing the PSPA Amendments; it intended to take "every dollar of earnings that [the Enterprises] generate[] . . . to benefit taxpayers." Id. ¶ 10 (quoting a Treasury announcement).

b. The FHFA-C agreed to changes that benefit Treasury.

For its part, the FHFA-C was operating under the belief that Treasury would benefit from the PSPA Amendments. The FHFA-C prioritized Treasury's interests over the fate of the Enterprises and the interests of their shareholders. Id. ¶ 77. Mel Watt—a former FHFA Director—commented at the time that he did not "lay awake at night worrying what's fair to the shareholders." Id. (quoting an interview).

c. Treasury and the FHFA understood that the PSPA Amendments would not facilitate the Enterprises exiting conservatorship.

[6] The capital reserve for each Enterprise started at $3 billion and was set to decrease to $0 by January 2018, but the Enterprises and Treasury agreed in December 2017 to reset the capital reserve amount to $3 billion in the first quarter of 2018. 1st Am. Compl. ¶ 54; Fairholme II, 147 Fed. Cl. at 19 n.5.

Treasury was aware that the new terms of the PSPAs were not conducive to the Enterprises exiting conservatorship. Treasury acknowledged that its goal was to facilitate the "wind down" of the Enterprises. Id. ¶ 57 (quoting a Treasury report). At the time of the PSPA Amendments, Treasury explained that the new deal would ensure that the Enterprises "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." Id. ¶ 70 (emphasis removed) (quoting Treasury press release).

The FHFA shared a similar sentiment. The FHFA's former Acting Director, Edward DeMarco, testified before the United States Senate that the PSPA Amendments "reinforce the notion that the [Enterprises] will not be building capital as a potential step to regaining their former corporate status." Id. ¶ 77 (emphasis removed) (quoting the testimony). Indeed, the FHFA explained to Congress that its vision for the future included a housing industry without Fannie and Freddie. Fairholme II, 147 Fed. Cl. at 20.

d. Treasury has benefited from the PSPA Amendments at the expense of the Enterprises and other shareholders.

There are four significant effects that flowed from the PSPA Amendments. First, plaintiffs lost their economic interests in the Enterprises because, under the new terms, private shareholders can never receive dividends or liquidation distributions. 1st Am. Compl. ¶¶ 2, 9, 89-90. Second, Treasury acquired plaintiffs' economic interests in the Enterprises because Treasury now possesses "the entire value" of the Enterprises. Id. ¶ 94. Third, Treasury reaped a windfall of $128.9 billion in comparison to what it would have received absent changes to the PSPAs. Id. ¶¶ 86-87 (alleging that the Enterprises paid Treasury $223.6 billion under the PSPA Amendments but would have only paid Treasury $94.7 billion under the previous terms). Fourth, the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink of insolvency. Id. ¶¶ 55, 88.

8. Treasury and the FHFA are committed to ending the conservatorships.

On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the Treasury Secretary to develop, "as soon as practicable," a plan for "[e]nding the conservatorships of the [Enterprises] upon the completion of specified reforms . . . ."[7]

[7] The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source, the Federal Register. See Murakami v. United States, 46 Fed. Cl. 731, 739 (2000) (noting that the court may take judicial notice of government documents), aff'd, 398 F.3d 1342, 1354-55 (Fed. Cir. 2005); see also Democracy Forward Found. v. White House Office of Am. Innovation, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) ("[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum."). See generally Fed. R. Evid. 201 (discussing judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the court may consider facts derived from sources subject to judicial notice without converting the motion into one for summary judgment. Sebastian v. United States, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

Memorandum on Federal Housing Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must include proposals for "[s]etting the conditions necessary for the termination of the conservatorships" and outlined some of those conditions. Id. at 12,480. Subsequently, Treasury issued a plan in which it advocated for "begin[ning] the process of ending the [Enterprises'] conservatorships."[8] U.S. Dep't of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf [https://perma.cc/RGH8-N385]; accord id. at 26 ("It is, after 11 years, time to bring the conservatorships to an end."). As part of the plan to end the conservatorships, Treasury proposed that it and the FHFA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. Id. at 26-27.

The FHFA shares Treasury's goals with respect to the conservatorships. Mark Calabria, the current FHFA Director, testified during his confirmation hearing that he wanted to end the conservatorships.[9] 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony). See generally Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs, 116th Cong. 10-40, 74-75, 148-85 (2019) [hereinafter Calabria Testimony] (documenting Mr. Calabria's testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that each Enterprise retains. Calabria Testimony, supra, at 150; see also id. at 25 ("I support the idea of having significantly more capital at the [Enterprises].").

B. Plaintiffs own Fannie and Freddie stock.

There are two plaintiffs in this case: Mason Capital, L.P. and Mason Capital Master Fund, L.P. (collectively, "Mason"). The first plaintiff is a Delaware limited partnership; the second is a Cayman Islands limited partnership. 1st Am. Compl. ¶¶ 13-14. Each plaintiff owned Fannie preferred stock and Freddie preferred stock at the time of the Net Worth Sweep. Id. The shares owned by these plaintiffs were primarily purchased after the conservatorships were established in 2008. Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 1.

II. PROCEDURAL HISTORY

Plaintiffs filed their complaint on April 11, 2018. This case was coordinated with similar, related cases assigned to the undersigned judge.[10] Plaintiffs filed their first amended complaint in this case on August 16, 2018. In their amended complaint, plaintiffs present four

[8] The court takes judicial notice of Treasury's reform plan because it is a government record available from a reliable source, Treasury's website. See supra note 7.

[9] The court takes judicial notice of the relevant testimony because the statements are recorded in government documents. See supra note 7.

[10] A fuller recitation of the procedural history of this case and related cases is provided in Fairholme II, 147 Fed. Cl. at 21-23.

claims. Plaintiffs first assert that the Net Worth Sweep constitutes a Fifth Amendment taking (count I) of their economic interests in their stock. Plaintiffs next assert, in the alternative, that the Net Worth Sweep constitutes an illegal exaction (count II) of those same economic interests because the (1) FHFA was operating unconstitutionally and (2) FHFA-C and Treasury exceeded their statutory authority when they approved the PSPA Amendments. Plaintiffs also plead a breach-of-fiduciary-duty claim ("fiduciary duty claim") (count III) premised on the Net Worth Sweep being unreasonable, arbitrary, and contrary to the duty owed to the Mason shareholders. Additionally, plaintiffs assert a breach-of-implied-contract claim (count IV) based on a purported agreement by which the Enterprises consented to the conservatorship in exchange for the FHFA agreeing to preserve the Enterprises' assets with the goal of making them safe and solvent. Specifically, plaintiffs assert that each dividend payment under the Net Worth Sweep constitutes a breach because it depletes the Enterprises' assets in a manner that undermines the goals of conservatorship.

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case and eleven related cases before the undersigned.[11] The plaintiffs in each of the twelve cases filed a response brief on their respective dockets; some of the plaintiffs relied on a joint brief filed in six of the cases, others, as is the case here, filed a joint brief for five of the cases in which the plaintiffs are all represented by the same counsel. Defendant filed its omnibus reply brief in each of the cases on May 6, 2019. The parties have fully briefed defendant's motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiffs in this case have adopted the favorable arguments made by the plaintiffs in the related cases to the extent that such arguments are relevant.[12] Defendant's motion to dismiss is now ripe for adjudication.

III. STANDARD OF REVIEW

In ruling on a motion to dismiss a complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), the court generally assumes that the allegations in the complaint are true and construes those allegations in the plaintiff's favor. Trusted Integration, Inc. v. United States, 659 F.3d 1159, 1163 (Fed. Cir. 2011). With respect to RCFC 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of the

[11] The eleven related cases are Fairholme Funds, Inc. v. United States, No. 13-465C; Washington Federal v. United States, No. 13-385C; Cacciapalle v. United States, No. 13-466C; Fisher v. United States, No. 13-608C; Arrowood Indemnity Company v. United States, No. 13-698C; Reid v. United States, No. 14-152C; Rafter v. United States, No. 14-740C; Owl Creek Asia I, L.P. v. United States, No. 18-281C; Akanthos Opportunity Master Fund, L.P. v. United States, No. 18-369C; Appaloosa Investment Limited Partnership I v. United States, No. 18-370C; and CSS, LLC v. United States, No. 18-371C.

[12] The court addresses in this opinion some arguments that were made primarily by the plaintiffs in the related cases to provide context for the resolution of defendant's motion to dismiss. In addition, to the extent that any of plaintiffs' less-developed arguments are not discussed in this opinion, the court found such arguments to be unpersuasive.

evidence, that the court possesses subject-matter jurisdiction. Id. The allegations in the complaint must include "the facts essential to show jurisdiction." McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936). And, if such jurisdictional facts are challenged in a motion to dismiss, the plaintiff "must support them by competent proof." Id.; accord Land v. Dollar, 330 U.S. 731, 735 & n.4 (1947) ("[W]hen a question of the District Court's jurisdiction is raised, . . . the court may inquire by affidavits or otherwise, into the facts as they exist." (citations omitted)). If the court finds that it lacks subject-matter jurisdiction, it must, pursuant to RCFC 12(h)(3), dismiss the complaint.

A claim that survives a jurisdictional challenge remains subject to dismissal under RCFC 12(b)(6) if it does not provide a basis for the court to grant relief. Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002) ("A motion to dismiss . . . for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy."). To survive a motion to dismiss under RCFC 12(b)(6), a plaintiff must include in the complaint "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Indeed, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 814-19 (1982).

IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a "threshold matter." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998). Subject-matter jurisdiction cannot be waived or forfeited because it "involves a court's power to hear a case." Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it is "an inflexible matter that must be considered before proceeding to evaluate the merits of a case." Matthews v. United States, 72 Fed. Cl. 274, 278 (2006); accord K-Con Bldg. Sys., Inc. v. United States, 778 F.3d 1000, 1004-05 (Fed. Cir. 2015). Either party, or the court sua sponte, may challenge the court's subject-matter jurisdiction at any time. Arbaugh, 546 U.S. at 506; see also Jeun v. United States, 128 Fed. Cl. 203, 209-10 (2016) (collecting cases).

The ability of the United States Court of Federal Claims ("Court of Federal Claims") to entertain suits against the United States is limited. "The United States, as sovereign, is immune from suit save as it consents to be sued." United States v. Sherwood, 312 U.S. 584, 586 (1941). The waiver of immunity "may not be inferred, but must be unequivocally expressed." United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003). Any such waiver must be narrowly construed. Smith v. Orr, 855 F.2d 1544, 1552 (Fed. Cir. 1988). The Tucker Act, the principal statute governing the jurisdiction of this court, waives sovereign immunity for claims against the United States, not sounding in tort, that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (2018); White Mountain, 537 U.S. at 472. However, the Tucker Act is merely a jurisdictional statute and "does not create any substantive right enforceable against the United

States for money damages." United States v. Testan, 424 U.S. 392, 298 (1976). Instead, the substantive right must appear in another source of law, such as a "money-mandating constitutional provision, statute or regulation that has been violated, or an express or implied contract with the United States." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc).

Defendant challenges the court's jurisdiction to entertain plaintiffs' claims on a number of bases. Specifically, defendant argues that plaintiffs have not asserted claims against the United States and that the court lacks jurisdiction over the subject matter of certain claims. The court addresses these contentions in turn.[13]

A. Plaintiffs have asserted claims against the United States.

The court first considers whether plaintiffs have asserted claims against the United States, a necessary element of jurisdiction in the Court of Federal Claims. As set forth in their amended complaint, all of plaintiffs' claims are premised on actions taken by the FHFA-C and Treasury. Defendant argues that the court lacks jurisdiction to consider any claims premised on the FHFA-C's or Treasury's conduct. In response, plaintiffs contend that they have asserted claims against the government because (1) Treasury was involved in the challenged conduct, (2) the FHFA-C was coerced by the government, (3) the FHFA-C was the government's agent, and (4) the FHFA-C, in collaboration with Treasury, is a government actor. The court addresses each contention in turn.

1. The court cannot exercise jurisdiction based on allegations of Treasury's involvement.

Plaintiffs initially argue that the court has jurisdiction over their Fifth Amendment takings and illegal-exaction claims because they have alleged the involvement of Treasury—indisputably a part of the federal government—in the action underlying these claims, i.e., the Net Worth Sweep. Defendant counters that Treasury alone could not have implemented the PSPA Amendments, and Treasury's role as a counterparty to the voluntary agreement with the Enterprises is not sufficient to establish jurisdiction over plaintiffs' takings claim. Defendant further asserts that the court's order allowing jurisdictional discovery reflects that plaintiffs' allegations concerning Treasury alone are insufficient to confer jurisdiction.

The parties' dispute on the import of allegations concerning Treasury is ultimately immaterial in light of the court's determination, explained below, that the FHFA-C—the other party involved in the PSPA Amendments—is the United States. Nonetheless, the court notes, as defendant asserts, that it implicitly acknowledged in its February 26, 2014 discovery order, issued in Fairholme and related cases, that the allegations concerning Treasury alone were insufficient to support jurisdiction. In that order, the court permitted the plaintiffs in those

[13] In Fairholme II, the court addressed additional jurisdictional concerns that were not raised or are not implicated in this case. See generally 147 Fed. Cl. at 24-25 (rejecting defendant's contention that the claims of the Fairholme plaintiffs were barred by 28 U.S.C. § 1500), 34-37 (rejecting the contention of a putative intervenor that the Court of Federal Claims lacks jurisdiction to entertain Fifth Amendment takings claims).

related cases to conduct fact discovery on whether the FHFA-C was "the 'United States' for purposes of the Tucker Act." Fairholme Funds, Inc. v. United States, 114 Fed. Cl. 718, 721 (2014). The aforementioned discovery would have been unnecessary (and unwarranted) if, as plaintiffs assert here, the court has jurisdiction over plaintiffs' claims based on their allegations concerning Treasury.

2. The FHFA-C was not coerced into approving the PSPA Amendments.

Plaintiffs also argue that the FHFA-C is the United States because the FHFA-C was coerced into approving the PSPA Amendments by Treasury. Defendant counters that the FHFA-C was not coerced by Treasury because the FHFA-C had a choice of whether to accept or reject the PSPA Amendments. Defendant asserts that there is no coercion if a party has a choice, regardless of however difficult refusal of a particular option may be. Indeed, defendant contends that plaintiffs fail to proffer any allegations that Treasury required the FHFA-C to enter into the agreements against its will. Defendant further asserts that other courts have declined to conclude that the FHFA-C felt compelled to follow Treasury based on allegations that Treasury invented the amendment concept or led the process.

a. The court has jurisdiction over claims based on actions that resulted from government coercion.

The court has jurisdiction over claims premised on the FHFA-C's actions if Treasury's "influence over the" FHFA-C "was coercive rather than merely persuasive." A & D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1154 (Fed. Cir. 2014). The line between coercion and persuasion "is highly fact-specific." Id. Precedent from the United States Court of Appeals for the Federal Circuit ("Federal Circuit") frames the contours of the inquiry. In Langenegger v. United States, the plaintiffs pleaded that the United States coerced El Salvador by threatening to withhold financial and military assistance unless El Salvador passed legislation expropriating private property. 756 F.2d 1565, 1567 (Fed. Cir. 1985). The Federal Circuit disagreed with the plaintiffs' characterization of the threats because "[d]iplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of [coercion], however difficult refusal may be as a practical matter." Id. at 1572. Similarly, the Federal Circuit concluded in B & G Enterprises, Ltd. v. United States that California was not coerced into enacting restrictions on smoking, notwithstanding the federal government conditioning grants on states enacting such limits. 220 F.3d 1318, 1321, 1325 (Fed. Cir. 2000); see also A & D Auto, 748 F.3d at 1155 (explaining that "coercion was not established" in B & G). The court explained that "it was California's decision to create [the] restrictions[;] . . . Congress may have provided the bait, but California decided to bite." B & G, 220 F.3d at 1325. In A & D Auto, the Federal Circuit addressed coercion in the context of the government allegedly conditioning vital financial assistance to bankrupt automobile companies on those companies terminating some of their franchise agreements. 748 F.3d at 1145. Unable to resolve the issue due to gaps in the record, the court noted in dicta that a relevant consideration was "whether the government financing was essential to the companies." Id.

A common thread runs through the Federal Circuit's decisions: the importance of choice. A nonfederal actor is not coerced when it can choose to go against the wishes of the United

States, even if doing so will cause significant hardships, Langenegger, 756 F.2d at 1567, or result in a loss of prospective benefits, id.; B & G, 220 F.3d at 1325. But there is no choice, in any meaningful sense, when there is only one realistic option. A & D Auto, 748 F.3d at 1145 (noting the importance of considering whether the companies could survive without accepting the government's offer); cf. Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) (noting that, with respect to Congress's spending powers, "the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions"). Put differently, the nonfederal actor must make a voluntary decision, which it cannot do if there is only one realistic option. See BMR Gold Corp. v. United States, 41 Fed. Cl. 277, 282 (1998) (finding that the "the necessary element of coerciveness" for a taking was missing because the plaintiff granted the military permission to cross his land); accord Henn v. Nat'l Geographic Soc., 819 F.2d 824, 826 (7th Cir. 1987) (noting that hard choices remain voluntary when they are not akin to "Don Corleone's '[m]ake him an offer he can't refuse'"). In sum, the FHFA-C was not coerced if it voluntarily chose to enter into the PSPA Amendments.

b. Plaintiffs have not established that Treasury coerced the FHFA-C into approving the PSPA Amendments.

In support of their contention that Treasury coerced the FHFA-C into approving the PSPA Amendments, plaintiffs allege that Treasury proposed the terms of the amendments and used its influence over the FHFA-C to ensure compliance with Treasury's wishes. Those allegations are not enough to establish coercion. First, given the Enterprises' improving financial condition and Treasury's existing funding commitment, the FHFA-C's decision to execute the PSPA Amendments was voluntary because it could reject the deals without imperiling the Enterprises. The facts here, therefore, are diametrically opposed to the circumstances in A & D Auto that the Federal Circuit suggested may support coercion because the automobile dealers faced insolvency if they did not accede to the financing terms. See 748 F.3d at 1145. Second, the FHFA-C's lack of protestation is informative. "[T]he very fact that FHFA[-C] itself [did] not br[ing] suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA[-C] was an independent, willing participant in its negotiations with the Treasury." Robinson v. Fed. Hous. Fin. Agency, 223 F. Supp. 3d 659, 668 (E.D. Ky. 2016), aff'd, 876 F.3d 220 (6th Cir. 2017). The court's conclusion is bolstered by the fact that another court has held that materially similar allegations to those at issue here did not "come close to a reasonable inference that [the] FHFA[-C] considered itself bound to do whatever Treasury ordered." Perry Capital LLC v. Lew, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) ("Perry I"), aff'd in part, rev'd in part sub nom. Perry II, 864 F.3d at 591. This court agrees with the reasoning in Perry I: the PSPA Amendments were executed by sophisticated parties, and many agreements arise from a party's proposal being accepted by the other party. Id. Plaintiffs have not established that the FHFA-C was coerced into approving the PSPA Amendments by Treasury.

3. The FHFA-C is not Treasury's agent.

Plaintiffs further argue that the FHFA-C's actions are attributable to the United States because the FHFA-C is Treasury's agent. Defendant counters that plaintiffs have not pleaded an agency relationship because Treasury does not control the FHFA-C's operations. Indeed, defendant notes that Treasury is statutorily barred from exercising such control.

The United States is subject to claims in this court for the actions of a third party "if [that] party is acting as the government's agent . . . ." A & D Auto, 748 F.3d at 1154. "An essential element of agency is the principal's right to control the agent's actions." Hollingsworth v. Perry, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01 cmt. f (Am. Law. Inst. 2005)); accord O'Neill v. Dep't of Hous. & Urban Dev., 220 F.3d 1354, 1360 (Fed. Cir. 2000) (acknowledging that the common-law meaning of agency requires, among other things, that the principal has the right to control the agent's conduct); see also Preseault v. United States, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (concluding that a state's actions were attributable to the United States when the state acted pursuant to the Interstate Commerce Commission's order); Hendler v. United States, 952 F.2d 1364, 1378-79 (Fed. Cir. 1991) (attributing a state's actions to the United States when the state acted under authority flowing from an Environmental Protection Agency order). The facts, as alleged, do not reflect that Treasury controlled the FHFA-C's actions because Congress explicitly precluded the FHFA-C from being subservient to another agency, 12 U.S.C. § 4617(a)(7) (providing that the FHFA-C cannot be subject to the "direction or supervision" of any other agency), and plaintiffs have not alleged facts indicating that Treasury exercised such control notwithstanding the statutory bar. Although the FHFA-C was required by the PSPAs to obtain Treasury's approval for certain actions (e.g., issuing dividends), the PSPAs did not provide Treasury with the right to unilaterally order amendments. Moreover, plaintiffs describe an FHFA-C that made decisions independently: Treasury sought to influence the opinions of the FHFA-C's senior officials; Treasury "push[ed]" for the PSPA Amendments; and the FHFA-C agreed to the PSPA Amendments. 1st Am. Compl. ¶¶ 2, 63, 65. Simply stated, plaintiffs have not alleged facts establishing that Treasury exercised the control over the FHFA-C that is necessary for an agency relationship.

4. The FHFA-C is the United States because the FHFA-C retains the FHFA's governmental character.

In addition, plaintiffs contend that the FHFA-C is itself a government actor.[14] Defendant disagrees. First, relying on O'Melveny & Myers v. Fed. Deposit Ins. Corp., 412 U.S. 79 (1994), defendant argues that the FHFA-C is not the United States because the FHFA-C stands in the Enterprises' shoes. Specifically, defendant asserts that Congress's decision to have the FHFA-C succeed to the Enterprises' rights reflects that Congress intended that the FHFA-C step into the Enterprises' private shoes and shed its government character. Second, defendant argues that the FHFA-C's exercise of nontraditional conservatorship powers is immaterial because Congress can expand the conservator's role without transforming it into a government actor. Third, defendant argues that the Enterprises are not government instrumentalities—which means that the FHFA did not step into the shoes of a government actor when it became the Enterprises' conservator—because the government does not retain permanent authority to appoint the Enterprises' directors.

[14] To determine whether this action is against the United States, the court need not reach plaintiffs' argument that Treasury and the FHFA-C formed a "control group." See Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 22-26.

Defendant contends that the government only has temporary, albeit indefinite, control over the Enterprises because the conservatorships are not permanent.

In response, plaintiffs dispute the premise of defendant's argument that, pursuant to O'Melveny, the FHFA becomes the Enterprises when acting as conservator. Plaintiffs assert that O'Melveny does not concern whether an entity is the United States or, if the decision can be read as addressing that issue, is distinguishable because it concerns receivers or is limited to conservators exercising traditional conservator powers. Second, plaintiffs argue that the FHFA has not shed its government status, even if it has stepped into the Enterprises' shoes, when it acts as conservator. Specifically, plaintiffs assert that the FHFA-C retains the FHFA's government status because (1) the FHFA-C has acted beyond the traditional conservator powers and (2) Congress expressed its intention for that result by precluding the conservator from being subject to the supervision of "any other agency." 12 U.S.C. § 4617 (emphasis added). Third, plaintiffs argue that their claims are against the United States, even if the FHFA-C steps into the shoes of the Enterprises, because the Enterprises are government instrumentalities.

In short, the parties disagree over the government status of the FHFA-C. The FHFA is indisputably the United States, see id. § 4511(a) (establishing the FHFA as an "independent agency of the Federal Government"), and so the only question is whether the FHFA sheds that status when it acts as conservator. In other jurisdictions, courts have held (with near unanimity) that the FHFA loses its government status pursuant to O'Melveny. In O'Melveny, the United States Supreme Court ("Supreme Court") explained that the Federal Deposit Insurance Corporation ("FDIC") "steps into [the] shoes" of a private company when acting as receiver and sheds its government character because the FDIC "succeed[s] to . . . all rights, titles, powers, and privileges of the [entity in receivership] . . . ." 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); see also AG Route Seven P'ship v. United States, 57 Fed. Cl. 521, 534 (2003) (citing O'Melveny for the proposition that the FDIC as receiver is a "private party, and not the government per se" because it "is merely standing in the shoes . . . of the defunct thrift"). The courts drawing from O'Melveny have concluded that the FHFA steps into the shoes of the Enterprises and sheds its government character when acting as conservator because Congress provided that the FHFA-C exercises the same rights with respect to the Enterprises as Congress granted to the FDIC as receiver. See, e.g., Herron v. Fannie Mae, 861 F.3d 160, 169 (D.C. Cir. 2017); cf. Ameristar Fin. Servicing Co. v. United States, 75 Fed. Cl. 807, 811 (2007) (concluding, with respect to the FDIC, that the step-into-the-shoes principle set forth in O'Melveny also applies in the conservator context).

a. The FHFA-C is not the United States if the FHFA steps into the Enterprises' shoes when acting as conservator.

Plaintiffs initially contend that defendant's reliance on O'Melveny is erroneous because, assuming that O'Melveny applies, the FHFA-C is the United States even though it steps into the Enterprises' shoes. Specifically, plaintiffs assert that the FHFA-C is the United States under the facts alleged because (1) the FHFA-C exercises nontraditional conservator powers, (2) Congress intended that the FHFA-C retain the FHFA's government status, and (3) the FHFA-C steps into the shoes of a government instrumentality. The court addresses each assertion in turn.

First, the FHFA-C did not become a government actor by exercising powers beyond those traditionally afforded to a conservator. As a threshold matter, plaintiffs have not alleged facts reflecting that the FHFA-C used such powers; the execution of the PSPA Amendments was a "quintessential conservatorship" function. Perry II, 864 F.3d at 607. More importantly, however, plaintiffs would not prevail even if the FHFA-C exercised nontraditional conservatorship powers in agreeing to the PSPA Amendments. When this argument was pressed in other jurisdictions, it was rejected:

> It may well be true that FHFA's actions would not be allowed under traditional principles of corporate or conservatorship law, but it does not follow that those actions are therefore governmental. Legislatures can expand conservatorship and similar powers without transforming conservators into agents of the government. Cf. Pegram v. Herdrich, 530 U.S. 211, 225-26 (2000) (explaining that the Employee Retirement Income Security Act altered the common law of trusts to permit certain actions that would otherwise violate the trustee's fiduciary duties).

Bhatti v. Fed. Hous. Fin. Agency, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (footnote omitted). The court agrees with that reasoning, and plaintiffs provide no authority that supports a contrary result. Although plaintiffs state that the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") decision in Waterview Management Co. v. FDIC, 105 F.3d 696 (D.C. Cir. 1997), supports their position, they are mistaken. Waterview is not on point because the D.C. Circuit did not hold that a conservator is per se the United States when acting pursuant to a congressional grant of broad powers. Rather, it held that, as a matter of statutory interpretation, the existence of a receivership did not preempt a prereceivership contract. Id. at 699-702.

Second, Congress's instruction that the FHFA-C is not subject to the supervision of any other agency does not reflect congressional intent for the FHFA to retain its government status when acting as conservator even if it steps into the shoes of the Enterprises. Because the court only reaches this issue by assuming that O'Melveny is instructive, the statutory language concerning supervision of the FHFA-C does not support a finding of jurisdiction because the same language is present in the statute that the Supreme Court addressed in O'Melveny. See 512 U.S. at 85-86 (discussing 12 U.S.C. § 1821). Compare 12 U.S.C. § 1821(c)(3)(C) ("When acting as conservator or receiver . . . , [the FDIC] shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC's] rights, powers, and privileges."), with id. § 4617(a)(7) ("When acting as conservator or receiver, the [FHFA] shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the [FHFA].").

The third argument advanced by plaintiffs—that the FHFA-C is the United States because it steps into the shoes of a government instrumentality—also is not meritorious. A government instrumentality's actions are attributable to the United States for purposes of the Tucker Act. See Corr v. Metro. Wash. Airports Auth., 702 F.3d 1334, 1336 (Fed. Cir. 2012) (noting that a claim against a government instrumentality is a claim against the United States for purposes of the Little Tucker Act, 28 U.S.C. § 1346(a)(2)). The Supreme Court established in Lebron v. National Railroad Passenger Corp. that a company is a government instrumentality when (1) it is created by "special law," (2) it is established "for the furtherance of governmental objectives," and (3) the federal government "retains for itself permanent authority to appoint a majority of the [company's] directors . . . ." 513 U.S. 374, 400 (1995). After Lebron, the Supreme Court clarified that, for purposes of the instrumentality test, "the practical reality of federal control and supervision prevails over Congress' disclaimer of the [the entity's] governmental status." Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1233 (2015).

There is no dispute that the Enterprises satisfy the first two prongs of the Lebron test; Congress created the Enterprises by special law to achieve governmental objectives related to the housing market. See 12 U.S.C. § 4501; see also Herron, 861 F.3d at 167 (addressing claims involving Fannie and noting that "[t]his case satisfies the first two Lebron criteria"); Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 75 F.3d 1401, 1406-07 (9th Cir. 1996) (reaching same conclusion for Freddie). The status of the Enterprises, therefore, turns on the third prong: whether the government retains permanent authority to appoint a majority of the Enterprises' directors.

The Federal Circuit has not addressed the government-control prong with respect to the Enterprises, but courts in other jurisdictions have done so. Those decisions provide a starting point for the court. It appears that every court to consider the issue, with the exception of one district court, has held that the government does not exercise permanent control over the Enterprises. Sisti v. Fed. Hous. Fin. Agency, 324 F. Supp. 3d 273, 279 (D.R.I. 2018) (concluding that the government retains permanent authority to control the Enterprises after noting that "[t]he non-controlling precedent to date" has reached the opposite conclusion). Most of the courts that concluded that the government lacks permanent control over the Enterprises issued their decisions before the Supreme Court in Association of American Railroads emphasized the importance of evaluating the practical reality over nomenclature, and the other courts focused on the statutory purpose for the conservatorships rather than the Enterprises' actual situation. E.g., Herron, 861 F.3d at 169 (relying on the notion that a conservatorship is fundamentally temporary). In other words, the courts adopting the prevailing view considered the issue of control without regard for the Supreme Court's instruction to focus on the practical reality. The court, therefore, does not find those decisions persuasive.

The crux of the inquiry, as the Supreme Court mandates, is on the practical reality of the government's control over the Enterprises. Ass'n of Am. R.Rs., 135 S. Ct. at 1233. It is of no import that Congress nominally authorized a facially temporary conservatorship, see 12 U.S.C. § 4617(a) (permitting the FHFA to act as conservator to "reorganiz[e]" or "rehabilitat[e]" the Enterprises), because Congress's disclaimers are no substitute for the court's obligation to assess the government's actual control, Ass'n of Am. R.Rs., 135 S. Ct. at 1233. The court focuses on the length of the conservatorship because the FHFA-C wields complete control over the Enterprises so long as they are in conservatorship. See generally 12 U.S.C. § 4617.

Plaintiffs allege that the Enterprises will remain undercapitalized—and thus subject to conservatorship pursuant to 12 U.S.C. § 4617(a)(3)(J)—until the PSPAs, in their current form, are changed because the Enterprises cannot accumulate any capital under the existing terms of the PSPAs. Although the PSPAs could be further amended, plaintiffs' allegations reflect that

Treasury and the FHFA-C will not do so because the purpose of the PSPA Amendments is to prevent the Enterprises from accumulating the necessary capital to become independent companies. Plaintiffs, in short, have alleged that the government intended, and has taken steps to ensure, that the conservatorships never end. Those facts, viewed in isolation, would support a conclusion that the practical reality is that the Enterprises are under permanent government control. The court's inquiry, however, is not limited to plaintiffs' allegations because it has taken judicial notice of relevant facts reflecting that the status quo has changed: The Treasury Secretary and the FHFA Director are now both committed to ending the conservatorships. Moreover, the idea that the Enterprises are permanently subject to government control because they can never accumulate the capital needed to exit the conservatorships is undermined by recent developments. Indeed, Treasury proposed amending the Net Worth Sweep to allow the Enterprises to retain more capital, and the FHFA Director testified during his confirmation hearing that, if confirmed, he would seek to increase the amount of capital that the Enterprises retain. Simply stated, the practical reality is that the Enterprises are not subject to permanent government control because the relevant parties are working to terminate the conservatorships.[15]

In sum, the FHFA-C does not become the United States if the FHFA steps into the Enterprises' shoes when serving as conservator.

b. The FHFA-C retains the FHFA's government character because the FHFA-C does not step into the Enterprises' shoes.

The key inquiry, therefore, is whether the FHFA steps into the shoes of the Enterprises when acting as conservator. Defendant argues that the FHFA-C sheds its government character and assumes the identity of the Enterprises based on the reasoning in O'Melveny. Defendant's reliance on O'Melveny is misplaced. O'Melveny concerns a receiver stepping into the shoes of a failed bank. 512 U.S. at 86. The roles of a conservator and receiver are meaningfully different. In a recent decision, the United States District Court for the District of Rhode Island artfully explained the differences and their import for assessing whether the FHFA-C is the government:

> The O'Melveny Court held that FDIC, when acting as a receiver for a private entity, steps into the shoes of that private entity for state law claims. This holding makes sense given the purpose of receivership: "to preserve a company's assets, for the benefit of creditors, in the face of bankruptcy." When FDIC is appointed receiver, it must dispose of the received entity's assets, resolving obligations and

[15] Plaintiffs may disagree with the court's conclusion that events occurring after the PSPA Amendments are relevant to determining whether the Enterprises were under permanent government control during the events discussed in plaintiffs' complaint. Even if the court agreed that events occurring after the PSPA Amendments are not germane, plaintiffs still would not prevail because they allege that the conservatorships began as temporary measures. See 1st Am. Compl. ¶ 7 (noting the temporary nature of the conservatorships and quoting an FHFA publication stating that the conservatorships would be terminated once the Enterprises had been restored "to a safe and solvent condition"); id. (noting that the FHFA reassured the market that the Enterprises would return to normal business operations). Thus, the Enterprises were not under permanent government control before the PSPA Amendments.

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> claims made against the entity. Notably, "[i]n receivership, the receiver owes fiduciary duties to the creditors, which the corporation would otherwise owe to creditors during a period of insolvency." It logically follows, then, that the receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity.
>
> Conservatorship, in contrast, serves a different function. FHFA has described the purpose of conservatorship is "to establish control and oversight of a company to put it in a sound and solvent condition." Conservators, unlike receivers, have a fiduciary duty running to the corporation itself.
>
> This is "critically distinct" from the fiduciary duties owed as a receiver—the receiver does indeed "step into the shoes" of the entity by assuming the fiduciary duties of the entity, but the conservator does not: it remains distinct, and rather owes a duty to the entity. Given the difference in fiduciary duties, O'Melveny's "steps into the shoes" holding makes sense in the context of receivership, but not in the context of conservatorship.

Sisti, 324 F. Supp. 3d at 282-83 (citations and footnotes omitted). See generally Brian Taylor Goldman, The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State-Action, 17 J. Bus. & Sec. L. 11, 23-30 (2016). The district court, relying on the above analysis, declined to treat the FHFA-C as a private actor. Sisti, 324 F. Supp. 3d at 284. This court agrees with the reasoning and conclusion in Sisti: the FHFA does not shed its government character when acting as conservator because it does not step into the shoes of the Enterprises. Otherwise stated, the FHFA-C is the United States because it retains the FHFA's government character. Plaintiffs' claims, therefore, are against the United States for purposes of the Tucker Act.

B. The court lacks jurisdiction over plaintiffs' claim that sounds in tort.

1. Plaintiffs' fiduciary duty claim sounds in tort.

Defendant next argues that the court lacks jurisdiction over plaintiffs' fiduciary duty claim because the United States does not owe to each Enterprise's shareholders a fiduciary duty that is grounded in a statute or contract. Defendant asserts that such a fiduciary duty cannot be based on (1) HERA because, pursuant to the statute, the FHFA-C is only required to act in the government's and the Enterprises' best interests; or (2) the PSPAs because plaintiffs are not parties to those contracts. Plaintiffs, in their opposition to defendant's motion to dismiss, counter that their claim is based on a fiduciary duty rooted in both HERA and the PSPAs. As to HERA, plaintiffs assert that Congress made the FHFA-C a fiduciary by authorizing it to control the Enterprises, entrusting it with duties that are at the core of what it means to be a fiduciary, and using terminology—"conservator"—associated with a fiduciary. With respect to the PSPAs, plaintiffs argue that Treasury owes a fiduciary duty to the shareholders because it, acting with the FHFA-C, acquired control rights under the contract.

The court, pursuant to the Tucker Act, lacks jurisdiction over tort claims. 28 U.S.C. § 1491(a)(1). A breach of fiduciary duty is generally classified as a tort. Newby v. United

States, 57 Fed. Cl. 382, 294 (2003). A fiduciary duty claim, however, does not sound in tort for purposes of the Tucker Act when the fiduciary relationship is founded on a money-mandating statute or a contractual provision between the claimant and United States. See Hopi Tribe v. United States, 782 F.3d 662, 667 (Fed. Cir. 2015) (statute); Cleveland Chair Co. v. United States, 557 F.2d 244, 246 (Ct. Cl. 1977) (contract); see also 28 U.S.C. § 1491(a)(1) (providing jurisdiction over claims "founded upon . . . any Act of Congress . . . or contract with the United States").

The initial issue is whether HERA establishes a fiduciary relationship between the FHFA-C and the Enterprises' shareholders. The court begins with the language of the statute. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). "If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect." Rosete v. Office of Pers. Mgmt., 48 F.3d 514, 517 (Fed. Cir. 1995); accord Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Congress provided in HERA that the FHFA-C is only required to act in the interests of itself or the Enterprises. 12 U.S.C. § 4617(b)(2)(J). That statement reflects a clear intent: the FHFA-C does not owe a fiduciary duty to shareholders because the conservator is not required to consider shareholders' interests.[16] See id.; see also Collins v. Mnuchin, 938 F.3d 553, 580 (5th Cir. 2019) (en banc) (noting that HERA "may permit" the FHFA-C to pursue actions that are "inconsistent with fiduciary duties"), petitions for cert. filed, 88 U.S.L.W. 3114 (U.S. Sept. 25, 2019) (No. 19-422), 88 U.S.L.W. 3146 (U.S. Oct. 25, 2019) (No. 19-563). The plain language controls, and therefore the court does not consider the peripheral considerations urged by plaintiffs such as the implications of the word "conservator," the FHFA-C's control over the Enterprises, or the FHFA-C's other powers. In sum, plaintiffs cannot establish jurisdiction for their fiduciary duty claim by relying on HERA.

Next, the court turns to whether Treasury, acting together with the FHFA-C, owed a fiduciary duty to the Enterprises' other shareholders because it acquired control rights by agreeing to the PSPAs. Plaintiffs' argument is premised on the state-law principle (which they term "general corporate law") that a controlling shareholder owes a fiduciary duty to the minority shareholders. The court is not convinced. First, plaintiffs' allegation of a fiduciary relationship is not founded on a contract within the meaning of the Tucker Act. Plaintiffs are not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs. They invoke the contracts solely to establish that Treasury, with the assistance of the FHFA-C, is a controlling shareholder and rely on that conclusion to argue that it has a fiduciary duty based on state law.

[16] The court's interpretation of HERA's plain language is buttressed by the fact that Congress seemingly made a deliberate decision to exclude shareholder interests from the FHFA-C's considerations. Congress modeled HERA on the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Jacobs v. Fed. Hous. Fin. Agency, 908 F.3d 884, 893 (3d Cir. 2018). Under FIRREA, Congress permitted the FDIC as conservator to consider the best interests of a bank, its depositors, or the FDIC. 12 U.S.C. § 1821(d)(2)(J)(ii). Although Congress permitted the FDIC to take into consideration the interests of its depositors, Congress omitted the analogue of depositors—shareholders—from the list of germane interests that the conservator can consider when acting pursuant to HERA. Compare id. (FIRREA), with 12 U.S.C. § 4617(b)(2)(J) (HERA). The omission is telling.

The contract, otherwise stated, is one step removed from the purported genesis of the fiduciary duty—the application of state-law principles. That gap is too much in light of the court's obligation to narrowly construe the Tucker Act's waiver of sovereign immunity. See Smith, 855 F.2d at 1552 (noting that the Tucker Act is narrowly construed); see also Perry II, 864 F.3d at 619-20 (rejecting the legal theory that the Enterprises' shareholders' need to reference the PSPAs for their fiduciary duty claim was enough to conclude that the claim was rooted in a contract for purposes of the Tucker Act).

Second, plaintiffs fail to demonstrate the applicability of the state-law principles underlying their theory for why Treasury assumed fiduciary duties. Federal law governs the obligations Treasury incurred by entering into the PSPAs. See Boyle v. United Techs. Corp., 487 U.S. 500, 519 (1988) ("The proposition that federal common law continues to govern the 'obligations to and rights of the United States under its contracts' is nearly as old as Erie [v. Tompkins, 304 U.S. 64 (1938),] itself."). Although courts may shape federal law by drawing from state-law principles, plaintiffs do not explain why doing so is appropriate in this instance.

Third, plaintiffs do not prevail even if their fiduciary duty claim could be founded on a contract and federal common law incorporates the state-law principles regarding controlling shareholders' fiduciary obligations. Under Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders. See Ivanhoe Partners v. Newmont Min. Corp., 535 A.2d 1334, 1344 (Del. 1987); Parsch v. Massey, 79 Va. Cir. 446 (2009); see also Quadrant Structured Prod. Co. v. Vertin, 102 A.3d 155, 183 (Del. Ch. 2014) (acknowledging that those "who effectively control a corporation" owe a fiduciary duty to others).[17] To have the requisite level of control, the controlling shareholder must (1) be able to exercise a majority of the corporation's voting power or (2) direct the corporation without owning a majority of stock. Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1113 (Del. 1994). The latter, effective exercise of control, "is not an easy test to satisfy"; the individual or group must be, "as a practical matter, . . . no differently situated than if they had majority voting control." In re PNB Holding Co. S'holders Litig., No. CIV.A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006).

Plaintiffs have not established that Treasury meets either control test. First, plaintiffs do not allege that Treasury owns any of the Enterprises' voting stock. Treasury purchased preferred stock and acquired the right to buy common (i.e., voting) stock, but there is no indication that Treasury exercised its warrants or otherwise acquired common stock.[18] Second, plaintiffs do not

[17] The court refers to Delaware and Virginia law because Fannie is a Delaware corporation, and Freddie is a Virginia corporation. When evaluating Virginia law, the court also looks to Delaware state court decisions because Virginia courts do so to resolve unsettled issues in the Commonwealth. E.g., U.S. Inspect Inc. v. McGreevy, No. 160966, 2000 WL 33232337, at *4 (Va. Cir. Ct. Nov. 27, 2000).

[18] Even if Treasury had exercised its option to buy a majority of the voting stock, it would not be a controlling shareholder because the FHFA-C succeeded to all of the shareholders' rights. See 12 U.S.C. § 4617(b)(2)(A) (noting that the FHFA-C, by operation of law, succeeds to all rights and powers of any Enterprise shareholder). Treasury, therefore, would have no voting power.

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demonstrate that Treasury exercised effective control over the Enterprises or was, in plaintiffs' terms, a "dominant shareholder." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 29 (quoting Sisti, 324 F. Supp. 3d at 283 n.9). Although Treasury acquired the right to preclude the Enterprises from taking certain actions, Treasury did not control the Enterprises because it could not direct any action—it could only respond to certain requests made by the Enterprises. As a practical matter, therefore, Treasury is situated differently than if it had majority voting power.

Having rejected the contentions advanced by plaintiffs in their opposition brief, the court turns to an argument that appears for the first time in plaintiffs' supplemental brief, which was filed at the court's request after the initial round of briefing on defendant's omnibus motion to dismiss was complete, Fairholme II was decided, and the court held a status conference regarding further proceedings in the related cases.[19] In their supplemental brief, plaintiffs contend that their fiduciary duty claim was founded on a contention that Treasury and the FHFA-C acted as a "control group," that this contention was set forth in their opposition brief in the section addressing the court's jurisdiction over their fiduciary duty claim, and that the court did not, in Fairholme II, consider this contention. But no such contention was made in plaintiffs' opposition brief.

In their opposition brief, plaintiffs explained that under state law, multiple shareholders who are legally connected can form a "control group" and be "deemed a single, majority shareholder," and then asserted that Treasury and the FHFA-C were such a control group, acting in concert as the United States. See Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 22-26. In other words, plaintiffs advanced their control group contention solely to establish that their suit was against the United States. In the portion of their opposition devoted to countering defendant's jurisdictional attack on their fiduciary duty claim, plaintiffs asserted only two bases for a fiduciary duty; each one was treated separately as governing the conduct of either Treasury or the FHFA-C. They did not argue that the fiduciary duty arose from Treasury and the FHFA-C acting as a control group. Accordingly, the court did not consider plaintiffs' control group allegation as a foundation for any fiduciary duty claim in Fairholme II, among the arguments raised by the plaintiffs in these related cases.

Because plaintiffs' control group contention was not raised in their opposition brief in support of their fiduciary duty claim, it is waived. See United States v. Ford Motor Co., 463 F.3d 1267, 1277 (Fed. Cir. 2006) (explaining that "[a]rguments raised for the first time in a reply brief are not properly before this court"); Ironclad/EEI v. United States, 78 Fed. Cl. 351, 358 (2007) (noting that "under the law of this circuit, arguments not presented in a party's principal brief to the court are typically deemed to have been waived"). But even if plaintiffs' argument were not waived, it is not persuasive. In Fairholme II, the court explained why neither Treasury nor the FHFA-C owed a fiduciary duty to the shareholders of Fannie and Freddie. 147 Fed. Cl. at 37-40. The court is not persuaded that a control group composed of two entities, neither of which was bound by the fiduciary duty posited by plaintiffs, would be bound by a fiduciary duty

[19] As defendant notes, the court did not invite plaintiffs, after the status conference held March 5, 2020, to relitigate issues already decided in Fairholme II.

simply because the entities are alleged to have worked in concert against the interests of the other shareholders of the Enterprises. Plaintiffs' attempt to graft a state law concept of a control group of shareholders onto a Tucker Act jurisdictional inquiry is not anchored in binding or even persuasive precedent, as explained in Fairholme II. Id. at 39-40. Having considered the allegations in plaintiffs' amended complaint, the timely arguments set forth in plaintiffs' opposition brief, and the untimely argument raised in plaintiffs' supplemental brief, the court concludes that it lacks jurisdiction over plaintiffs' fiduciary duty claim because it sounds in tort. Therefore, it dismisses count III of their amended complaint.

2. Plaintiffs' takings and illegal-exaction claims do not sound in tort.

Defendant also argues that plaintiffs' Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the FHFA-C. Plaintiffs counter that they have pleaded the predicates for takings and illegal-exaction claims, which means that it is irrelevant whether they also alleged facts that are germane to tortious actions.

When a party pleads the predicates for a takings claim or illegal-exaction claim, the court possesses jurisdiction to entertain such claims. See Hansen v. United States, 65 Fed. Cl. 76, 80-81 (2005) ("[S]o long as there is some material evidence in the record that establishes the predicates for a [claim covered by the Tucker Act,] . . . a plaintiff succeeds in demonstrating subject matter jurisdiction in this court . . . ."). Those claims, at a basic level, are contentions that the government expropriated private property lawfully (takings) or unlawfully (illegal exaction). See Orient Overseas Container Line (UK) Ltd. v. United States, 48 Fed. Cl. 284, 289 (2000) ("Takings claims arise because of a deprivation of property that is authorized by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation." (citing Dureiko v. United States, 209 F.3d 1345, 1359 (Fed. Cir. 2000); Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-08 (Ct. Cl. 1967))). If a party alleges the necessary predicates for these claims, the court is not deprived of jurisdiction even if the complaint contains allegations that could support a tort claim. See El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1353 (Fed. Cir. 2004) ("That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims."); Rith Energy, Inc. v. United States, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that this court has jurisdiction over a takings claim "even if the government's action was subject to legal challenge on some other ground"). Here, plaintiffs plead the predicates for takings and illegal-exaction claims by alleging, in essence, that they were forced to give their property to the government because of lawful or unlawful government conduct. Therefore, it is of no import to the court's jurisdiction whether plaintiffs have alleged facts that would also support a tort claim.

C. The court lacks jurisdiction over plaintiffs' implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract.

Defendant argues next that the court lacks jurisdiction to entertain plaintiffs' implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract. Specifically, defendant asserts that plaintiffs have not established that they are intended beneficiaries independent of their status as shareholders and that any benefit that is related to their status as shareholders is insufficient for jurisdiction. Plaintiffs counter that they are intended third-party beneficiaries of implied contracts, between the FHFA and each Enterprise's board, in which the boards consented to the conservatorships in exchange for the FHFA-C operating the Enterprises as a fiduciary and returning them to sound condition. Specifically, plaintiffs assert that the intent to benefit the shareholders is evident from (1) the boards' consent to the conservatorships because shareholders would benefit from a conservator focused on returning the Enterprises to a better condition, and (2) the government acknowledging that the Enterprises' stock would remain outstanding while the Enterprises were in conservatorship.

The court's jurisdiction over contract claims is limited by the Tucker Act. Ransom v. United States, 900 F.2d 242, 244 (Fed. Cir. 1990). Of particular import here, ordinarily, a plaintiff must be in privity of contract with the United States to invoke this court's jurisdiction over a contract claim against the government. Fid. & Guar. Ins. Underwriters, Inc. v. United States, 805 F.3d 1082, 1087 (Fed. Cir. 2015). But privity is not required if "the plaintiff can demonstrate that it was an intended third-party beneficiary under the contract." Pac. Gas & Elec. Co. v. United States, 838 F.3d 1341, 1361 (Fed. Cir. 2016).

"Third party beneficiary status is an 'exceptional privilege.'" Glass v. United States, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (quoting German All. Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 230 (1912)). The conditions for attaining such status are "stringent." Anderson v. United States, 344 F.3d 1343, 1352 (Fed. Cir. 2003). "[S]hareholders seeking status to sue as third-party beneficiaries of an allegedly breached contract must 'demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.'" Castle v. United States, 301 F.3d 1328, 1338 (Fed. Cir. 2002) (quoting Glass, 258 F.3d at 1354). Specifically, "the contract must express the intent of the promissor to benefit the shareholder personally, independently of his or her status as shareholder." Glass, 258 F.3d at 1353-54. As a practical matter, the shareholder does not personally benefit independent of its status as a shareholder when the contractual promises pertain only to the treatment of the company. See FDIC v. United States, 342 F.3d 1313, 1320 (Fed. Cir. 2003) (noting that the broken promises concerned the treatment of the company such that the plaintiffs did not benefit independent of their status as shareholders); accord Maher v. United States, 314 F.3d 600, 605 (Fed. Cir. 2002) (concluding that the plaintiffs were not third-party beneficiaries when they failed to "establish[] that the government took on any obligations in the merger agreement for [the plaintiffs'] personal benefit, or even that the merger agreement contains any provisions pertaining to [the plaintiffs] personally").

As plaintiffs are not parties to the alleged implied contracts between the FHFA and the Enterprises, the relevant issue is whether plaintiffs are third-party beneficiaries of those agreements. They are not. First, it is of no import that the Enterprises, as plaintiffs argue, purportedly agreed to the conservatorships because that would serve the interests of shareholders. Indeed, "every action of a corporation is supposed to benefit its shareholders," but the "law has not viewed this general benefit as making every shareholder a third-party beneficiary." Suess v. United States, 33 Fed. Cl. 89, 94 (1995). Second, plaintiffs' allegations reflect that they only benefit from the alleged implied contracts by virtue of their shareholder status. The relevant promises concerned how the FHFA-C would operate the Enterprises; the crux of the purported agreements was the FHFA-C promising to operate the Enterprises as a fiduciary to preserve their assets and return them to sound condition. Because the promises in the alleged implied contracts were directed at the Enterprises, plaintiffs cannot be third-party beneficiaries of the alleged contract. See FDIC, 342 F.3d at 1320. Third, plaintiffs have not demonstrated that the FHFA intended that plaintiffs would benefit independently of their status as shareholders even if they did so benefit. Plaintiffs rely on the FHFA's statements that private stock would remain outstanding and shareholders would continue to hold an economic interest in their stock. Those factual statements, however, do not reflect that the FHFA intended to confer any specific benefit on plaintiffs independent of their role as shareholders. Because plaintiffs have not alleged facts reflecting that the FHFA intended to confer a personal benefit on them, they are not third-party beneficiaries. See Glass, 258 F.3d at 1353-54. In sum, the court lacks jurisdiction to entertain plaintiffs' implied-in-fact-contract claim because plaintiffs are neither parties to a contract with the government nor third-party beneficiaries of any such agreement. Therefore, the court dismisses count IV of their amended complaint.

V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiffs' claims, defendant challenges plaintiffs' standing to pursue their claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. Starr Int'l Co. v. United States, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is "assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties." Kowalski v. Tesmer, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that controls. See Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted."), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014). Thus, in a suit brought by shareholders, it is the substance of the allegations and not the label assigned to the allegations—i.e., direct or derivative—that matters. See Starr, 856 F.3d at 966-67; see also In re Sunrise Sec. Litig., 916 F.2d 874, 882 (3d Cir. 1990) ("Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties."). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based on the rights of the company. See Starr, 856 F.3d at 966-67; see also Weir v. Stagg, No. 09-21745-CIV, 2011 WL 13174531, at *9 (S.D. Fla. Feb. 7, 2011) ("Shareholders do not have standing to bring a direct action for injuries suffered by a corporation, but rather, must bring a derivative action."). A shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the corporation's injuries—to have standing to litigate those claims. See Starr, 856 F.3d at 966-67.

Defendant argues that plaintiffs lack standing because their claims, pled as direct claims, actually belong to the Enterprises and are therefore derivative in nature. The parties in this case and the related cases fully briefed and argued this issue prior to the court issuing the Fairholme II decision. The court concluded in Fairholme II that Fannie and Freddie shareholders lack standing to pursue direct claims that are derivative in nature. Thereafter, the court solicited short supplemental briefs from plaintiffs and defendant regarding the applicability of the holdings in Fairholme II to this case. In their supplemental brief, plaintiffs suggest that their allegations are materially different from those asserted in Fairholme for purposes of standing, while defendant contends in its supplemental brief that there are no material differences. All of the parties' arguments are addressed below.

A. Plaintiffs' allegations are not materially different from the allegations in Fairholme.

As an initial matter, plaintiffs contend that their allegations are materially different from those advanced in Fairholme in two respects, such that the standing inquiry would be affected. Plaintiffs first argue that the type of harm they have suffered and the type of relief they have requested distinguish their claims from the direct claims in Fairholme. In essence, plaintiffs attempt to distinguish what they characterize as the Fairholme plaintiffs' allegation of the expropriation of the Enterprises' assets from their allegation of the expropriation of their economic interests. As defendant points out, however, the direct claims in Fairholme and the claims in this case are virtually indistinguishable in nature. All four counts of the amended complaint in this case mirror, in every essential way, the direct takings, illegal-exaction, fiduciary duty, and breach-of-implied-contract claims in Fairholme. Expropriation of the shareholders' economic interests was alleged in Fairholme, just as it is alleged in the first amended complaint in this case. Compare Fairholme II, 147 Fed. Cl. at 20, 46-47, with 1st Am. Compl. ¶¶ 89, 106-108. Thus, the standing analysis in Fairholme II is fully applicable to the claims presented here.

Plaintiffs next invoke their reliance on the allegation of the existence of a "control group," formed by Treasury and the FHFA-C, that dominated the Enterprises and injured them. In their view, this factual distinction in their amended complaint is significant because it was not discussed in Fairholme II. Plaintiffs fail to explain, however, how this factual distinction gives them standing to bring their claims. Plaintiffs apparently infer a logical connection between a control group of shareholders and a controlling shareholder, but the connection is not explained in a way that is helpful to the court. Indeed, in their supplemental brief plaintiffs cite primarily to a section of their opposition brief that does not address the topic of standing at all. If plaintiffs wished to advance a standing argument that specifically relied on the state law concept of a control group of shareholders and cases discussing such a phenomenon, no such argument was made in their opposition brief. Thus, any such standing argument that plaintiffs may be attempting to make in their supplemental brief, to the extent that one could be discerned, is waived as untimely.[20] See Ironclad/EEI, 78 Fed. Cl. at 358.

B. Plaintiffs' claims actually belong to the Enterprises.

Having determined that plaintiffs' allegations do not differ materially from those advanced in Fairholme, the court turns to defendant's contention that plaintiffs lack standing to

[20] Even if this argument were not waived, the court agrees with defendant that the control group scenario alleged by plaintiffs also fails to satisfy the criteria for dual-natured claims that might provide standing to a shareholder plaintiff asserting direct claims. See Section V.B, infra (discussing the criteria for dual-natured claims).

litigate their claims. Defendant's standing argument is premised on its assertion that plaintiffs' claims actually belong to the Enterprises—and are therefore derivative in nature—because, to prevail, plaintiffs would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises. Plaintiffs counter that they assert direct claims because the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises' capital structure to plaintiffs' detriment, which renders the claims for such conduct both direct and derivative under the dual-nature exception.[21] Defendant replies that the Federal Circuit rejected the notion that a plaintiff states a direct claim by alleging it was targeted by the challenged action. Defendant also contends that the dual-nature exception is not applicable because Treasury was not a controlling shareholder, the Enterprises did not issue new shares, and the PSPA Amendments did not involve the reallocation of power.

Neither theory plaintiffs advance for why their claims are substantively direct, rather than derivative, is persuasive. First, it is of no import whether the government targeted shareholders with the PSPA Amendments. See Starr, 856 F.3d at 973 (noting that the plaintiffs did not "sufficiently explain why the Government's subjective motivations are relevant to the inquiry into direct standing"). The direct-versus-derivative inquiry "turns on the plaintiff's injury, not the defendant's motive." Pagan v. Calderon, 448 F.3d 16, 30 (1st Cir. 2006). Second, plaintiffs have not asserted claims that qualify as both direct and derivative based on the dual-nature exception. The Federal Circuit explained that, pursuant to this exception, shareholder claims may be both direct and derivative "when a 'reduction in [the] economic value and voting power affected the minority stockholders uniquely . . . .'" Starr, 856 F.3d at 968 (quoting Gentile v. Rossette, 906 A.2d 91, 99 (Del. 2006)). Specifically, shareholder claims are both direct and derivative if

> "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value," and "(2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders."

Id. (quoting Gentile, 906 A.2d at 100). The exception does not apply here because Treasury was not a controlling shareholder at the time the PSPA Amendments were executed,[22] the PSPA Amendments did not involve the issuance of new shares, and shareholder voting power was not reallocated under the PSPA Amendments. It is not enough, contrary to plaintiffs' contention, that the government allegedly exacted economic value from the other shareholders by

[21] The plaintiffs in the related cases also asserted that their claims must be construed as direct claims to vindicate important federal policies if shareholders cannot assert derivative claims because of HERA. But as this court held in Fairholme II, the shareholders of the Enterprises, notwithstanding HERA, have standing to assert derivative claims because of the FHFA-C's conflict of interest. 147 Fed. Cl. at 49-51.

[22] Treasury is not a controlling shareholder for the reasons set forth in Section IV.B.1, supra.

rearranging the corporate structure. See El Paso Pipeline GP Co. v. Brinckerhoff, 152 A.3d 1248, 1264 (Del. 2016) (applying Gentile and holding a plaintiff does not state a direct claim under the dual-nature exception by pleading the "extraction of solely economic value from the minority by a controlling stockholder"). Because plaintiffs have not established that their claims are substantively direct in nature, they cannot demonstrate that they have standing to litigate those claims.

Plaintiffs fare no better if the court moves beyond their arguments for why their claims are substantively direct in nature. Federal law governs whether plaintiffs' claims are direct or derivative. See Starr, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. Id.; see also Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 97 (1991) (noting the "presumption that state law should be incorporated into federal common law"). Under Delaware law, the test for whether a shareholder's claim is derivative or direct depends on the answers to two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004) (en banc). "Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow." Gentile, 906 A.2d at 99, discussed in Starr, 856 F.3d at 965. Such claims are derivative even "though the overpayment may diminish the value of the corporation's stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend." Protas v. Cavanagh, No. CIV.A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012); see also Hometown Fin. Inc. v. United States, 56 Fed. Cl. 477, 486 (2003) ("[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to nothing more than a diminution in stock value or a loss of dividends.").

Plaintiffs focus on the expropriation of the Enterprises' assets via compulsory payments of all profits. The gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury. Regardless of plaintiffs' label (direct) or theory (taking, illegal exaction, breach of fiduciary duty, or breach of implied contract) for their claims, the claims are substantively derivative in nature because they are premised on allegations of overpayment.[23] See Gentile, 906 A.2d at 99; see also Roberts, 889

[23] Plaintiffs would remain unsuccessful if their allegations of waste and mismanagement (styled as self dealing, overreach, or abuse of discretion) were construed to be indicative of some action other than overpayment. Any claims premised on waste and mismanagement are derivative in nature. Kramer v. W. Pac. Indus., Inc., 546 A.2d 348, 353 (Del. 1988) (noting that "mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature"). Plaintiffs' claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. See Hometown, 56 Fed. Cl. at 486 (stock prices); In re Straight Path Commc'ns Inc. Consol. S'holder Litig., No. CV 2017-0486-SG, 2017

F.3d at 409 (explaining that the plaintiffs asserted "classic derivative claims" when they alleged that "the [PSPA Amendments] illegally dissipated corporate assets by transferring them to Treasury"). Plaintiffs cannot transform their substantively derivative claims into direct claims by merely alleging that, as a result of overpayments, they were deprived of their stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiffs' purported "harms are 'merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.'" Protas, 2012 WL 1580969, at *6 (quoting Gentile, 906 A.2d at 99); see also Agostino v. Hicks, 845 A.2d 1110, 1122 (Del. Ch. 2004) ("[T]he inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation."). Because plaintiffs' claims are derivative in nature, plaintiffs lack standing to pursue those claims on their own behalf.

C. Plaintiffs' claims are direct claims, as pled, and cannot be deemed to be derivative claims.

Plaintiffs, while acknowledging that they assert only direct claims,[24] attempt to avoid a dismissal of those claims for lack of standing by contending that "[e]ven if [their] direct claims were deemed derivative, they still may assert them, under circuit precedent, because the [FHFA-C] as conservator has a manifest conflict of interest." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 39. The precedent upon which plaintiffs rely is the Federal Circuit's decision in First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279 (Fed. Cir. 1999).

In First Hartford, the Federal Circuit held that a shareholder of a company could bring a derivative claim, notwithstanding a succession clause, if the company was controlled by an entity with a conflict of interest. Id. at 1283; accord id. at 1295 (remarking that the purpose of derivative suits was to "permit shareholders to file suit on behalf of a corporation when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation"). The court in Fairholme II concluded that pursuant to First Hartford, the plaintiff who asserted derivative claims in Fairholme had standing to litigate those claims due to the FHFA-C's conflict of interest. 147 Fed. Cl. at 49-51.

WL 5565264, at *4 (Del. Ch. Nov. 20, 2017) ("Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . . .").

[24] Indeed, there is no dispute that the four claims plaintiffs assert in their amended complaint are direct claims. In each count plaintiffs emphasize that the harm to plaintiffs is direct. 1st Am. Compl. ¶¶ 109, 113, 119, 135. In addition, the relief requested by plaintiffs is for monetary relief payable to them, not to the Enterprises. Id. at 46; see also Pls.' Suppl. Br. on Outstanding Mot. to Dismiss 3-4 (arguing that payments to the Enterprises would be of no use to plaintiffs). Finally, the amended complaint contains a statement that plaintiffs' claims are direct in nature. See 1st Am. Compl. ¶ 103 ("[A]ny claim raised by Mason that might be considered derivative on behalf of the Company is in fact direct, on behalf of Mason itself.").

If plaintiffs had asserted derivative claims in their amended complaint, the "conflict of interest" holding in First Hartford would have aided plaintiffs in their quest to establish standing. But they did not do so. Thus, their reliance on this holding in First Hartford is misplaced.

As for plaintiffs' suggestion that their direct claims could be deemed derivative, they identify no authority for that recharacterization of their claims, even though they had the opportunity to do so in their opposition brief and their supplemental brief. The court finds plaintiffs' "direct claims deemed derivative" argument, Pls.' Suppl. Br. on Outstanding Mot. to Dismiss 5 (emphasis removed), to be unsupported by authority and unpersuasive for the purpose of establishing plaintiffs' standing to bring the claims in their amended complaint.[25]

D. Plaintiffs' standing to bring direct claims is not established by another holding in First Hartford.

Finally, the court addresses an assertion in plaintiffs' opposition brief that was not explicitly addressed in Fairholme II. Only one sentence of that sixty-page brief was devoted to the following contention included among plaintiffs' standing arguments: "[T]he Federal Circuit has repeatedly recognized a direct claim where a shareholder alleged deprivation of a contingent property interest in a bank." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 38 (citing First Hartford, 194 F.3d at 1296; Cal. Hous. Sec., Inc. v. United States, 959 F.2d 955, 957 n.2 (Fed. Cir. 1992)). Defendant, in support of its challenge to plaintiffs' standing to bring their claims, clearly relied on more recent precedent, the Federal Circuit's decision in Starr, to argue that plaintiffs' claims were derivative claims, not direct claims. Plaintiffs, notwithstanding their citation to First Hartford and a footnote in a case discussed in First Hartford, did not attempt, in any meaningful way, to explain why Starr should not be applied and followed in this case. Because plaintiffs' reliance on First Hartford as support for a shareholder's standing to bring direct claims is cursory and undeveloped, the court is within its discretion to deem this argument waived. See SmithKline Beecham Corp. v. Apotex Corp., 439 F.3d 1312, 1320 (Fed. Cir. 2006) (noting that the court has discretion on whether to consider undeveloped arguments).

Even if this argument were not waived, the Federal Circuit's Starr decision remains the binding precedent most on point. In Starr, the distinction between direct and derivative claims brought by shareholders is the focus of the Federal Circuit's standing analysis. 856 F.3d at 963-73. Just as here, the plaintiffs brought takings and illegal-exaction claims related to a government intervention, during a financial crisis, affecting the future of a corporation in which they owned shares. Id. at 958-61. Starr provides the test for determining whether such claims are direct or derivative in nature and requires that nominally direct claims—that are actually derivative claims—be dismissed for lack of standing. Id. at 973.

In the face of this binding precedent, the court cannot conclude that the holding in First Hartford, which concerns direct Fifth Amendment takings claims, is more relevant. It is true that in First Hartford shareholders of a bank in receivership could pursue their takings claims as

[25] As defendant notes, claims brought on behalf of the Enterprises are asserted in numerous shareholder derivative claims in these related cases.

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direct claims against the United States. 194 F.3d at 1287. However, First Hartford does not address the distinction between direct and derivative claims. When faced with binding precedent that addresses a crucial distinction, such as Starr, and one that does not, such as First Hartford, the court follows the precedent most on point. Cf. Union Elec. Co. v. United States, 363 F.3d 1292, 1297 (Fed. Cir. 2004) ("[W]e have repeatedly held that the disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue." (citing Boeing N. Am., Inc. v. Roche, 298 F.3d 1274, 1282 (Fed. Cir. 2002))).

In sum, plaintiffs have not established that they have standing to litigate their claims because they do not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court dismisses plaintiffs' claims on standing grounds to the extent that it has subject-matter jurisdiction over those claims.[26]

VI. CONCLUSION

For the reasons stated above, the court **GRANTS** defendant's motion to dismiss and **DISMISSES** plaintiffs' complaint because the court lacks jurisdiction to entertain their breach of fiduciary duty and implied-in-fact-contract claims, and plaintiffs lack standing to pursue any of their claims. The clerk shall enter judgment accordingly. No costs.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

[26] As explained above, the court lacks jurisdiction over plaintiffs' claims for breach of fiduciary duty and breach of implied contract. See supra Sections IV.B.1 (fiduciary duty), IV.C (contract). In addition, because all of plaintiffs' claims must be dismissed for lack of standing, the court need not reach defendant's remaining arguments that these claims should be dismissed for failure to state a claim upon which relief can be granted.

In the United States Court of Federal Claims

No. 18-369C
(Filed: June 8, 2020)

AKANTHOS OPPORTUNITY MASTER FUND, L.P., Plaintiff, v. THE UNITED STATES, Defendant.	*	Motion to Dismiss; RCFC 12(b)(1); RCFC 12(b)(6); Jurisdiction; Standing; Direct Claims; Instrumentalities; Coercion; Agent; Conservators; Conflict of Interest; Third-Party Beneficiaries; Stock; Shareholders; Fannie; Freddie; FHFA

Lawrence D. Rosenberg, Washington, DC, for plaintiff.

Kenneth M. Dintzer, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiff in this case challenges the actions of the United States during the conservatorships of the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie"). Specifically, plaintiff takes issue with the conservator for Fannie and Freddie (collectively, the "Enterprises") amending a funding agreement between the Enterprises and the United States Department of the Treasury ("Treasury"). Based on the revisions to that agreement, plaintiff seeks the return of money illegally exacted, damages for breach of contract and breach of fiduciary duty, and compensation for a taking pursuant to the Fifth Amendment to the United States Constitution ("Constitution"). Defendant moves to dismiss plaintiff's amended complaint, arguing that the court lacks subject-matter jurisdiction over plaintiff's claims, plaintiff lacks standing to pursue its claims, and plaintiff fails to state a claim upon which relief may be granted. For the reasons stated below, the court grants defendant's motion to dismiss.

I. BACKGROUND

A. The Enterprises are private companies that are under the control of a conservator.

1. The Enterprises operated independently before the financial crisis.

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities that are sold to investors.[1] 1st Am. Compl. ¶¶ 16-17; Fairholme II, 147 Fed. Cl. at 15. Congress chartered Fannie in 1938 and established Freddie in 1970. 1st Am. Compl. ¶¶ 16-17. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. Id. Freddie is organized under Virginia law, and Fannie is organized under Delaware law. Id. The Enterprises issued their own common and preferred stock. Id. ¶ 19. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. Fairholme II, 147 Fed. Cl. at 15. Those owning preferred stock, including plaintiff in this suit, acquired the right to receive dividends and a liquidation preference. 1st Am. Compl. ¶ 19.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. Id. ¶ 20. Although the Enterprises began recording losses in 2007, they were stable and adequately capitalized. Id. ¶¶ 22-23. Otherwise stated, the Enterprises were not in financial distress or otherwise at risk of insolvency. Id.

2. Congress created the Federal Housing Finance Agency to regulate the Enterprises and authorized the agency to serve as a conservator for each Enterprise.

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency ("FHFA") and provided it with supervisory and regulatory authority over the Enterprises. See 12 U.S.C. § 4511(a)-(b) (2018).[2] Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator ("FHFA-C") for each Enterprise to reorganize, rehabilitate, or wind up its affairs.[3] Id.

[1] This background section is a less comprehensive version of the court's recitation of facts in a related case, Fairholme Funds, Inc. v. United States, 147 Fed. Cl. 1 (2019) ("Fairholme II"), motion to certify interlocutory appeal granted, 147 Fed. Cl. 126 (2020).

[2] Congress has not amended the relevant portions of HERA since enacting the law in 2008. The court, therefore, refers to the most recent version of the United States Code.

[3] To avoid any ambiguity, the court reiterates that it is using "FHFA" to refer to the agency acting in its regulatory role and "FHFA-C" when discussing the agency acting as a conservator.

§ 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its obligations. Id. § 4617(a)(3).[4] The conservator, once appointed, functions independently; it is not "subject to the direction or supervision of any other agency of the United States or any State in the exercise of [its] rights, powers, and privileges . . . ." Id. § 4617(a)(7).

Congress also delineated the scope of the FHFA-C's powers in HERA. See generally id. § 4617. As soon as it is appointed, the FHFA-C "immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . . ." Id. § 4617(b)(2)(A). Congress also conferred on the conservator the power to "[o]perate the [Enterprise]." Id. § 4617(b)(2)(B). Pursuant to that power, the conservator "may," among other things, "perform all functions of the [Enterprise]," "preserve and conserve the assets and property of the [Enterprise]," and "provide by contract for assistance in fulfilling any function . . . of the [conservator]." Id. The conservator "may" also "take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise]." Id. § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator "may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]" and "take any action authorized by [12 U.S.C. § 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA]." Id. § 4617(b)(2)(J). By describing the FHFA-C's role primarily in terms of what powers it "may" exercise, see generally id. § 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its powers, see United States v. Rodgers, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."). Simply stated, the FHFA has "extraordinarily broad flexibility to carry out its role as conservator." Perry Capital LLC v. Mnuchin, 864 F.3d 591, 606 (D.C. Cir. 2017) ("Perry II"), cert. denied, 138 S. Ct. 978 (2018).

3. Congress authorized Treasury to purchase securities issued by the Enterprises.

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(g) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. Id. §§ 1455(*l*)(4), 1719(g)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the availability of mortgage finance, and protect taxpayers. Id. §§ 1455(*l*)(1)(B), 1719(g)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

(i) The need for preferences or priorities regarding payments to the Government.

[4] Congress enticed the Enterprises to consent to a conservatorship by insulating their board members from any liability to shareholders or creditors for agreeing in good faith to the FHFA's appointment of a conservator. 12 U.S.C. § 4617(a)(6).

(ii) Limits on maturity or disposition of obligations or securities to be purchased.

(iii) The [Enterprise's] plan for the orderly resumption of private market funding or capital market access.

(iv) The probability of the [Enterprise] fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the [Enterprise's] status as a private shareholder-owned company.

(vi) Restrictions on the use of [Enterprise] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

Id. §§ 1455(*l*)(1)(C), 1719(g)(1)(C).

4. The FHFA became the conservator for each Enterprise.

Around the beginning of September 2008, the FHFA and Treasury sought to persuade each Enterprise's board of directors to consent to conservatorship. 1st Am. Compl. ¶ 33. The FHFA told each Enterprise's board that conservatorship would further the interests of the shareholders. Id. Around the same time, the FHFA made an offer to each board: consent to a conservatorship in exchange for the FHFA-C aiming to preserve and conserve the Enterprises' assets, attempting to restore the Enterprises to sound and solvent condition, and terminating the conservatorships when those goals were achieved. Id. ¶¶ 5, 7; Fairholme II, 147 Fed. Cl. at 17. Each Enterprise's board accepted that offer and consented to a conservatorship on September 6, 2008, with an understanding that the FHFA-C would operate in the aforementioned limited ways. Fairholme II, 147 Fed. Cl. at 17.

The conservatorships became effective on September 6, 2008, upon each Enterprise's board's consent. 1st Am. Compl. ¶¶ 33-34; see also 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when "[t]he [Enterprise], by resolution of its board of directors or its shareholders or members, consents to the appointment").

5. The FHFA-C contracted with Treasury to obtain funding for the Enterprises.

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement ("PSPA") with Treasury for each Enterprise. 1st Am. Compl. ¶ 6. Treasury entered into the agreements pursuant to its authority under HERA to buy the Enterprises' securities. Id. ¶¶ 6, 35. Under the PSPAs, Treasury committed to provide up to $100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. Id. ¶ 35. If an Enterprise's liabilities exceeded its assets, then the Enterprise could draw on Treasury's funding commitment in an amount equal to the difference between the Enterprise's liabilities and assets. Fairholme II, 147 Fed. Cl. at 17.

In return for Treasury's funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their respective common stock at a nominal price. 1st Am. Compl. ¶ 35. Treasury's preferred stock had an initial liquidation preference of $1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury's funding commitment. Id. In the event of a liquidation, Treasury was entitled to recover the full liquidation value of its shares before any other shareholder would receive compensation. Id. Second, Treasury bargained for the right to a quarterly cash dividend that would be equal, per annum, to 10% of its liquidation preference. Id. An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. Id. Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. Id. ¶¶ 35, 41. Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. Id. ¶ 36.

The FHFA-C and Treasury amended each Enterprise's PSPA on May 6, 2009, to increase Treasury's funding commitment to each Enterprise from $100 billion to $200 billion. Id. ¶ 43. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed $200 billion. Id. ¶ 44.

6. The Enterprises' finances improved during their conservatorships.

In the early stages of the conservatorships, each Enterprise's net worth decreased as it reported losses. Fairholme II, 147 Fed. Cl. at 18. Some of the losses resulted from the FHFA-C writing down the value of deferred tax assets.[5] Id. Notwithstanding those on-paper losses, as of late 2009, Fannie had drawn only $60 billion from Treasury, and Freddie had only drawn $51 billion. 1st Am. Compl. ¶ 45.

By 2011 and into 2012, the Enterprises' financial outlooks were promising. In addition to an improvement in the housing market, the Enterprises had improved their financial performance. Id. ¶ 50. They were positioned to further improve their financial condition by revising their valuations of deferred tax assets because of growing profits, and by increasing their earnings due to reduced credit losses. Id. The FHFA-C and Treasury were aware of those forthcoming changes and the Enterprises' improving outlooks. Id. ¶ 8. In August 2012,

[5] A deferred tax asset is an asset that may be used to offset future tax liability. Fairholme II, 147 Fed. Cl. at 18 n.4. A company must write down the value of that deferred asset if it is unlikely to be used to offset future taxable profits. Id. This write down occurs, for example, if a company predicts it will not be profitable in the future. Id.

Treasury and FHFA-C knew that the Enterprises would soon experience improved profitability and received projections reflecting that the Enterprises would have positive comprehensive income in 2012. Id. ¶¶ 51-52. Otherwise stated, the FHFA-C and Treasury knew, by early August 2012, that the Enterprises were poised to generate profits in excess of their respective dividend obligations to Treasury. Id. ¶ 50.

7. Treasury and the FHFA-C agreed to a third amendment to the PSPAs.

At an unspecified time prior to August 2012, Treasury and the FHFA-C began considering a third amendment to each PSPA. Treasury was the driving force behind the initiative to amend the PSPAs' terms. Id. ¶¶ 56, 68. Indeed, an FHFA official reported in early August 2012 that Treasury was making a "renewed push" to implement a new amendment. Id. ¶ 64 (quoting the FHFA official). The FHFA-C learned of the proposed changes before the Enterprises; Treasury informed the Enterprises that the new terms were forthcoming and announced the changes to the Enterprises. Id. ¶ 66. Treasury officials who were involved with the process do not recall Treasury making any backup or contingency plans in the event that the FHFA-C rejected the proposed terms. Fairholme II, 147 Fed. Cl. at 19. The FHFA-C accepted the changes without advocating for different terms. Id.

Treasury and the FHFA-C decided to announce the changed terms in mid-August 2012 because, according to Treasury, the Enterprises would be reporting earnings exceeding their dividend obligation at the beginning of that month. Id. On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA ("PSPA Amendment"). 1st Am. Compl. ¶¶ 2, 9, 53. A key component of the amended PSPAs is the requirement—referred to here as the "Net Worth Sweep"—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise's net worth (except for a small capital reserve amount) rather than a dividend based on a set percentage of the liquidation preference.[6] Id. ¶ 53. Additionally, under the amended PSPAs, the Enterprises are not obligated to pay a periodic commitment fee. Id. ¶ 64.

a. Treasury wanted to ensure that it benefited from the new terms.

With the PSPAs, Treasury sought to secure a more beneficial arrangement for itself, as a representative for taxpayers. During the lead-up to the PSPA Amendments, a Treasury official acknowledged in an internal communication that the government had resolved to "ensure existing common equity holders will not have access to any positive earnings from the [Enterprises] in the future." Id. ¶ 56 (emphasis removed) (quoting the document). Treasury recognized its goal of obtaining all of the Enterprises' profits by executing the PSPA Amendments; it intended to take "every dollar of earnings that [the Enterprises] generate[] . . . to benefit taxpayers." Id. ¶ 10 (quoting a Treasury announcement).

b. The FHFA-C agreed to changes that benefit Treasury.

[6] The capital reserve for each Enterprise started at $3 billion and was set to decrease to $0 by January 2018, but the Enterprises and Treasury agreed in December 2017 to reset the capital reserve amount to $3 billion in the first quarter of 2018. 1st Am. Compl. ¶ 53; Fairholme II, 147 Fed. Cl. at 19 n.5.

For its part, the FHFA-C was operating under the belief that Treasury would benefit from the PSPA Amendments. The FHFA-C prioritized Treasury's interests over the fate of the Enterprises and the interests of their shareholders. Id. ¶ 76. Mel Watt—a former FHFA Director—commented at the time that he did not "lay awake at night worrying what's fair to the shareholders." Id. (quoting an interview).

c. Treasury and the FHFA understood that the PSPA Amendments would not facilitate the Enterprises exiting conservatorship.

Treasury was aware that the new terms of the PSPAs were not conducive to the Enterprises exiting conservatorship. Treasury acknowledged that its goal was to facilitate the "wind down" of the Enterprises. Id. ¶ 56 (quoting a Treasury report). At the time of the PSPA Amendments, Treasury explained that the new deal would ensure that the Enterprises "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." Id. ¶ 69 (emphasis removed) (quoting Treasury press release).

The FHFA shared a similar sentiment. The FHFA's former Acting Director, Edward DeMarco, testified before the United States Senate that the PSPA Amendments "reinforce the notion that the [Enterprises] will not be building capital as a potential step to regaining their former corporate status." Id. ¶ 76 (emphasis removed) (quoting the testimony). Indeed, the FHFA explained to Congress that its vision for the future included a housing industry without Fannie and Freddie. Fairholme II, 147 Fed. Cl. at 20.

d. Treasury has benefited from the PSPA Amendments at the expense of the Enterprises and other shareholders.

There are four significant effects that flowed from the PSPA Amendments. First, plaintiff lost its economic interests in the Enterprises because, under the new terms, private shareholders can never receive dividends or liquidation distributions. 1st Am. Compl. ¶¶ 2, 9, 88-89. Second, Treasury acquired plaintiff's economic interests in the Enterprises because Treasury now possesses "the entire value" of the Enterprises. Id. ¶ 93. Third, Treasury reaped a windfall of $128.9 billion in comparison to what it would have received absent changes to the PSPAs. Id. ¶¶ 85-86 (alleging that the Enterprises paid Treasury $223.6 billion under the PSPA Amendments but would have only paid Treasury $94.7 billion under the previous terms). Fourth, the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink of insolvency. Id. ¶¶ 54, 87.

8. Treasury and the FHFA are committed to ending the conservatorships.

On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the Treasury Secretary to develop, "as soon as practicable," a plan for "[e]nding the

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conservatorships of the [Enterprises] upon the completion of specified reforms . . . ."[7] Memorandum on Federal Housing Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must include proposals for "[s]etting the conditions necessary for the termination of the conservatorships" and outlined some of those conditions. Id. at 12,480. Subsequently, Treasury issued a plan in which it advocated for "begin[ning] the process of ending the [Enterprises'] conservatorships."[8] U.S. Dep't of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf [https://perma.cc/RGH8-N385]; accord id. at 26 ("It is, after 11 years, time to bring the conservatorships to an end."). As part of the plan to end the conservatorships, Treasury proposed that it and the FHFA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. Id. at 26-27.

The FHFA shares Treasury's goals with respect to the conservatorships. Mark Calabria, the current FHFA Director, testified during his confirmation hearing that he wanted to end the conservatorships.[9] 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony). See generally Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs, 116th Cong. 10-40, 74-75, 148-85 (2019) [hereinafter Calabria Testimony] (documenting Mr. Calabria's testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that each Enterprise retains. Calabria Testimony, supra, at 150; see also id. at 25 ("I support the idea of having significantly more capital at the [Enterprises].").

B. Plaintiff owns Fannie and Freddie stock.

There is one plaintiff in this case: Akanthos Opportunity Master Fund, L.P ("Akanthos"). Akanthos is a Cayman Islands Exempted Limited Partnership. 1st Am. Compl. ¶ 13. Akanthos

[7] The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source, the Federal Register. See Murakami v. United States, 46 Fed. Cl. 731, 739 (2000) (noting that the court may take judicial notice of government documents), aff'd, 398 F.3d 1342, 1354-55 (Fed. Cir. 2005); see also Democracy Forward Found. v. White House Office of Am. Innovation, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) ("[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum."). See generally Fed. R. Evid. 201 (discussing judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the court may consider facts derived from sources subject to judicial notice without converting the motion into one for summary judgment. Sebastian v. United States, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

[8] The court takes judicial notice of Treasury's reform plan because it is a government record available from a reliable source, Treasury's website. See supra note 7.

[9] The court takes judicial notice of the relevant testimony because the statements are recorded in government documents. See supra note 7.

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owned Fannie preferred stock and Freddie preferred stock at the time of the Net Worth Sweep. Id. The shares owned by plaintiff were primarily purchased after the conservatorships were established in 2008. Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 1.

II. PROCEDURAL HISTORY

Plaintiff filed its complaint on March 8, 2018. This case was coordinated with similar, related cases assigned to the undersigned judge.[10] Plaintiff filed its first amended complaint in this case on August 16, 2018. In its amended complaint, plaintiff presents four claims. Plaintiff first asserts that the Net Worth Sweep constitutes a Fifth Amendment taking (count I) of its economic interest in its stock. Plaintiff next asserts that the Net Worth Sweep constitutes an illegal exaction (count II) of that same economic interest because the (1) FHFA was operating unconstitutionally and (2) FHFA-C and Treasury exceeded their statutory authority when they approved the PSPA Amendments. Plaintiff also pleads a breach-of-fiduciary-duty claim ("fiduciary duty claim") (count III) premised on the Net Worth Sweep being unreasonable, arbitrary, and contrary to the duty owed to Akanthos as a shareholder. Additionally, plaintiff asserts a breach-of-implied-contract claim (count IV) based on a purported agreement by which the Enterprises consented to the conservatorship in exchange for the FHFA agreeing to preserve the Enterprises' assets with the goal of making them safe and solvent. Specifically, plaintiff asserts that each dividend payment under the Net Worth Sweep constitutes a breach because it depletes the Enterprises' assets in a manner that undermines the goals of conservatorship.

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case and eleven related cases before the undersigned.[11] The plaintiffs in each of the twelve cases filed a response brief on their respective dockets; some of the plaintiffs relied on a joint brief filed in six of the cases, others, as is the case here, filed a combined brief for five of the cases in which the plaintiffs are all represented by the same counsel. Defendant filed its omnibus reply brief in each of the cases on May 6, 2019. The parties have fully briefed defendant's motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiff in this case has adopted the favorable arguments made by the

[10] A fuller recitation of the procedural history of this case and related cases is provided in Fairholme II, 147 Fed. Cl. at 21-23.

[11] The eleven related cases are Fairholme Funds, Inc. v. United States, No. 13-465C; Washington Federal v. United States, No. 13-385C; Cacciapalle v. United States, No. 13-466C; Fisher v. United States, No. 13-608C; Arrowood Indemnity Company v. United States, No. 13-698C; Reid v. United States, No. 14-152C; Rafter v. United States, No. 14-740C; Owl Creek Asia I, L.P. v. United States, No. 18-281C; Appaloosa Investment Limited Partnership I v. United States, No. 18-370C; CSS, LLC v. United States, No. 18-371C; and Mason Capital L.P. v. United States, No. 18-529C.

plaintiffs in the related cases to the extent that such arguments are relevant.[12] Defendant's motion to dismiss is now ripe for adjudication.

III. STANDARD OF REVIEW

In ruling on a motion to dismiss a complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), the court generally assumes that the allegations in the complaint are true and construes those allegations in the plaintiff's favor. Trusted Integration, Inc. v. United States, 659 F.3d 1159, 1163 (Fed. Cir. 2011). With respect to RCFC 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of the evidence, that the court possesses subject-matter jurisdiction. Id. The allegations in the complaint must include "the facts essential to show jurisdiction." McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936). And, if such jurisdictional facts are challenged in a motion to dismiss, the plaintiff "must support them by competent proof." Id.; accord Land v. Dollar, 330 U.S. 731, 735 & n.4 (1947) ("[W]hen a question of the District Court's jurisdiction is raised, . . . the court may inquire by affidavits or otherwise, into the facts as they exist." (citations omitted)). If the court finds that it lacks subject-matter jurisdiction, it must, pursuant to RCFC 12(h)(3), dismiss the complaint.

A claim that survives a jurisdictional challenge remains subject to dismissal under RCFC 12(b)(6) if it does not provide a basis for the court to grant relief. Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002) ("A motion to dismiss . . . for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy."). To survive a motion to dismiss under RCFC 12(b)(6), a plaintiff must include in the complaint "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Indeed, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 814-19 (1982).

IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a "threshold matter." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998). Subject-matter jurisdiction cannot be waived or forfeited because it "involves a court's power to hear a case." Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it is "an inflexible matter that must be considered before proceeding to evaluate the merits of a case." Matthews v. United States, 72 Fed. Cl. 274, 278 (2006); accord K-Con Bldg. Sys., Inc. v.

[12] The court addresses in this opinion some arguments that were made primarily by the plaintiffs in the related cases to provide context for the resolution of defendant's motion to dismiss. In addition, to the extent that any of plaintiff's less-developed arguments are not discussed in this opinion, the court found such arguments to be unpersuasive.

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United States, 778 F.3d 1000, 1004-05 (Fed. Cir. 2015). Either party, or the court sua sponte, may challenge the court's subject-matter jurisdiction at any time. Arbaugh, 546 U.S. at 506; see also Jeun v. United States, 128 Fed. Cl. 203, 209-10 (2016) (collecting cases).

The ability of the United States Court of Federal Claims ("Court of Federal Claims") to entertain suits against the United States is limited. "The United States, as sovereign, is immune from suit save as it consents to be sued." United States v. Sherwood, 312 U.S. 584, 586 (1941). The waiver of immunity "may not be inferred, but must be unequivocally expressed." United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003). Any such waiver must be narrowly construed. Smith v. Orr, 855 F.2d 1544, 1552 (Fed. Cir. 1988). The Tucker Act, the principal statute governing the jurisdiction of this court, waives sovereign immunity for claims against the United States, not sounding in tort, that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (2018); White Mountain, 537 U.S. at 472. However, the Tucker Act is merely a jurisdictional statute and "does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 298 (1976). Instead, the substantive right must appear in another source of law, such as a "money-mandating constitutional provision, statute or regulation that has been violated, or an express or implied contract with the United States." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc).

Defendant challenges the court's jurisdiction to entertain plaintiff's claims on a number of bases. Specifically, defendant argues that plaintiff has not asserted claims against the United States and that the court lacks jurisdiction over the subject matter of certain claims. The court addresses these contentions in turn.[13]

A. Plaintiff has asserted claims against the United States.

The court first considers whether plaintiff has asserted claims against the United States, a necessary element of jurisdiction in the Court of Federal Claims. As set forth in its amended complaint, all of plaintiff's claims are premised on actions taken by the FHFA-C and Treasury. Defendant argues that the court lacks jurisdiction to consider any claims premised on the FHFA-C's or Treasury's conduct. In response, plaintiff contends that it has asserted claims against the government because (1) Treasury was involved in the challenged conduct, (2) the FHFA-C was coerced by the government, (3) the FHFA-C was the government's agent, and (4) the FHFA-C, in collaboration with Treasury, is a government actor. The court addresses each contention in turn.

[13] In Fairholme II, the court addressed additional jurisdictional concerns that were not raised or are not implicated in this case. See generally 147 Fed. Cl. at 24-25 (rejecting defendant's contention that the claims of the Fairholme plaintiffs were barred by 28 U.S.C. § 1500), 34-37 (rejecting the contention of a putative intervenor that the Court of Federal Claims lacks jurisdiction to entertain Fifth Amendment takings claims).

1. The court cannot exercise jurisdiction based on allegations of Treasury's involvement.

Plaintiff initially argues that the court has jurisdiction over its Fifth Amendment takings and illegal-exaction claims because it has alleged the involvement of Treasury—indisputably a part of the federal government—in the action underlying these claims, i.e., the Net Worth Sweep. Defendant counters that Treasury alone could not have implemented the PSPA Amendments, and Treasury's role as a counterparty to the voluntary agreement with the Enterprises is not sufficient to establish jurisdiction over plaintiff's takings claim. Defendant further asserts that the court's order allowing jurisdictional discovery reflects that plaintiff's allegations concerning Treasury alone are insufficient to confer jurisdiction.

The parties' dispute on the import of allegations concerning Treasury is ultimately immaterial in light of the court's determination, explained below, that the FHFA-C—the other party involved in the PSPA Amendments—is the United States. Nonetheless, the court notes, as defendant asserts, that it implicitly acknowledged in its February 26, 2014 discovery order, issued in Fairholme and related cases, that the allegations concerning Treasury alone were insufficient to support jurisdiction. In that order, the court permitted the plaintiffs in those related cases to conduct fact discovery on whether the FHFA-C was "the 'United States' for purposes of the Tucker Act." Fairholme Funds, Inc. v. United States, 114 Fed. Cl. 718, 721 (2014). The aforementioned discovery would have been unnecessary (and unwarranted) if, as plaintiff asserts here, the court has jurisdiction over plaintiff's claims based on its allegations concerning Treasury.

2. The FHFA-C was not coerced into approving the PSPA Amendments.

Plaintiff also argues that the FHFA-C is the United States because the FHFA-C was coerced into approving the PSPA Amendments by Treasury. Defendant counters that the FHFA-C was not coerced by Treasury because the FHFA-C had a choice of whether to accept or reject the PSPA Amendments. Defendant asserts that there is no coercion if a party has a choice, regardless of however difficult refusal of a particular option may be. Indeed, defendant contends that plaintiff fails to proffer any allegations that Treasury required the FHFA-C to enter into the agreements against its will. Defendant further asserts that other courts have declined to conclude that the FHFA-C felt compelled to follow Treasury based on allegations that Treasury invented the amendment concept or led the process.

a. The court has jurisdiction over claims based on actions that resulted from government coercion.

The court has jurisdiction over claims premised on the FHFA-C's actions if Treasury's "influence over the" FHFA-C "was coercive rather than merely persuasive." A & D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1154 (Fed. Cir. 2014). The line between coercion and persuasion "is highly fact-specific." Id. Precedent from the United States Court of Appeals for the Federal Circuit ("Federal Circuit") frames the contours of the inquiry. In Langenegger v. United States, the plaintiffs pleaded that the United States coerced El Salvador by threatening to withhold financial and military assistance unless El Salvador passed legislation expropriating private property. 756 F.2d 1565, 1567 (Fed. Cir. 1985). The Federal Circuit disagreed with the

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plaintiffs' characterization of the threats because "[d]iplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of [coercion], however difficult refusal may be as a practical matter." Id. at 1572. Similarly, the Federal Circuit concluded in B & G Enterprises, Ltd. v. United States that California was not coerced into enacting restrictions on smoking, notwithstanding the federal government conditioning grants on states enacting such limits. 220 F.3d 1318, 1321, 1325 (Fed. Cir. 2000); see also A & D Auto, 748 F.3d at 1155 (explaining that "coercion was not established" in B & G). The court explained that "it was California's decision to create [the] restrictions[;] . . . Congress may have provided the bait, but California decided to bite." B & G, 220 F.3d at 1325. In A & D Auto, the Federal Circuit addressed coercion in the context of the government allegedly conditioning vital financial assistance to bankrupt automobile companies on those companies terminating some of their franchise agreements. 748 F.3d at 1145. Unable to resolve the issue due to gaps in the record, the court noted in dicta that a relevant consideration was "whether the government financing was essential to the companies." Id.

A common thread runs through the Federal Circuit's decisions: the importance of choice. A nonfederal actor is not coerced when it can choose to go against the wishes of the United States, even if doing so will cause significant hardships, Langenegger, 756 F.2d at 1567, or result in a loss of prospective benefits, id.; B & G, 220 F.3d at 1325. But there is no choice, in any meaningful sense, when there is only one realistic option. A & D Auto, 748 F.3d at 1145 (noting the importance of considering whether the companies could survive without accepting the government's offer); cf. Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) (noting that, with respect to Congress's spending powers, "the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions"). Put differently, the nonfederal actor must make a voluntary decision, which it cannot do if there is only one realistic option. See BMR Gold Corp. v. United States, 41 Fed. Cl. 277, 282 (1998) (finding that the "the necessary element of coerciveness" for a taking was missing because the plaintiff granted the military permission to cross his land); accord Henn v. Nat'l Geographic Soc., 819 F.2d 824, 826 (7th Cir. 1987) (noting that hard choices remain voluntary when they are not akin to "Don Corleone's '[m]ake him an offer he can't refuse'"). In sum, the FHFA-C was not coerced if it voluntarily chose to enter into the PSPA Amendments.

b. Plaintiff has not established that Treasury coerced the FHFA-C into approving the PSPA Amendments.

In support of its contention that Treasury coerced the FHFA-C into approving the PSPA Amendments, plaintiff alleges that Treasury proposed the terms of the amendments and used its influence over the FHFA-C to ensure compliance with Treasury's wishes. Those allegations are not enough to establish coercion. First, given the Enterprises' improving financial condition and Treasury's existing funding commitment, the FHFA-C's decision to execute the PSPA Amendments was voluntary because it could reject the deals without imperiling the Enterprises. The facts here, therefore, are diametrically opposed to the circumstances in A & D Auto that the Federal Circuit suggested may support coercion because the automobile dealers faced insolvency if they did not accede to the financing terms. See 748 F.3d at 1145. Second, the FHFA-C's lack of protestation is informative. "[T]he very fact that FHFA[-C] itself [did] not br[ing] suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA[-C] was an independent, willing participant in its negotiations with the Treasury." Robinson v. Fed. Hous. Fin. Agency, 223 F. Supp. 3d 659, 668 (E.D. Ky. 2016), aff'd, 876 F.3d 220 (6th Cir. 2017). The court's conclusion is bolstered by the fact that another court has held that materially similar allegations to those at issue here did not "come close to a reasonable inference that [the] FHFA[-C] considered itself bound to do whatever Treasury ordered." Perry Capital LLC v. Lew, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) ("Perry I"), aff'd in part, rev'd in part sub nom. Perry II, 864 F.3d at 591. This court agrees with the reasoning in Perry I: the PSPA Amendments were executed by sophisticated parties, and many agreements arise from a party's proposal being accepted by the other party. Id. Plaintiff has not established that the FHFA-C was coerced into approving the PSPA Amendments by Treasury.

3. The FHFA-C is not Treasury's agent.

Plaintiff further argues that the FHFA-C's actions are attributable to the United States because the FHFA-C is Treasury's agent. Defendant counters that plaintiff has not pleaded an agency relationship because Treasury does not control the FHFA-C's operations. Indeed, defendant notes that Treasury is statutorily barred from exercising such control.

The United States is subject to claims in this court for the actions of a third party "if [that] party is acting as the government's agent . . . ." A & D Auto, 748 F.3d at 1154. "An essential element of agency is the principal's right to control the agent's actions." Hollingsworth v. Perry, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01 cmt. f (Am. Law. Inst. 2005)); accord O'Neill v. Dep't of Hous. & Urban Dev., 220 F.3d 1354, 1360 (Fed. Cir. 2000) (acknowledging that the common-law meaning of agency requires, among other things, that the principal has the right to control the agent's conduct); see also Preseault v. United States, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (concluding that a state's actions were attributable to the United States when the state acted pursuant to the Interstate Commerce Commission's order); Hendler v. United States, 952 F.2d 1364, 1378-79 (Fed. Cir. 1991) (attributing a state's actions to the United States when the state acted under authority flowing from an Environmental Protection Agency order). The facts, as alleged, do not reflect that Treasury controlled the FHFA-C's actions because Congress explicitly precluded the FHFA-C from being subservient to another agency, 12 U.S.C. § 4617(a)(7) (providing that the FHFA-C cannot be subject to the "direction or supervision" of any other agency), and plaintiff has not alleged facts indicating that Treasury exercised such control notwithstanding the statutory bar. Although the FHFA-C was required by the PSPAs to obtain Treasury's approval for certain actions (e.g., issuing dividends), the PSPAs did not provide Treasury with the right to unilaterally order amendments. Moreover, plaintiff describes an FHFA-C that made decisions independently: Treasury sought to influence the opinions of the FHFA-C's senior officials; Treasury "push[ed]" for the PSPA Amendments; and the FHFA-C agreed to the PSPA Amendments. 1st Am. Compl. ¶¶ 2, 62, 64. Simply stated, plaintiff has not alleged facts establishing that Treasury exercised the control over the FHFA-C that is necessary for an agency relationship.

4. The FHFA-C is the United States because the FHFA-C retains the FHFA's governmental character.

In addition, plaintiff contends that the FHFA-C is itself a government actor.[14] Defendant disagrees. First, relying on O'Melveny & Myers v. Fed. Deposit Ins. Corp., 412 U.S. 79 (1994), defendant argues that the FHFA-C is not the United States because the FHFA-C stands in the Enterprises' shoes. Specifically, defendant asserts that Congress's decision to have the FHFA-C succeed to the Enterprises' rights reflects that Congress intended that the FHFA-C step into the Enterprises' private shoes and shed its government character. Second, defendant argues that the FHFA-C's exercise of nontraditional conservatorship powers is immaterial because Congress can expand the conservator's role without transforming it into a government actor. Third, defendant argues that the Enterprises are not government instrumentalities—which means that the FHFA did not step into the shoes of a government actor when it became the Enterprises' conservator—because the government does not retain permanent authority to appoint the Enterprises' directors. Defendant contends that the government only has temporary, albeit indefinite, control over the Enterprises because the conservatorships are not permanent.

In response, plaintiff disputes the premise of defendant's argument that, pursuant to O'Melveny, the FHFA becomes the Enterprises when acting as conservator. Plaintiff asserts that O'Melveny does not concern whether an entity is the United States or, if the decision can be read as addressing that issue, is distinguishable because it concerns receivers or is limited to conservators exercising traditional conservator powers. Second, plaintiff argues that the FHFA has not shed its government status, even if it has stepped into the Enterprises' shoes, when it acts as conservator. Specifically, plaintiff asserts that the FHFA-C retains the FHFA's government status because (1) the FHFA-C has acted beyond the traditional conservator powers and (2) Congress expressed its intention for that result by precluding the conservator from being subject to the supervision of "any other agency." 12 U.S.C. § 4617 (emphasis added). Third, plaintiff argues that its claims are against the United States, even if the FHFA-C steps into the shoes of the Enterprises, because the Enterprises are government instrumentalities.

In short, the parties disagree over the government status of the FHFA-C. The FHFA is indisputably the United States, see id. § 4511(a) (establishing the FHFA as an "independent agency of the Federal Government"), and so the only question is whether the FHFA sheds that status when it acts as conservator. In other jurisdictions, courts have held (with near unanimity) that the FHFA loses its government status pursuant to O'Melveny. In O'Melveny, the United States Supreme Court ("Supreme Court") explained that the Federal Deposit Insurance Corporation ("FDIC") "steps into [the] shoes" of a private company when acting as receiver and sheds its government character because the FDIC "succeed[s] to . . . all rights, titles, powers, and privileges of the [entity in receivership] . . . ." 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); see also AG Route Seven P'ship v. United States, 57 Fed. Cl. 521, 534 (2003) (citing O'Melveny for the proposition that the FDIC as receiver is a "private party, and not the government per se" because it "is merely standing in the shoes . . . of the defunct thrift").

[14] To determine whether this action is against the United States, the court need not reach plaintiff's argument that Treasury and the FHFA-C formed a "control group." See Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 22-26.

The courts drawing from O'Melveny have concluded that the FHFA steps into the shoes of the Enterprises and sheds its government character when acting as conservator because Congress provided that the FHFA-C exercises the same rights with respect to the Enterprises as Congress granted to the FDIC as receiver. See, e.g., Herron v. Fannie Mae, 861 F.3d 160, 169 (D.C. Cir. 2017); cf. Ameristar Fin. Servicing Co. v. United States, 75 Fed. Cl. 807, 811 (2007) (concluding, with respect to the FDIC, that the step-into-the-shoes principle set forth in O'Melveny also applies in the conservator context).

a. The FHFA-C is not the United States if the FHFA steps into the Enterprises' shoes when acting as conservator.

Plaintiff initially contends that defendant's reliance on O'Melveny is erroneous because, assuming that O'Melveny applies, the FHFA-C is the United States even though it steps into the Enterprises' shoes. Specifically, plaintiff asserts that the FHFA-C is the United States under the facts alleged because (1) the FHFA-C exercises nontraditional conservator powers, (2) Congress intended that the FHFA-C retain the FHFA's government status, and (3) the FHFA-C steps into the shoes of a government instrumentality. The court addresses each assertion in turn.

First, the FHFA-C did not become a government actor by exercising powers beyond those traditionally afforded to a conservator. As a threshold matter, plaintiff has not alleged facts reflecting that the FHFA-C used such powers; the execution of the PSPA Amendments was a "quintessential conservatorship" function. Perry II, 864 F.3d at 607. More importantly, however, plaintiff would not prevail even if the FHFA-C exercised nontraditional conservatorship powers in agreeing to the PSPA Amendments. When this argument was pressed in other jurisdictions, it was rejected:

> It may well be true that FHFA's actions would not be allowed under traditional principles of corporate or conservatorship law, but it does not follow that those actions are therefore governmental. Legislatures can expand conservatorship and similar powers without transforming conservators into agents of the government. Cf. Pegram v. Herdrich, 530 U.S. 211, 225-26 (2000) (explaining that the Employee Retirement Income Security Act altered the common law of trusts to permit certain actions that would otherwise violate the trustee's fiduciary duties).

Bhatti v. Fed. Hous. Fin. Agency, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (footnote omitted). The court agrees with that reasoning, and plaintiff provides no authority that supports a contrary result. Although plaintiff states that the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") decision in Waterview Management Co. v. FDIC, 105 F.3d 696 (D.C. Cir. 1997), supports its position, it is mistaken. Waterview is not on point because the D.C. Circuit did not hold that a conservator is per se the United States when acting pursuant to a congressional grant of broad powers. Rather, it held that, as a matter of statutory interpretation, the existence of a receivership did not preempt a prereceivership contract. Id. at 699-702.

Second, Congress's instruction that the FHFA-C is not subject to the supervision of any other agency does not reflect congressional intent for the FHFA to retain its government status when acting as conservator even if it steps into the shoes of the Enterprises. Because the court only reaches this issue by assuming that O'Melveny is instructive, the statutory language concerning supervision of the FHFA-C does not support a finding of jurisdiction because the same language is present in the statute that the Supreme Court addressed in O'Melveny. See 512 U.S. at 85-86 (discussing 12 U.S.C. § 1821). Compare 12 U.S.C. § 1821(c)(3)(C) ("When acting as conservator or receiver . . . , [the FDIC] shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC's] rights, powers, and privileges."), with id. § 4617(a)(7) ("When acting as conservator or receiver, the [FHFA] shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the [FHFA].").

The third argument advanced by plaintiff—that the FHFA-C is the United States because it steps into the shoes of a government instrumentality—also is not meritorious. A government instrumentality's actions are attributable to the United States for purposes of the Tucker Act. See Corr v. Metro. Wash. Airports Auth., 702 F.3d 1334, 1336 (Fed. Cir. 2012) (noting that a claim against a government instrumentality is a claim against the United States for purposes of the Little Tucker Act, 28 U.S.C. § 1346(a)(2)). The Supreme Court established in Lebron v. National Railroad Passenger Corp. that a company is a government instrumentality when (1) it is created by "special law," (2) it is established "for the furtherance of governmental objectives," and (3) the federal government "retains for itself permanent authority to appoint a majority of the [company's] directors . . . ." 513 U.S. 374, 400 (1995). After Lebron, the Supreme Court clarified that, for purposes of the instrumentality test, "the practical reality of federal control and supervision prevails over Congress' disclaimer of the [the entity's] governmental status." Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1233 (2015).

There is no dispute that the Enterprises satisfy the first two prongs of the Lebron test; Congress created the Enterprises by special law to achieve governmental objectives related to the housing market. See 12 U.S.C. § 4501; see also Herron, 861 F.3d at 167 (addressing claims involving Fannie and noting that "[t]his case satisfies the first two Lebron criteria"); Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 75 F.3d 1401, 1406-07 (9th Cir. 1996) (reaching same conclusion for Freddie). The status of the Enterprises, therefore, turns on the third prong: whether the government retains permanent authority to appoint a majority of the Enterprises' directors.

The Federal Circuit has not addressed the government-control prong with respect to the Enterprises, but courts in other jurisdictions have done so. Those decisions provide a starting point for the court. It appears that every court to consider the issue, with the exception of one district court, has held that the government does not exercise permanent control over the Enterprises. Sisti v. Fed. Hous. Fin. Agency, 324 F. Supp. 3d 273, 279 (D.R.I. 2018) (concluding that the government retains permanent authority to control the Enterprises after noting that "[t]he non-controlling precedent to date" has reached the opposite conclusion). Most of the courts that concluded that the government lacks permanent control over the Enterprises issued their decisions before the Supreme Court in Association of American Railroads emphasized the importance of evaluating the practical reality over nomenclature, and the other courts focused on the statutory purpose for the conservatorships rather than the Enterprises' actual situation. E.g., Herron, 861 F.3d at 169 (relying on the notion that a conservatorship is fundamentally temporary). In other words, the courts adopting the prevailing view considered the issue of control without regard for the Supreme Court's instruction to focus on the practical reality. The court, therefore, does not find those decisions persuasive.

The crux of the inquiry, as the Supreme Court mandates, is on the practical reality of the government's control over the Enterprises. Ass'n of Am. R.Rs., 135 S. Ct. at 1233. It is of no import that Congress nominally authorized a facially temporary conservatorship, see 12 U.S.C. § 4617(a) (permitting the FHFA to act as conservator to "reorganiz[e]" or "rehabilitat[e]" the Enterprises), because Congress's disclaimers are no substitute for the court's obligation to assess the government's actual control, Ass'n of Am. R.Rs., 135 S. Ct. at 1233. The court focuses on the length of the conservatorship because the FHFA-C wields complete control over the Enterprises so long as they are in conservatorship. See generally 12 U.S.C. § 4617.

Plaintiff alleges that the Enterprises will remain undercapitalized—and thus subject to conservatorship pursuant to 12 U.S.C. § 4617(a)(3)(J)—until the PSPAs, in their current form, are changed because the Enterprises cannot accumulate any capital under the existing terms of the PSPAs. Although the PSPAs could be further amended, plaintiff's allegations reflect that Treasury and the FHFA-C will not do so because the purpose of the PSPA Amendments is to prevent the Enterprises from accumulating the necessary capital to become independent companies. Plaintiff, in short, has alleged that the government intended, and has taken steps to ensure, that the conservatorships never end. Those facts, viewed in isolation, would support a conclusion that the practical reality is that the Enterprises are under permanent government control. The court's inquiry, however, is not limited to plaintiff's allegations because it has taken judicial notice of relevant facts reflecting that the status quo has changed: the Treasury Secretary and the FHFA Director are now both committed to ending the conservatorships. Moreover, the idea that the Enterprises are permanently subject to government control because they can never accumulate the capital needed to exit the conservatorships is undermined by recent developments. Indeed, Treasury proposed amending the Net Worth Sweep to allow the Enterprises to retain more capital, and the FHFA Director testified during his confirmation hearing that, if confirmed, he would seek to increase the amount of capital that the Enterprises retain. Simply stated, the practical reality is that the Enterprises are not subject to permanent government control because the relevant parties are working to terminate the conservatorships.[15]

[15] Plaintiff may disagree with the court's conclusion that events occurring after the PSPA Amendments are relevant to determining whether the Enterprises were under permanent government control during the events discussed in plaintiff's complaint. Even if the court agreed that events occurring after the PSPA Amendments are not germane, plaintiff still would not prevail because it alleges that the conservatorships began as temporary measures. See 1st Am. Compl. ¶ 7 (noting the temporary nature of the conservatorships and quoting an FHFA publication stating that the conservatorships would be terminated once the Enterprises had been restored "to a safe and solvent condition"); id. (noting that the FHFA reassured the market that the Enterprises would return to normal business operations). Thus, the Enterprises were not under permanent government control before the PSPA Amendments.

In sum, the FHFA-C does not become the United States if the FHFA steps into the Enterprises' shoes when serving as conservator.

b. The FHFA-C retains the FHFA's government character because the FHFA-C does not step into the Enterprises' shoes.

The key inquiry, therefore, is whether the FHFA steps into the shoes of the Enterprises when acting as conservator. Defendant argues that the FHFA-C sheds its government character and assumes the identity of the Enterprises based on the reasoning in O'Melveny. Defendant's reliance on O'Melveny is misplaced. O'Melveny concerns a receiver stepping into the shoes of a failed bank. 512 U.S. at 86. The roles of a conservator and receiver are meaningfully different. In a recent decision, the United States District Court for the District of Rhode Island artfully explained the differences and their import for assessing whether the FHFA-C is the government:

> The O'Melveny Court held that FDIC, when acting as a receiver for a private entity, steps into the shoes of that private entity for state law claims. This holding makes sense given the purpose of receivership: "to preserve a company's assets, for the benefit of creditors, in the face of bankruptcy." When FDIC is appointed receiver, it must dispose of the received entity's assets, resolving obligations and claims made against the entity. Notably, "[i]n receivership, the receiver owes fiduciary duties to the creditors, which the corporation would otherwise owe to creditors during a period of insolvency." It logically follows, then, that the receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity.
>
> Conservatorship, in contrast, serves a different function. FHFA has described the purpose of conservatorship is "to establish control and oversight of a company to put it in a sound and solvent condition." Conservators, unlike receivers, have a fiduciary duty running to the corporation itself.
>
> This is "critically distinct" from the fiduciary duties owed as a receiver—the receiver does indeed "step into the shoes" of the entity by assuming the fiduciary duties of the entity, but the conservator does not: it remains distinct, and rather owes a duty to the entity. Given the difference in fiduciary duties, O'Melveny's "steps into the shoes" holding makes sense in the context of receivership, but not in the context of conservatorship.

Sisti, 324 F. Supp. 3d at 282-83 (citations and footnotes omitted). See generally Brian Taylor Goldman, The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State-Action, 17 J. Bus. & Sec. L. 11, 23-30 (2016). The district court, relying on the above analysis, declined to treat the FHFA-C as a private actor. Sisti, 324 F. Supp. 3d at 284. This court agrees with the reasoning and conclusion in Sisti: the FHFA does not shed its government character when acting as conservator because it does not step into the shoes of the Enterprises. Otherwise stated, the FHFA-C is the United States because it retains the FHFA's government character. Plaintiff's claims, therefore, are against the United States for purposes of the Tucker Act.

B. The court lacks jurisdiction over plaintiff's claim that sounds in tort.

1. Plaintiff's fiduciary duty claim sounds in tort.

Defendant next argues that the court lacks jurisdiction over plaintiff's fiduciary duty claim because the United States does not owe to each Enterprise's shareholders a fiduciary duty that is grounded in a statute or contract. Defendant asserts that such a fiduciary duty cannot be based on (1) HERA because, pursuant to the statute, the FHFA-C is only required to act in the government's and the Enterprises' best interests; or (2) the PSPAs because plaintiff is not a party to those contracts. Plaintiff, in its opposition to defendant's motion to dismiss, counters that its claim is based on a fiduciary duty rooted in both HERA and the PSPAs. As to HERA, plaintiff asserts that Congress made the FHFA-C a fiduciary by authorizing it to control the Enterprises, entrusting it with duties that are at the core of what it means to be a fiduciary, and using terminology—"conservator"—associated with a fiduciary. With respect to the PSPAs, plaintiff argues that Treasury owes a fiduciary duty to the shareholders because it, acting with the FHFA-C, acquired control rights under the contract.

The court, pursuant to the Tucker Act, lacks jurisdiction over tort claims. 28 U.S.C. § 1491(a)(1). A breach of fiduciary duty is generally classified as a tort. Newby v. United States, 57 Fed. Cl. 382, 294 (2003). A fiduciary duty claim, however, does not sound in tort for purposes of the Tucker Act when the fiduciary relationship is founded on a money-mandating statute or a contractual provision between the claimant and United States. See Hopi Tribe v. United States, 782 F.3d 662, 667 (Fed. Cir. 2015) (statute); Cleveland Chair Co. v. United States, 557 F.2d 244, 246 (Ct. Cl. 1977) (contract); see also 28 U.S.C. § 1491(a)(1) (providing jurisdiction over claims "founded upon . . . any Act of Congress . . . or contract with the United States").

The initial issue is whether HERA establishes a fiduciary relationship between the FHFA-C and the Enterprises' shareholders. The court begins with the language of the statute. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). "If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect." Rosete v. Office of Pers. Mgmt., 48 F.3d 514, 517 (Fed. Cir. 1995); accord Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Congress provided in HERA that the FHFA-C is only required to act in the interests of itself or the Enterprises. 12 U.S.C. § 4617(b)(2)(J). That statement reflects a clear intent: the FHFA-C does not owe a fiduciary duty to shareholders because the conservator is not required to consider shareholders' interests.[16] See id.; see also

[16] The court's interpretation of HERA's plain language is buttressed by the fact that Congress seemingly made a deliberate decision to exclude shareholder interests from the FHFA-C's considerations. Congress modeled HERA on the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Jacobs v. Fed. Hous. Fin. Agency, 908 F.3d 884, 893 (3d Cir. 2018). Under FIRREA, Congress permitted the FDIC as conservator to consider the best interests of a bank, its depositors, or the FDIC. 12 U.S.C. § 1821(d)(2)(J)(ii). Although Congress permitted the FDIC to take into consideration the interests of its depositors, Congress omitted the analogue of depositors—shareholders—from the list of germane interests that the

Collins v. Mnuchin, 938 F.3d 553, 580 (5th Cir. 2019) (en banc) (noting that HERA "may permit" the FHFA-C to pursue actions that are "inconsistent with fiduciary duties"), petitions for cert. filed, 88 U.S.L.W. 3114 (U.S. Sept. 25, 2019) (No. 19-422), 88 U.S.L.W. 3146 (U.S. Oct. 25, 2019) (No. 19-563). The plain language controls, and therefore the court does not consider the peripheral considerations urged by plaintiff such as the implications of the word "conservator," the FHFA-C's control over the Enterprises, or the FHFA-C's other powers. In sum, plaintiff cannot establish jurisdiction for its fiduciary duty claim by relying on HERA.

Next, the court turns to whether Treasury, acting together with the FHFA-C, owed a fiduciary duty to the Enterprises' other shareholders because it acquired control rights by agreeing to the PSPAs. Plaintiff's argument is premised on the state-law principle (which it terms "general corporate law") that a controlling shareholder owes a fiduciary duty to the minority shareholders. The court is not convinced. First, plaintiff's allegation of a fiduciary relationship is not founded on a contract within the meaning of the Tucker Act. Plaintiff is not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs. It invokes the contracts solely to establish that Treasury, with the assistance of the FHFA-C, is a controlling shareholder and relies on that conclusion to argue that Treasury has a fiduciary duty based on state law. The contract, otherwise stated, is one step removed from the purported genesis of the fiduciary duty—the application of state-law principles. That gap is too much in light of the court's obligation to narrowly construe the Tucker Act's waiver of sovereign immunity. See Smith, 855 F.2d at 1552 (noting that the Tucker Act is narrowly construed); see also Perry II, 864 F.3d at 619-20 (rejecting the legal theory that the Enterprises' shareholders' need to reference the PSPAs for their fiduciary duty claim was enough to conclude that the claim was rooted in a contract for purposes of the Tucker Act).

Second, plaintiff fails to demonstrate the applicability of the state-law principles underlying its theory for why Treasury assumed fiduciary duties. Federal law governs the obligations Treasury incurred by entering into the PSPAs. See Boyle v. United Techs. Corp., 487 U.S. 500, 519 (1988) ("The proposition that federal common law continues to govern the 'obligations to and rights of the United States under its contracts' is nearly as old as Erie [v. Tompkins, 304 U.S. 64 (1938),] itself."). Although courts may shape federal law by drawing from state-law principles, plaintiff does not explain why doing so is appropriate in this instance.

Third, plaintiff does not prevail even if its fiduciary duty claim could be founded on a contract and federal common law incorporates the state-law principles regarding controlling shareholders' fiduciary obligations. Under Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders. See Ivanhoe Partners v. Newmont Min. Corp., 535 A.2d 1334, 1344 (Del. 1987); Parsch v. Massey, 79 Va. Cir. 446 (2009); see also Quadrant Structured Prod. Co. v. Vertin, 102 A.3d 155, 183 (Del. Ch. 2014) (acknowledging that those "who effectively control a corporation" owe a fiduciary duty to others).[17] To have the

conservator can consider when acting pursuant to HERA. Compare id. (FIRREA), with 12 U.S.C. § 4617(b)(2)(J) (HERA). The omission is telling.

[17] The court refers to Delaware and Virginia law because Fannie is a Delaware corporation, and Freddie is a Virginia corporation. When evaluating Virginia law, the court also looks to Delaware state court decisions because Virginia courts do so to resolve unsettled issues

requisite level of control, the controlling shareholder must (1) be able to exercise a majority of the corporation's voting power or (2) direct the corporation without owning a majority of stock. Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1113 (Del. 1994). The latter, effective exercise of control, "is not an easy test to satisfy"; the individual or group must be, "as a practical matter, . . . no differently situated than if they had majority voting control." In re PNB Holding Co. S'holders Litig., No. CIV.A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006).

Plaintiff has not established that Treasury meets either control test. First, plaintiff does not allege that Treasury owns any of the Enterprises' voting stock. Treasury purchased preferred stock and acquired the right to buy common (i.e., voting) stock, but there is no indication that Treasury exercised its warrants or otherwise acquired common stock.[18] Second, plaintiff does not demonstrate that Treasury exercised effective control over the Enterprises or was, in plaintiff's terms, a "dominant shareholder." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 29 (quoting Sisti, 324 F. Supp. 3d at 283 n.9). Although Treasury acquired the right to preclude the Enterprises from taking certain actions, Treasury did not control the Enterprises because it could not direct any action—it could only respond to certain requests made by the Enterprises. As a practical matter, therefore, Treasury is situated differently than if it had majority voting power.

Having rejected the contentions advanced by plaintiff in its opposition brief, the court turns to an argument that appears for the first time in plaintiff's supplemental brief, which was filed at the court's request after the initial round of briefing on defendant's omnibus motion to dismiss was complete, Fairholme II was decided, and the court held a status conference regarding further proceedings in the related cases.[19] In its supplemental brief, plaintiff contends that its fiduciary duty claim was founded on a contention that Treasury and the FHFA-C acted as a "control group," that this contention was set forth in its opposition brief in the section addressing the court's jurisdiction over its fiduciary duty claim, and that the court did not, in Fairholme II, consider this contention. But no such contention was made in plaintiff's opposition brief.

In its opposition brief, plaintiff explained that under state law, multiple shareholders who are legally connected can form a "control group" and be "deemed a single, majority shareholder," and then asserted that Treasury and the FHFA-C were such a control group, acting in concert as the United States. See Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to

in the Commonwealth. E.g., U.S. Inspect Inc. v. McGreevy, No. 160966, 2000 WL 33232337, at *4 (Va. Cir. Ct. Nov. 27, 2000).

[18] Even if Treasury had exercised its option to buy a majority of the voting stock, it would not be a controlling shareholder because the FHFA-C succeeded to all of the shareholders' rights. See 12 U.S.C. § 4617(b)(2)(A) (noting that the FHFA-C, by operation of law, succeeds to all rights and powers of any Enterprise shareholder). Treasury, therefore, would have no voting power.

[19] As defendant notes, the court did not invite plaintiff, after the status conference held March 5, 2020, to relitigate issues already decided in Fairholme II.

Dismiss 22-26. In other words, plaintiff advanced its control group contention solely to establish that its suit was against the United States. In the portion of its opposition devoted to countering defendant's jurisdictional attack on its fiduciary duty claim, plaintiff asserted only two bases for a fiduciary duty; each one was treated separately as governing the conduct of either Treasury or the FHFA-C. It did not argue that the fiduciary duty arose from Treasury and the FHFA-C acting as a control group. Accordingly, the court did not consider plaintiff's control group allegation as a foundation for any fiduciary duty claim in Fairholme II, among the arguments raised by the plaintiffs in these related cases.

Because plaintiff's control group contention was not raised in its opposition brief in support of its fiduciary duty claim, it is waived. See United States v. Ford Motor Co., 463 F.3d 1267, 1277 (Fed. Cir. 2006) (explaining that "[a]rguments raised for the first time in a reply brief are not properly before this court"); Ironclad/EEI v. United States, 78 Fed. Cl. 351, 358 (2007) (noting that "under the law of this circuit, arguments not presented in a party's principal brief to the court are typically deemed to have been waived"). But even if plaintiff's argument were not waived, it is not persuasive. In Fairholme II, the court explained why neither Treasury nor the FHFA-C owed a fiduciary duty to the shareholders of Fannie and Freddie. 147 Fed. Cl. at 37-40. The court is not persuaded that a control group composed of two entities, neither of which was bound by the fiduciary duty posited by plaintiff, would be bound by a fiduciary duty simply because the entities are alleged to have worked in concert against the interests of the other shareholders of the Enterprises. Plaintiff's attempt to graft a state law concept of a control group of shareholders onto a Tucker Act jurisdictional inquiry is not anchored in binding or even persuasive precedent, as explained in Fairholme II. Id. at 39-40. Having considered the allegations in plaintiff's amended complaint, the timely arguments set forth in plaintiff's opposition brief, and the untimely argument raised in plaintiff's supplemental brief, the court concludes that it lacks jurisdiction over plaintiff's fiduciary duty claim because it sounds in tort. Therefore, it dismisses count III of plaintiff's amended complaint.

2. Plaintiff's takings and illegal-exaction claims do not sound in tort.

Defendant also argues that plaintiff's Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the FHFA-C. Plaintiff counters that it has pleaded the predicates for takings and illegal-exaction claims, which means that it is irrelevant whether it also alleged facts that are germane to tortious actions.

When a party pleads the predicates for a takings claim or illegal-exaction claim, the court possesses jurisdiction to entertain such claims. See Hansen v. United States, 65 Fed. Cl. 76, 80-81 (2005) ("[S]o long as there is some material evidence in the record that establishes the predicates for a [claim covered by the Tucker Act,] . . . a plaintiff succeeds in demonstrating subject matter jurisdiction in this court . . . ."). Those claims, at a basic level, are contentions that the government expropriated private property lawfully (takings) or unlawfully (illegal exaction). See Orient Overseas Container Line (UK) Ltd. v. United States, 48 Fed. Cl. 284, 289 (2000) ("Takings claims arise because of a deprivation of property that is authorized by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation." (citing Dureiko v. United States, 209 F.3d 1345, 1359 (Fed. Cir. 2000); Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-08 (Ct. Cl. 1967))). If a party alleges the necessary predicates for these claims, the court is not deprived of jurisdiction even if the complaint contains allegations that could support a tort claim. See El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1353 (Fed. Cir. 2004) ("That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims."); Rith Energy, Inc. v. United States, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that this court has jurisdiction over a takings claim "even if the government's action was subject to legal challenge on some other ground"). Here, plaintiff pleads the predicates for takings and illegal-exaction claims by alleging, in essence, that it was forced to give its property to the government because of lawful or unlawful government conduct. Therefore, it is of no import to the court's jurisdiction whether plaintiff has alleged facts that would also support a tort claim.

C. The court lacks jurisdiction over plaintiff's implied-in-fact-contract claim because plaintiff is not a third-party beneficiary of such a contract.

Defendant argues next that the court lacks jurisdiction to entertain plaintiff's implied-in-fact-contract claim because plaintiff is not a third-party beneficiary of such a contract. Specifically, defendant asserts that plaintiff has not established that it is an intended beneficiary independent of its status as a shareholder and that any benefit that is related to its status as a shareholder is insufficient for jurisdiction. Plaintiff counters that it is an intended third-party beneficiary of implied contracts, between the FHFA and each Enterprise's board, in which the boards consented to the conservatorships in exchange for the FHFA-C operating the Enterprises as a fiduciary and returning them to sound condition. Specifically, plaintiff asserts that the intent to benefit the shareholders is evident from (1) the boards' consent to the conservatorships because shareholders would benefit from a conservator focused on returning the Enterprises to a better condition, and (2) the government acknowledging that the Enterprises' stock would remain outstanding while the Enterprises were in conservatorship.

The court's jurisdiction over contract claims is limited by the Tucker Act. Ransom v. United States, 900 F.2d 242, 244 (Fed. Cir. 1990). Of particular import here, ordinarily, a plaintiff must be in privity of contract with the United States to invoke this court's jurisdiction over a contract claim against the government. Fid. & Guar. Ins. Underwriters, Inc. v. United States, 805 F.3d 1082, 1087 (Fed. Cir. 2015). But privity is not required if "the plaintiff can demonstrate that it was an intended third-party beneficiary under the contract." Pac. Gas & Elec. Co. v. United States, 838 F.3d 1341, 1361 (Fed. Cir. 2016).

"Third party beneficiary status is an 'exceptional privilege.'" Glass v. United States, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (quoting German All. Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 230 (1912)). The conditions for attaining such status are "stringent." Anderson v. United States, 344 F.3d 1343, 1352 (Fed. Cir. 2003). "[S]hareholders seeking status to sue as third-party beneficiaries of an allegedly breached contract must 'demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.'" Castle v. United States, 301 F.3d 1328, 1338 (Fed. Cir. 2002) (quoting Glass, 258 F.3d at 1354). Specifically, "the contract must express the intent of the promissor to benefit the shareholder personally, independently of his or her status as shareholder." Glass, 258 F.3d at 1353-54. As a practical matter, the shareholder does not personally benefit independent of its status as a shareholder when the contractual promises pertain only to the treatment of the company. See FDIC v. United States, 342 F.3d 1313, 1320 (Fed. Cir. 2003) (noting that the broken promises concerned the treatment of the company such that the plaintiffs did not benefit independent of their status as shareholders); accord Maher v. United States, 314 F.3d 600, 605 (Fed. Cir. 2002) (concluding that the plaintiffs were not third-party beneficiaries when they failed to "establish[] that the government took on any obligations in the merger agreement for [the plaintiffs'] personal benefit, or even that the merger agreement contains any provisions pertaining to [the plaintiffs] personally").

As plaintiff is not a party to the alleged implied contracts between the FHFA and the Enterprises, the relevant issue is whether plaintiff is a third-party beneficiary of those agreements. It is not. First, it is of no import that the Enterprises, as plaintiff argues, purportedly agreed to the conservatorships because that would serve the interests of shareholders. Indeed, "every action of a corporation is supposed to benefit its shareholders," but the "law has not viewed this general benefit as making every shareholder a third-party beneficiary." Suess v. United States, 33 Fed. Cl. 89, 94 (1995). Second, plaintiff's allegations reflect that it only benefits from the alleged implied contracts by virtue of its shareholder status. The relevant promises concerned how the FHFA-C would operate the Enterprises; the crux of the purported agreements was the FHFA-C promising to operate the Enterprises as a fiduciary to preserve their assets and return them to sound condition. Because the promises in the alleged implied contracts were directed at the Enterprises, plaintiff cannot be a third-party beneficiary of the alleged contract. See FDIC, 342 F.3d at 1320. Third, plaintiff has not demonstrated that the FHFA intended that plaintiff would benefit independently of its status as a shareholder even if it did so benefit. Plaintiff relies on the FHFA's statements that private stock would remain outstanding and shareholders would continue to hold an economic interest in their stock. Those factual statements, however, do not reflect that the FHFA intended to confer any specific benefit on plaintiff independent of its role as a shareholder. Because plaintiff has not alleged facts reflecting that the FHFA intended to confer a personal benefit on it, it is not a third-party beneficiary. See Glass, 258 F.3d at 1353-54. In sum, the court lacks jurisdiction to entertain plaintiff's implied-in-fact-contract claim because plaintiff is neither a party to a contract with the government nor a third-party beneficiary of any such agreement. Therefore, the court dismisses count IV of its amended complaint.

V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiff's claims, defendant challenges plaintiff's standing to pursue its claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. Starr Int'l Co. v. United States, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is "assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties." Kowalski v. Tesmer, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that controls. See Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted."), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014). Thus, in a suit brought by a shareholder, it is the substance of the allegations and not the label assigned to the allegations—i.e., direct or derivative—that matters. See Starr, 856 F.3d at 966-67; see also In re Sunrise Sec. Litig., 916 F.2d 874, 882 (3d Cir. 1990) ("Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties."). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based on the rights of the company. See Starr, 856 F.3d at 966-67; see also Weir v. Stagg, No. 09-21745-CIV, 2011 WL 13174531, at *9 (S.D. Fla. Feb. 7, 2011) ("Shareholders do not have standing to bring a direct action for injuries suffered by a corporation, but rather, must bring a derivative action."). A shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the corporation's injuries—to have standing to litigate those claims. See Starr, 856 F.3d at 966-67.

Defendant argues that plaintiff lacks standing because its claims, pled as direct claims, actually belong to the Enterprises and are therefore derivative in nature. The parties in this case and the related cases fully briefed and argued this issue prior to the court issuing the Fairholme II decision. The court concluded in Fairholme II that Fannie and Freddie shareholders lack standing to pursue direct claims that are derivative in nature. Thereafter, the court solicited short supplemental briefs from plaintiff and defendant regarding the applicability of the holdings in Fairholme II to this case. In its supplemental brief, plaintiff suggests that its allegations are materially different from those asserted in Fairholme for purposes of standing, while defendant contends in its supplemental brief that there are no material differences. All of the parties' arguments are addressed below.

A. Plaintiffs' allegations are not materially different from the allegations in Fairholme.

As an initial matter, plaintiff contends that its allegations are materially different from those advanced in Fairholme in two respects, such that the standing inquiry would be affected. Plaintiff first argues that the type of harm it has suffered and the type of relief it has requested distinguish its claims from the direct claims in Fairholme. In essence, plaintiff attempts to distinguish what it characterizes as the Fairholme plaintiffs' allegation of the expropriation of the Enterprises' assets from its allegation of the expropriation of its economic interests. As defendant points out, however, the direct claims in Fairholme and the claims in this case are virtually indistinguishable in nature. All four counts of the amended complaint in this case mirror, in every essential way, the direct takings, illegal-exaction, fiduciary duty, and breach-of-implied-contract claims in Fairholme. Expropriation of the shareholders' economic interests was alleged in Fairholme, just as it is alleged in the first amended complaint in this case. Compare Fairholme II, 147 Fed. Cl. at 20, 46-47, with 1st Am. Compl. ¶¶ 88, 105-107. Thus, the standing analysis in Fairholme II is fully applicable to the claims presented here.

Plaintiff next invokes its reliance on the allegation of the existence of a "control group," formed by Treasury and the FHFA-C, that dominated the Enterprises and injured it. In its view, this factual distinction in its first amended complaint is significant because it was not discussed in Fairholme II. Plaintiff fails to explain, however, how this factual distinction gives it standing to bring its direct claims. Plaintiff apparently infers a logical connection between a control group of shareholders and a controlling shareholder, but the connection is not explained in a way that is helpful to the court. Indeed, in its supplemental brief plaintiff cites primarily to a section of its opposition brief that does not address the topic of standing at all. If plaintiff wished to advance a standing argument that specifically relied on the state law concept of a control group of shareholders and cases discussing such a phenomenon, no such argument was made in its opposition brief. Thus, any such standing argument that plaintiff may be attempting to make in its supplemental brief, to the extent that one could be discerned, is waived as untimely.[20] See Ironclad/EEI, 78 Fed. Cl. at 358.

B. Plaintiff's claims actually belong to the Enterprises.

Having determined that plaintiff's allegations do not differ materially from those advanced in Fairholme, the court turns to defendant's contention that plaintiff lacks standing to litigate its claims. Defendant's standing argument is premised on its assertion that plaintiff's claims actually belong to the Enterprises—and are therefore derivative in nature—because, to prevail, plaintiff would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises. Plaintiff counters that it asserts direct claims because the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises' capital structure to plaintiff's detriment, which renders the claims for such conduct both direct and derivative under the dual-nature exception.[21] Defendant replies that the Federal Circuit rejected the notion that a plaintiff states a direct claim by alleging it was targeted by the challenged action. Defendant also contends that the dual-nature exception is not applicable because Treasury was not a controlling shareholder, the Enterprises did not issue new shares, and the PSPA Amendments did not involve the reallocation of power.

Neither theory plaintiff advances for why its claims are substantively direct, rather than derivative, is persuasive. First, it is of no import whether the government targeted shareholders with the PSPA Amendments. See Starr, 856 F.3d at 973 (noting that the plaintiffs did not "sufficiently explain why the Government's subjective motivations are relevant to the inquiry into direct standing"). The direct-versus-derivative inquiry "turns on the plaintiff's injury, not the defendant's motive." Pagan v. Calderon, 448 F.3d 16, 30 (1st Cir. 2006). Second, plaintiff has not asserted claims that qualify as both direct and derivative based on the dual-nature exception. The Federal Circuit explained that, pursuant to this exception, shareholder claims may be both direct and derivative "when a 'reduction in [the] economic value and voting power affected the minority stockholders uniquely . . . .'" Starr, 856 F.3d at 968 (quoting Gentile v.

[20] Even if this argument were not waived, the court agrees with defendant that the control group scenario alleged by plaintiff also fails to satisfy the criteria for dual-natured claims that might provide standing to a shareholder plaintiff asserting direct claims. See Section V.B, infra (discussing the criteria for dual-natured claims).

[21] The plaintiffs in the related cases also asserted that their claims must be construed as direct claims to vindicate important federal policies if shareholders cannot assert derivative claims because of HERA. But as this court held in Fairholme II, the shareholders of the Enterprises, notwithstanding HERA, have standing to assert derivative claims because of the FHFA-C's conflict of interest. 147 Fed. Cl. at 49-51.

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Rossette, 906 A.2d 91, 99 (Del. 2006)). Specifically, shareholder claims are both direct and derivative if

> "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value," and "(2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders."

Id. (quoting Gentile, 906 A.2d at 100). The exception does not apply here because Treasury was not a controlling shareholder at the time the PSPA Amendments were executed,[22] the PSPA Amendments did not involve the issuance of new shares, and shareholder voting power was not reallocated under the PSPA Amendments. It is not enough, contrary to plaintiff's contention, that the government allegedly exacted economic value from the other shareholders by rearranging the corporate structure. See El Paso Pipeline GP Co. v. Brinckerhoff, 152 A.3d 1248, 1264 (Del. 2016) (applying Gentile and holding a plaintiff does not state a direct claim under the dual-nature exception by pleading the "extraction of solely economic value from the minority by a controlling stockholder"). Because plaintiff has not established that its claims are substantively direct in nature, it cannot demonstrate that it has standing to litigate those claims.

Plaintiff fares no better if the court moves beyond its arguments for why its claims are substantively direct in nature. Federal law governs whether plaintiff's claims are direct or derivative. See Starr, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. Id.; see also Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 97 (1991) (noting the "presumption that state law should be incorporated into federal common law"). Under Delaware law, the test for whether a shareholder's claim is derivative or direct depends on the answers to two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004) (en banc). "Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow." Gentile, 906 A.2d at 99, discussed in Starr, 856 F.3d at 965. Such claims are derivative even "though the overpayment may diminish the value of the corporation's stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend." Protas v. Cavanagh, No. CIV.A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012); see also Hometown Fin. Inc. v. United States, 56 Fed. Cl. 477, 486 (2003) ("[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to nothing more than a diminution in stock value or a loss of dividends.").

[22] Treasury is not a controlling shareholder for the reasons set forth in Section IV.B.1, supra.

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Plaintiff focuses on the expropriation of the Enterprises' assets via compulsory payments of all profits. The gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury. Regardless of plaintiff's label (direct) or theory (taking, illegal exaction, breach of fiduciary duty, or breach of implied contract) for its claims, the claims are substantively derivative in nature because they are premised on allegations of overpayment.[23] See Gentile, 906 A.2d at 99; see also Roberts, 889 F.3d at 409 (explaining that the plaintiffs asserted "classic derivative claims" when they alleged that "the [PSPA Amendments] illegally dissipated corporate assets by transferring them to Treasury"). Plaintiff cannot transform its substantively derivative claims into direct claims by merely alleging that, as a result of overpayments, it was deprived of its stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiff's purported "harms are 'merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.'" Protas, 2012 WL 1580969, at *6 (quoting Gentile, 906 A.2d at 99); see also Agostino v. Hicks, 845 A.2d 1110, 1122 (Del. Ch. 2004) ("[T]he inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation."). Because plaintiff's claims are derivative in nature, plaintiff lacks standing to pursue those claims on its own behalf.

C. Plaintiff's claims are direct claims, as pled, and cannot be deemed to be derivative claims.

Plaintiff, while acknowledging that it asserts only direct claims,[24] attempts to avoid a dismissal of those claims for lack of standing by contending that "[e]ven if [its] direct claims were deemed derivative, [it] still may assert them, under circuit precedent, because the [FHFA-C] as conservator has a manifest conflict of interest." Pls.' Corrected Combined Opp'n to Def.'s

[23] Plaintiff would remain unsuccessful if its allegations of waste and mismanagement (styled as self dealing, overreach, or abuse of discretion) were construed to be indicative of some action other than overpayment. Any claims premised on waste and mismanagement are derivative in nature. Kramer v. W. Pac. Indus., Inc., 546 A.2d 348, 353 (Del. 1988) (noting that "mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature"). Plaintiff's claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. See Hometown, 56 Fed. Cl. at 486 (stock prices); In re Straight Path Commc'ns Inc. Consol. S'holder Litig., No. CV 2017-0486-SG, 2017 WL 5565264, at *4 (Del. Ch. Nov. 20, 2017) ("Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . . .").

[24] Indeed, there is no dispute that the four claims plaintiff asserts in its amended complaint are direct claims. In each count plaintiff emphasizes that the harm to plaintiff is direct. 1st Am. Compl. ¶¶ 108, 112, 118, 134. In addition, the relief requested by plaintiff is for monetary relief payable to it, not to the Enterprises. Id. at 47; see also Pls.' Suppl. Br. on Outstanding Mot. to Dismiss 3-4 (arguing that payments to the Enterprises would be of no use to plaintiff). Finally, the amended complaint contains a statement that plaintiff's claims are direct in nature. See 1st Am. Compl. ¶ 102 ("[A]ny claim raised by Akanthos that might be considered derivative on behalf of the Company is in fact direct, on behalf of Akanthos itself.").

Omnibus Mot. to Dismiss 39. The precedent upon which plaintiff relies is the Federal Circuit's decision in First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279 (Fed. Cir. 1999).

Once defendant challenged the standing of plaintiffs in these related cases to bring direct claims, the opposition brief filed in this case raised a novel standing argument. Although plaintiff continues to argue that its claims are direct, and that it has standing to bring direct claims, it posits that "[e]ven if plaintiffs' direct claims [in these five cases] were deemed derivative, they still may assert them, under circuit precedent, because the [FHFA-C] as conservator has a manifest conflict of interest." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 39. The precedent upon which plaintiff relies is the Federal Circuit's decision in First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279 (Fed. Cir. 1999).

In First Hartford, the Federal Circuit held that a shareholder of a company could bring a derivative claim, notwithstanding a succession clause, if the company was controlled by an entity with a conflict of interest. Id. at 1283; accord id. at 1295 (remarking that the purpose of derivative suits was to "permit shareholders to file suit on behalf of a corporation when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation"). The court in Fairholme II concluded that pursuant to First Hartford, the plaintiff who asserted derivative claims in Fairholme had standing to litigate those claims due to the FHFA-C's conflict of interest. 147 Fed. Cl. at 49-51.

If plaintiff had asserted derivative claims in its amended complaint, the "conflict of interest" holding in First Hartford would have aided plaintiff in its quest to establish standing. But it did not do so. Thus, its reliance on this holding in First Hartford is misplaced.

As for plaintiff's suggestion that its direct claims could be deemed derivative, it identifies no authority for that recharacterization of its claims, even though it had the opportunity to do so in its opposition brief and its supplemental brief. The court finds plaintiff's "direct claims deemed derivative" argument, Pls.' Suppl. Br. on Outstanding Mot. to Dismiss 5 (emphasis removed), to be unsupported by authority and unpersuasive for the purpose of establishing plaintiff's standing to bring the claims in its amended complaint.[25]

D. Plaintiff's standing to bring direct claims is not established by another holding in First Hartford.

Finally, the court addresses an assertion in plaintiff's opposition brief that was not explicitly addressed in Fairholme II. Only one sentence of that sixty-page brief was devoted to the following contention included among plaintiff's standing arguments: "[T]he Federal Circuit has repeatedly recognized a direct claim where a shareholder alleged deprivation of a contingent property interest in a bank." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to

[25] As defendant notes, claims brought on behalf of the Enterprises are asserted in numerous shareholder derivative claims in these related cases.

Dismiss 38 (citing First Hartford, 194 F.3d at 1296; Cal. Hous. Sec., Inc. v. United States, 959 F.2d 955, 957 n.2 (Fed. Cir. 1992)). Defendant, in support of its challenge to plaintiff's standing to bring its claims, relied on more recent precedent, the Federal Circuit's decision in Starr, to argue that plaintiff's claims were derivative claims, not direct claims. Plaintiff, notwithstanding its citation to First Hartford and a footnote in a case discussed in First Hartford, did not attempt, in any meaningful way, to explain why Starr should not be applied and followed in this case. Because plaintiff's reliance on First Hartford as support for a shareholder's standing to bring direct claims is cursory and undeveloped, the court is within its discretion to deem this argument waived. See SmithKline Beecham Corp. v. Apotex Corp., 439 F.3d 1312, 1320 (Fed. Cir. 2006) (noting that the court has discretion on whether to consider undeveloped arguments).

Even if this argument were not waived, the Federal Circuit's Starr decision remains the binding precedent most on point. In Starr, the distinction between direct and derivative claims brought by shareholders is the focus of the Federal Circuit's standing analysis. 856 F.3d at 963-73. Just as here, the plaintiffs brought takings and illegal-exaction claims related to a government intervention, during a financial crisis, affecting the future of a corporation in which they owned shares. Id. at 958-61. Starr provides the test for determining whether such claims are direct or derivative in nature and requires that nominally direct claims—that are actually derivative claims—be dismissed for lack of standing. Id. at 973.

In the face of this binding precedent, the court cannot conclude that the holding in First Hartford, which concerns direct Fifth Amendment takings claims, is more relevant. It is true that in First Hartford shareholders of a bank in receivership could pursue their takings claims as direct claims against the United States. 194 F.3d at 1287. However, First Hartford does not address the distinction between direct and derivative claims. When faced with binding precedent that addresses a crucial distinction, such as Starr, and one that does not, such as First Hartford, the court follows the precedent most on point. Cf. Union Elec. Co. v. United States, 363 F.3d 1292, 1297 (Fed. Cir. 2004) ("[W]e have repeatedly held that the disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue." (citing Boeing N. Am., Inc. v. Roche, 298 F.3d 1274, 1282 (Fed. Cir. 2002))).

In sum, plaintiff has not established that it has standing to litigate its claims because it does not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court dismisses plaintiff's claims on standing grounds to the extent that it has subject-matter jurisdiction over those claims.[26]

[26] As explained above, the court lacks jurisdiction over plaintiff's claims for breach of fiduciary duty and breach of implied contract. See supra Sections IV.B.1 (fiduciary duty), IV.C (contract). In addition, because all of plaintiff's claims must be dismissed for lack of standing, the court need not reach defendant's remaining arguments that these claims should be dismissed for failure to state a claim upon which relief can be granted.

VI. CONCLUSION

For the reasons stated above, the court **GRANTS** defendant's motion to dismiss and **DISMISSES** plaintiff's complaint because the court lacks jurisdiction to entertain its fiduciary duty and implied-in-fact-contract claims, and plaintiff lacks standing to pursue any of its claims. The clerk shall enter judgment accordingly. No costs.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

In the United States Court of Federal Claims

No. 18-370C
(Filed: June 8, 2020)

APPALOOSA INVESTMENT LIMITED PARTNERSHIP I et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(1); RCFC 12(b)(6); Jurisdiction; Standing; Direct Claims; Instrumentalities; Coercion; Agent; Conservators; Conflict of Interest; Third-Party Beneficiaries; Stock; Shareholders; Fannie; Freddie; FHFA

Lawrence D. Rosenberg, Washington, DC, for plaintiffs.

Kenneth M. Dintzer, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiffs in this case challenge the actions of the United States during the conservatorships of the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie"). Specifically, plaintiffs take issue with the conservator for Fannie and Freddie (collectively, the "Enterprises") amending a funding agreement between the Enterprises and the United States Department of the Treasury ("Treasury"). Based on the revisions to that agreement, plaintiffs seek the return of money illegally exacted, damages for breach of contract and breach of fiduciary duty, and compensation for a taking pursuant to the Fifth Amendment to the United States Constitution ("Constitution"). Defendant moves to dismiss plaintiffs' amended complaint, arguing that the court lacks subject-matter jurisdiction over plaintiffs' claims, plaintiffs lack standing to pursue their claims, and plaintiffs fail to state a claim upon which relief may be granted. For the reasons stated below, the court grants defendant's motion to dismiss.

I. BACKGROUND

A. The Enterprises are private companies that are under the control of a conservator.

1. The Enterprises operated independently before the financial crisis.

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities that are sold to investors.[1] 2d Am. Compl. ¶¶ 19-20; Fairholme II, 147 Fed. Cl. at 15. Congress chartered Fannie in 1938 and established Freddie in 1970. 2d Am. Compl. ¶¶ 19-20. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. Id. Freddie is organized under Virginia law, and Fannie is organized under Delaware law. Id. The Enterprises issued their own common and preferred stock. Id. ¶ 22. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. Fairholme II, 147 Fed. Cl. at 15. Those owning preferred stock, including plaintiffs in this suit, acquired the right to receive dividends and a liquidation preference. 2d Am. Compl. ¶ 22.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. Id. ¶ 23. Although the Enterprises began recording losses in 2007, they were stable and adequately capitalized. Id. ¶¶ 25-26. Otherwise stated, the Enterprises were not in financial distress or otherwise at risk of insolvency. Id.

2. Congress created the Federal Housing Finance Agency to regulate the Enterprises and authorized the agency to serve as a conservator for each Enterprise.

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency ("FHFA") and provided it with supervisory and regulatory authority over the Enterprises. See 12 U.S.C. § 4511(a)-(b) (2018).[2] Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator ("FHFA-C") for each Enterprise to reorganize, rehabilitate, or wind up its affairs.[3] Id.

[1] This background section is a less comprehensive version of the court's recitation of facts in a related case, Fairholme Funds, Inc. v. United States, 147 Fed. Cl. 1 (2019) ("Fairholme II"), motion to certify interlocutory appeal granted, 147 Fed. Cl. 126 (2020).

[2] Congress has not amended the relevant portions of HERA since enacting the law in 2008. The court, therefore, refers to the most recent version of the United States Code.

[3] To avoid any ambiguity, the court reiterates that it is using "FHFA" to refer to the agency acting in its regulatory role and "FHFA-C" when discussing the agency acting as a conservator.

§ 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its obligations. Id. § 4617(a)(3).[4] The conservator, once appointed, functions independently; it is not "subject to the direction or supervision of any other agency of the United States or any State in the exercise of [its] rights, powers, and privileges . . . ." Id. § 4617(a)(7).

Congress also delineated the scope of the FHFA-C's powers in HERA. See generally id. § 4617. As soon as it is appointed, the FHFA-C "immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . . ." Id. § 4617(b)(2)(A). Congress also conferred on the conservator the power to "[o]perate the [Enterprise]." Id. § 4617(b)(2)(B). Pursuant to that power, the conservator "may," among other things, "perform all functions of the [Enterprise]," "preserve and conserve the assets and property of the [Enterprise]," and "provide by contract for assistance in fulfilling any function . . . of the [conservator]." Id. The conservator "may" also "take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise]." Id. § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator "may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]" and "take any action authorized by [12 U.S.C. § 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA]." Id. § 4617(b)(2)(J). By describing the FHFA-C's role primarily in terms of what powers it "may" exercise, see generally id. § 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its powers, see United States v. Rodgers, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."). Simply stated, the FHFA has "extraordinarily broad flexibility to carry out its role as conservator." Perry Capital LLC v. Mnuchin, 864 F.3d 591, 606 (D.C. Cir. 2017) ("Perry II"), cert. denied, 138 S. Ct. 978 (2018).

3. Congress authorized Treasury to purchase securities issued by the Enterprises.

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(g) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. Id. §§ 1455(*l*)(4), 1719(g)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the availability of mortgage finance, and protect taxpayers. Id. §§ 1455(*l*)(1)(B), 1719(g)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

(i) The need for preferences or priorities regarding payments to the Government.

[4] Congress enticed the Enterprises to consent to a conservatorship by insulating their board members from any liability to shareholders or creditors for agreeing in good faith to the FHFA's appointment of a conservator. 12 U.S.C. § 4617(a)(6).

(ii) Limits on maturity or disposition of obligations or securities to be purchased.

(iii) The [Enterprise's] plan for the orderly resumption of private market funding or capital market access.

(iv) The probability of the [Enterprise] fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the [Enterprise's] status as a private shareholder-owned company.

(vi) Restrictions on the use of [Enterprise] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

Id. §§ 1455(*l*)(1)(C), 1719(g)(1)(C).

4. The FHFA became the conservator for each Enterprise.

Around the beginning of September 2008, the FHFA and Treasury sought to persuade each Enterprise's board of directors to consent to conservatorship. 2d Am. Compl. ¶ 36. The FHFA told each Enterprise's board that conservatorship would further the interests of the shareholders. Id. Around the same time, the FHFA made an offer to each board: consent to a conservatorship in exchange for the FHFA-C aiming to preserve and conserve the Enterprises' assets, attempting to restore the Enterprises to sound and solvent condition, and terminating the conservatorships when those goals were achieved. Id. ¶¶ 5, 7; Fairholme II, 147 Fed. Cl. at 17. Each Enterprise's board accepted that offer and consented to a conservatorship on September 6, 2008, with an understanding that the FHFA-C would operate in the aforementioned limited ways. Fairholme II, 147 Fed. Cl. at 17.

The conservatorships became effective on September 6, 2008, upon each Enterprise's board's consent. 2d Am. Compl. ¶¶ 36-37; see also 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when "[t]he [Enterprise], by resolution of its board of directors or its shareholders or members, consents to the appointment").

5. The FHFA-C contracted with Treasury to obtain funding for the Enterprises.

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement ("PSPA") with Treasury for each Enterprise. 2d Am. Compl. ¶ 6. Treasury entered into the agreements pursuant to its authority under HERA to buy the Enterprises' securities. Id. ¶¶ 6, 38. Under the PSPAs, Treasury committed to provide up to $100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. Id. ¶ 38. If an Enterprise's liabilities exceeded its assets, then the Enterprise could draw on Treasury's funding commitment in an amount equal to the difference between the Enterprise's liabilities and assets. Fairholme II, 147 Fed. Cl. at 17.

In return for Treasury's funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their respective common stock at a nominal price. 2d Am. Compl. ¶ 38. Treasury's preferred stock had an initial liquidation preference of $1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury's funding commitment. Id. In the event of a liquidation, Treasury was entitled to recover the full liquidation value of its shares before any other shareholder would receive compensation. Id. Second, Treasury bargained for the right to a quarterly cash dividend that would be equal, per annum, to 10% of its liquidation preference. Id. An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. Id. Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. Id. ¶¶ 38, 44. Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. Id. ¶ 39.

The FHFA-C and Treasury amended each Enterprise's PSPA on May 6, 2009, to increase Treasury's funding commitment to each Enterprise from $100 billion to $200 billion. Id. ¶ 46. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed $200 billion. Id. ¶ 47.

6. The Enterprises' finances improved during their conservatorships.

In the early stages of the conservatorships, each Enterprise's net worth decreased as it reported losses. Fairholme II, 147 Fed. Cl. at 18. Some of the losses resulted from the FHFA-C writing down the value of deferred tax assets.[5] Id. Notwithstanding those on-paper losses, as of late 2009, Fannie had drawn only $60 billion from Treasury, and Freddie had only drawn $51 billion. 2d Am. Compl. ¶ 48.

By 2011 and into 2012, the Enterprises' financial outlooks were promising. In addition to an improvement in the housing market, the Enterprises had improved their financial performance. Id. ¶ 53. They were positioned to further improve their financial condition by revising their valuations of deferred tax assets because of growing profits, and by increasing their earnings due to reduced credit losses. Id. The FHFA-C and Treasury were aware of those forthcoming changes and the Enterprises' improving outlooks. Id. ¶ 8. In August 2012,

[5] A deferred tax asset is an asset that may be used to offset future tax liability. Fairholme II, 147 Fed. Cl. at 18 n.4. A company must write down the value of that deferred asset if it is unlikely to be used to offset future taxable profits. Id. This write down occurs, for example, if a company predicts it will not be profitable in the future. Id.

Treasury and FHFA-C knew that the Enterprises would soon experience improved profitability and received projections reflecting that the Enterprises would have positive comprehensive income in 2012. Id. ¶¶ 54-55. Otherwise stated, the FHFA-C and Treasury knew, by early August 2012, that the Enterprises were poised to generate profits in excess of their respective dividend obligations to Treasury. Id. ¶ 53.

7. Treasury and the FHFA-C agreed to a third amendment to the PSPAs.

At an unspecified time prior to August 2012, Treasury and the FHFA-C began considering a third amendment to each PSPA. Treasury was the driving force behind the initiative to amend the PSPAs' terms. Id. ¶¶ 59, 71. Indeed, an FHFA official reported in early August 2012 that Treasury was making a "renewed push" to implement a new amendment. Id. ¶ 67 (quoting the FHFA official). The FHFA-C learned of the proposed changes before the Enterprises; Treasury informed the Enterprises that the new terms were forthcoming and announced the changes to the Enterprises. Id. ¶ 69. Treasury officials who were involved with the process do not recall Treasury making any backup or contingency plans in the event that the FHFA-C rejected the proposed terms. Fairholme II, 147 Fed. Cl. at 19. The FHFA-C accepted the changes without advocating for different terms. Id.

Treasury and the FHFA-C decided to announce the changed terms in mid-August 2012 because, according to Treasury, the Enterprises would be reporting earnings exceeding their dividend obligation at the beginning of that month. Id. On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA ("PSPA Amendment"). 2d Am. Compl. ¶¶ 2, 9, 56. A key component of the amended PSPAs is the requirement—referred to here as the "Net Worth Sweep"—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise's net worth (except for a small capital reserve amount) rather than a dividend based on a set percentage of the liquidation preference.[6] Id. ¶ 56. Additionally, under the amended PSPAs, the Enterprises are not obligated to pay a periodic commitment fee. Id. ¶ 67.

a. Treasury wanted to ensure that it benefited from the new terms.

With the PSPAs, Treasury sought to secure a more beneficial arrangement for itself, as a representative for taxpayers. During the lead-up to the PSPA Amendments, a Treasury official acknowledged in an internal communication that the government had resolved to "ensure existing common equity holders will not have access to any positive earnings from the [Enterprises] in the future." Id. ¶ 59 (emphasis removed) (quoting the document). Treasury recognized its goal of obtaining all of the Enterprises' profits by executing the PSPA Amendments; it intended to take "every dollar of earnings that [the Enterprises] generate[] . . . to benefit taxpayers." Id. ¶ 10 (quoting a Treasury announcement).

b. The FHFA-C agreed to changes that benefit Treasury.

[6] The capital reserve for each Enterprise started at $3 billion and was set to decrease to $0 by January 2018, but the Enterprises and Treasury agreed in December 2017 to reset the capital reserve amount to $3 billion in the first quarter of 2018. 2d Am. Compl. ¶ 56; Fairholme II, 147 Fed. Cl. at 19 n.5.

For its part, the FHFA-C was operating under the belief that Treasury would benefit from the PSPA Amendments. The FHFA-C prioritized Treasury's interests over the fate of the Enterprises and the interests of their shareholders. Id. ¶ 79. Mel Watt—a former FHFA Director—commented at the time that he did not "lay awake at night worrying what's fair to the shareholders." Id. (quoting an interview).

c. Treasury and the FHFA understood that the PSPA Amendments would not facilitate the Enterprises exiting conservatorship.

Treasury was aware that the new terms of the PSPAs were not conducive to the Enterprises exiting conservatorship. Treasury acknowledged that its goal was to facilitate the "wind down" of the Enterprises. Id. ¶ 59 (quoting a Treasury report). At the time of the PSPA Amendments, Treasury explained that the new deal would ensure that the Enterprises "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." Id. ¶ 72 (emphasis removed) (quoting Treasury press release).

The FHFA shared a similar sentiment. The FHFA's former Acting Director, Edward DeMarco, testified before the United States Senate that the PSPA Amendments "reinforce the notion that the [Enterprises] will not be building capital as a potential step to regaining their former corporate status." Id. ¶ 79 (emphasis removed) (quoting the testimony). Indeed, the FHFA explained to Congress that its vision for the future included a housing industry without Fannie and Freddie. Fairholme II, 147 Fed. Cl. at 20.

d. Treasury has benefited from the PSPA Amendments at the expense of the Enterprises and other shareholders.

There are four significant effects that flowed from the PSPA Amendments. First, plaintiffs lost their economic interests in the Enterprises because, under the new terms, private shareholders can never receive dividends or liquidation distributions. 2d Am. Compl. ¶¶ 2, 9, 91-92. Second, Treasury acquired plaintiffs' economic interests in the Enterprises because Treasury now possesses "the entire value" of the Enterprises. Id. ¶ 96. Third, Treasury reaped a windfall of $128.9 billion in comparison to what it would have received absent changes to the PSPAs. Id. ¶¶ 88-89 (alleging that the Enterprises paid Treasury $223.6 billion under the PSPA Amendments but would have only paid Treasury $94.7 billion under the previous terms). Fourth, the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink of insolvency. Id. ¶¶ 57, 90.

8. Treasury and the FHFA are committed to ending the conservatorships.

On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the Treasury Secretary to develop, "as soon as practicable," a plan for "[e]nding the conservatorships of the [Enterprises] upon the completion of specified reforms . . . ."[7] Memorandum on Federal Housing Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must include proposals for "[s]etting the conditions necessary for the termination of the conservatorships" and outlined some of those conditions. Id. at 12,480. Subsequently, Treasury issued a plan in which it advocated for "begin[ning] the process of ending the [Enterprises'] conservatorships."[8] U.S. Dep't of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf [https://perma.cc/RGH8-N385]; accord id. at 26 ("It is, after 11 years, time to bring the conservatorships to an end."). As part of the plan to end the conservatorships, Treasury proposed that it and the FHFA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. Id. at 26-27.

The FHFA shares Treasury's goals with respect to the conservatorships. Mark Calabria, the current FHFA Director, testified during his confirmation hearing that he wanted to end the conservatorships.[9] 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony). See generally Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs, 116th Cong. 10-40, 74-75, 148-85 (2019) [hereinafter Calabria Testimony] (documenting Mr. Calabria's testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that each Enterprise retains. Calabria Testimony, supra, at 150; see also id. at 25 ("I support the idea of having significantly more capital at the [Enterprises].").

B. Plaintiffs own Fannie and Freddie stock.

There are four plaintiffs in this case: Appaloosa Investment L.P. I; Palomino Fund Ltd.; Palomino Master Ltd.; and Azteca Partners LLC (collectively, "Appaloosa"). The first plaintiff

[7] The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source, the Federal Register. See Murakami v. United States, 46 Fed. Cl. 731, 739 (2000) (noting that the court may take judicial notice of government documents), aff'd, 398 F.3d 1342, 1354-55 (Fed. Cir. 2005); see also Democracy Forward Found. v. White House Office of Am. Innovation, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) ("[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum."). See generally Fed. R. Evid. 201 (discussing judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the court may consider facts derived from sources subject to judicial notice without converting the motion into one for summary judgment. Sebastian v. United States, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

[8] The court takes judicial notice of Treasury's reform plan because it is a government record available from a reliable source, Treasury's website. See supra note 7.

[9] The court takes judicial notice of the relevant testimony because the statements are recorded in government documents. See supra note 7.

is a Delaware limited partnership; the second and third plaintiffs are British Virgin Islands companies; and the fourth plaintiff is a Delaware limited liability company. 2d Am. Compl. ¶¶ 13-16. Plaintiffs, or entities whose investment interests have passed to plaintiffs, owned Fannie preferred stock and Freddie preferred stock at the time of the Net Worth Sweep. Id. The shares owned by these plaintiffs or their predecessors in interest were primarily purchased after the conservatorships were established in 2008. Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 1.

II. PROCEDURAL HISTORY

Plaintiffs filed their complaint on March 8, 2018. This case was coordinated with similar, related cases assigned to the undersigned judge.[10] Plaintiffs filed their second amended complaint in this case on August 16, 2018. In their amended complaint, plaintiffs present four claims. Plaintiffs first assert that the Net Worth Sweep constitutes a Fifth Amendment taking (count I) of their economic interests in their stock. Plaintiffs next assert, in the alternative, that the Net Worth Sweep constitutes an illegal exaction (count II) of those same economic interests because the (1) FHFA was operating unconstitutionally and (2) FHFA-C and Treasury exceeded their statutory authority when they approved the PSPA Amendments. Plaintiffs also plead a breach-of-fiduciary-duty claim ("fiduciary duty claim") (count III) premised on the Net Worth Sweep being unreasonable, arbitrary, and contrary to the duty owed to the Appaloosa shareholders. Additionally, plaintiffs assert a breach-of-implied-contract claim (count IV) based on a purported agreement by which the Enterprises consented to the conservatorship in exchange for the FHFA agreeing to preserve the Enterprises' assets with the goal of making them safe and solvent. Specifically, plaintiffs assert that each dividend payment under the Net Worth Sweep constitutes a breach because it depletes the Enterprises' assets in a manner that undermines the goals of conservatorship.

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case and eleven related cases before the undersigned.[11] The plaintiffs in each of the twelve cases filed a response brief on their respective dockets; some of the plaintiffs relied on a joint brief filed in six of the cases, others, as is the case here, filed a joint brief for five of the cases in which the plaintiffs are all represented by the same counsel. Defendant filed its omnibus reply brief in each of the cases on May 6, 2019. The parties have fully briefed defendant's motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases

[10] A fuller recitation of the procedural history of this case and related cases is provided in Fairholme II, 147 Fed. Cl. at 21-23.

[11] The eleven related cases are Fairholme Funds, Inc. v. United States, No. 13-465C; Washington Federal v. United States, No. 13-385C; Cacciapalle v. United States, No. 13-466C; Fisher v. United States, No. 13-608C; Arrowood Indemnity Company v. United States, No. 13-698C; Reid v. United States, No. 14-152C; Rafter v. United States, No. 14-740C; Owl Creek Asia I, L.P. v. United States, No. 18-281C; Akanthos Opportunity Master Fund, L.P. v. United States, No. 18-369C; CSS, LLC v. United States, No. 18-371C; and Mason Capital L.P. v. United States, No. 18-529C.

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collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiffs in this case have adopted the favorable arguments made by the plaintiffs in the related cases to the extent that such arguments are relevant.[12] Defendant's motion to dismiss is now ripe for adjudication.

III. STANDARD OF REVIEW

In ruling on a motion to dismiss a complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), the court generally assumes that the allegations in the complaint are true and construes those allegations in the plaintiff's favor. Trusted Integration, Inc. v. United States, 659 F.3d 1159, 1163 (Fed. Cir. 2011). With respect to RCFC 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of the evidence, that the court possesses subject-matter jurisdiction. Id. The allegations in the complaint must include "the facts essential to show jurisdiction." McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936). And, if such jurisdictional facts are challenged in a motion to dismiss, the plaintiff "must support them by competent proof." Id.; accord Land v. Dollar, 330 U.S. 731, 735 & n.4 (1947) ("[W]hen a question of the District Court's jurisdiction is raised, . . . the court may inquire by affidavits or otherwise, into the facts as they exist." (citations omitted)). If the court finds that it lacks subject-matter jurisdiction, it must, pursuant to RCFC 12(h)(3), dismiss the complaint.

A claim that survives a jurisdictional challenge remains subject to dismissal under RCFC 12(b)(6) if it does not provide a basis for the court to grant relief. Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002) ("A motion to dismiss . . . for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy."). To survive a motion to dismiss under RCFC 12(b)(6), a plaintiff must include in the complaint "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Indeed, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 814-19 (1982).

IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a "threshold matter." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998). Subject-matter jurisdiction cannot be waived or forfeited because it "involves a court's power to hear a case." Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it

[12] The court addresses in this opinion some arguments that were made primarily by the plaintiffs in the related cases to provide context for the resolution of defendant's motion to dismiss. In addition, to the extent that any of plaintiffs' less-developed arguments are not discussed in this opinion, the court found such arguments to be unpersuasive.

is "an inflexible matter that must be considered before proceeding to evaluate the merits of a case." Matthews v. United States, 72 Fed. Cl. 274, 278 (2006); accord K-Con Bldg. Sys., Inc. v. United States, 778 F.3d 1000, 1004-05 (Fed. Cir. 2015). Either party, or the court sua sponte, may challenge the court's subject-matter jurisdiction at any time. Arbaugh, 546 U.S. at 506; see also Jeun v. United States, 128 Fed. Cl. 203, 209-10 (2016) (collecting cases).

The ability of the United States Court of Federal Claims ("Court of Federal Claims") to entertain suits against the United States is limited. "The United States, as sovereign, is immune from suit save as it consents to be sued." United States v. Sherwood, 312 U.S. 584, 586 (1941). The waiver of immunity "may not be inferred, but must be unequivocally expressed." United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003). Any such waiver must be narrowly construed. Smith v. Orr, 855 F.2d 1544, 1552 (Fed. Cir. 1988). The Tucker Act, the principal statute governing the jurisdiction of this court, waives sovereign immunity for claims against the United States, not sounding in tort, that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (2018); White Mountain, 537 U.S. at 472. However, the Tucker Act is merely a jurisdictional statute and "does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 298 (1976). Instead, the substantive right must appear in another source of law, such as a "money-mandating constitutional provision, statute or regulation that has been violated, or an express or implied contract with the United States." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc).

Defendant challenges the court's jurisdiction to entertain plaintiffs' claims on a number of bases. Specifically, defendant argues that plaintiffs have not asserted claims against the United States and that the court lacks jurisdiction over the subject matter of certain claims. The court addresses these contentions in turn.[13]

A. Plaintiffs have asserted claims against the United States.

The court first considers whether plaintiffs have asserted claims against the United States, a necessary element of jurisdiction in the Court of Federal Claims. As set forth in their amended complaint, all of plaintiffs' claims are premised on actions taken by the FHFA-C and Treasury. Defendant argues that the court lacks jurisdiction to consider any claims premised on the FHFA-C's or Treasury's conduct. In response, plaintiffs contend that they have asserted claims against the government because (1) Treasury was involved in the challenged conduct, (2) the FHFA-C was coerced by the government, (3) the FHFA-C was the government's agent, and (4) the FHFA-C, in collaboration with Treasury, is a government actor. The court addresses each contention in turn.

[13] In Fairholme II, the court addressed additional jurisdictional concerns that were not raised or are not implicated in this case. See generally 147 Fed. Cl. at 24-25 (rejecting defendant's contention that the claims of the Fairholme plaintiffs were barred by 28 U.S.C. § 1500), 34-37 (rejecting the contention of a putative intervenor that the Court of Federal Claims lacks jurisdiction to entertain Fifth Amendment takings claims).

1. The court cannot exercise jurisdiction based on allegations of Treasury's involvement.

Plaintiffs initially argue that the court has jurisdiction over their Fifth Amendment takings and illegal-exaction claims because they have alleged the involvement of Treasury—indisputably a part of the federal government—in the action underlying these claims, i.e., the Net Worth Sweep. Defendant counters that Treasury alone could not have implemented the PSPA Amendments, and Treasury's role as a counterparty to the voluntary agreement with the Enterprises is not sufficient to establish jurisdiction over plaintiffs' takings claim. Defendant further asserts that the court's order allowing jurisdictional discovery reflects that plaintiffs' allegations concerning Treasury alone are insufficient to confer jurisdiction.

The parties' dispute on the import of allegations concerning Treasury is ultimately immaterial in light of the court's determination, explained below, that the FHFA-C—the other party involved in the PSPA Amendments—is the United States. Nonetheless, the court notes, as defendant asserts, that it implicitly acknowledged in its February 26, 2014 discovery order, issued in Fairholme and related cases, that the allegations concerning Treasury alone were insufficient to support jurisdiction. In that order, the court permitted the plaintiffs in those related cases to conduct fact discovery on whether the FHFA-C was "the 'United States' for purposes of the Tucker Act." Fairholme Funds, Inc. v. United States, 114 Fed. Cl. 718, 721 (2014). The aforementioned discovery would have been unnecessary (and unwarranted) if, as plaintiffs assert here, the court has jurisdiction over plaintiffs' claims based on their allegations concerning Treasury.

2. The FHFA-C was not coerced into approving the PSPA Amendments.

Plaintiffs also argue that the FHFA-C is the United States because the FHFA-C was coerced into approving the PSPA Amendments by Treasury. Defendant counters that the FHFA-C was not coerced by Treasury because the FHFA-C had a choice of whether to accept or reject the PSPA Amendments. Defendant asserts that there is no coercion if a party has a choice, regardless of however difficult refusal of a particular option may be. Indeed, defendant contends that plaintiffs fail to proffer any allegations that Treasury required the FHFA-C to enter into the agreements against its will. Defendant further asserts that other courts have declined to conclude that the FHFA-C felt compelled to follow Treasury based on allegations that Treasury invented the amendment concept or led the process.

a. The court has jurisdiction over claims based on actions that resulted from government coercion.

The court has jurisdiction over claims premised on the FHFA-C's actions if Treasury's "influence over the" FHFA-C "was coercive rather than merely persuasive." A & D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1154 (Fed. Cir. 2014). The line between coercion and persuasion "is highly fact-specific." Id. Precedent from the United States Court of Appeals for the Federal Circuit ("Federal Circuit") frames the contours of the inquiry. In Langenegger v. United States, the plaintiffs pleaded that the United States coerced El Salvador by threatening to withhold financial and military assistance unless El Salvador passed legislation expropriating private property. 756 F.2d 1565, 1567 (Fed. Cir. 1985). The Federal Circuit disagreed with the plaintiffs' characterization of the threats because "[d]iplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of [coercion], however difficult refusal may be as a practical matter." Id. at 1572. Similarly, the Federal Circuit concluded in B & G Enterprises, Ltd. v. United States that California was not coerced into enacting restrictions on smoking, notwithstanding the federal government conditioning grants on states enacting such limits. 220 F.3d 1318, 1321, 1325 (Fed. Cir. 2000); see also A & D Auto, 748 F.3d at 1155 (explaining that "coercion was not established" in B & G). The court explained that "it was California's decision to create [the] restrictions[;] . . . Congress may have provided the bait, but California decided to bite." B & G, 220 F.3d at 1325. In A & D Auto, the Federal Circuit addressed coercion in the context of the government allegedly conditioning vital financial assistance to bankrupt automobile companies on those companies terminating some of their franchise agreements. 748 F.3d at 1145. Unable to resolve the issue due to gaps in the record, the court noted in dicta that a relevant consideration was "whether the government financing was essential to the companies." Id.

A common thread runs through the Federal Circuit's decisions: the importance of choice. A nonfederal actor is not coerced when it can choose to go against the wishes of the United States, even if doing so will cause significant hardships, Langenegger, 756 F.2d at 1567, or result in a loss of prospective benefits, id.; B & G, 220 F.3d at 1325. But there is no choice, in any meaningful sense, when there is only one realistic option. A & D Auto, 748 F.3d at 1145 (noting the importance of considering whether the companies could survive without accepting the government's offer); cf. Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) (noting that, with respect to Congress's spending powers, "the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions"). Put differently, the nonfederal actor must make a voluntary decision, which it cannot do if there is only one realistic option. See BMR Gold Corp. v. United States, 41 Fed. Cl. 277, 282 (1998) (finding that the "the necessary element of coerciveness" for a taking was missing because the plaintiff granted the military permission to cross his land); accord Henn v. Nat'l Geographic Soc., 819 F.2d 824, 826 (7th Cir. 1987) (noting that hard choices remain voluntary when they are not akin to "Don Corleone's '[m]ake him an offer he can't refuse'"). In sum, the FHFA-C was not coerced if it voluntarily chose to enter into the PSPA Amendments.

b. Plaintiffs have not established that Treasury coerced the FHFA-C into approving the PSPA Amendments.

In support of their contention that Treasury coerced the FHFA-C into approving the PSPA Amendments, plaintiffs allege that Treasury proposed the terms of the amendments and used its influence over the FHFA-C to ensure compliance with Treasury's wishes. Those allegations are not enough to establish coercion. First, given the Enterprises' improving financial condition and Treasury's existing funding commitment, the FHFA-C's decision to execute the PSPA Amendments was voluntary because it could reject the deals without imperiling the Enterprises. The facts here, therefore, are diametrically opposed to the circumstances in A & D Auto that the Federal Circuit suggested may support coercion because the automobile dealers faced insolvency if they did not accede to the financing terms. See 748 F.3d at 1145. Second, the FHFA-C's lack of protestation is informative. "[T]he very fact that

FHFA[-C] itself [did] not br[ing] suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA[-C] was an independent, willing participant in its negotiations with the Treasury." Robinson v. Fed. Hous. Fin. Agency, 223 F. Supp. 3d 659, 668 (E.D. Ky. 2016), aff'd, 876 F.3d 220 (6th Cir. 2017). The court's conclusion is bolstered by the fact that another court has held that materially similar allegations to those at issue here did not "come close to a reasonable inference that [the] FHFA[-C] considered itself bound to do whatever Treasury ordered." Perry Capital LLC v. Lew, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) ("Perry I"), aff'd in part, rev'd in part sub nom. Perry II, 864 F.3d at 591. This court agrees with the reasoning in Perry I: the PSPA Amendments were executed by sophisticated parties, and many agreements arise from a party's proposal being accepted by the other party. Id. Plaintiffs have not established that the FHFA-C was coerced into approving the PSPA Amendments by Treasury.

3. The FHFA-C is not Treasury's agent.

Plaintiffs further argue that the FHFA-C's actions are attributable to the United States because the FHFA-C is Treasury's agent. Defendant counters that plaintiffs have not pleaded an agency relationship because Treasury does not control the FHFA-C's operations. Indeed, defendant notes that Treasury is statutorily barred from exercising such control.

The United States is subject to claims in this court for the actions of a third party "if [that] party is acting as the government's agent . . . ." A & D Auto, 748 F.3d at 1154. "An essential element of agency is the principal's right to control the agent's actions." Hollingsworth v. Perry, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01 cmt. f (Am. Law. Inst. 2005)); accord O'Neill v. Dep't of Hous. & Urban Dev., 220 F.3d 1354, 1360 (Fed. Cir. 2000) (acknowledging that the common-law meaning of agency requires, among other things, that the principal has the right to control the agent's conduct); see also Preseault v. United States, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (concluding that a state's actions were attributable to the United States when the state acted pursuant to the Interstate Commerce Commission's order); Hendler v. United States, 952 F.2d 1364, 1378-79 (Fed. Cir. 1991) (attributing a state's actions to the United States when the state acted under authority flowing from an Environmental Protection Agency order). The facts, as alleged, do not reflect that Treasury controlled the FHFA-C's actions because Congress explicitly precluded the FHFA-C from being subservient to another agency, 12 U.S.C. § 4617(a)(7) (providing that the FHFA-C cannot be subject to the "direction or supervision" of any other agency), and plaintiffs have not alleged facts indicating that Treasury exercised such control notwithstanding the statutory bar. Although the FHFA-C was required by the PSPAs to obtain Treasury's approval for certain actions (e.g., issuing dividends), the PSPAs did not provide Treasury with the right to unilaterally order amendments. Moreover, plaintiffs describe an FHFA-C that made decisions independently: Treasury sought to influence the opinions of the FHFA-C's senior officials; Treasury "push[ed]" for the PSPA Amendments; and the FHFA-C agreed to the PSPA Amendments. 2d Am. Compl. ¶¶ 2, 65, 67. Simply stated, plaintiffs have not alleged facts establishing that Treasury exercised the control over the FHFA-C that is necessary for an agency relationship.

4. The FHFA-C is the United States because the FHFA-C retains the FHFA's governmental character.

In addition, plaintiffs contend that the FHFA-C is itself a government actor.[14] Defendant disagrees. First, relying on O'Melveny & Myers v. Fed. Deposit Ins. Corp., 412 U.S. 79 (1994), defendant argues that the FHFA-C is not the United States because the FHFA-C stands in the Enterprises' shoes. Specifically, defendant asserts that Congress's decision to have the FHFA-C succeed to the Enterprises' rights reflects that Congress intended that the FHFA-C step into the Enterprises' private shoes and shed its government character. Second, defendant argues that the FHFA-C's exercise of nontraditional conservatorship powers is immaterial because Congress can expand the conservator's role without transforming it into a government actor. Third, defendant argues that the Enterprises are not government instrumentalities—which means that the FHFA did not step into the shoes of a government actor when it became the Enterprises' conservator—because the government does not retain permanent authority to appoint the Enterprises' directors. Defendant contends that the government only has temporary, albeit indefinite, control over the Enterprises because the conservatorships are not permanent.

In response, plaintiffs dispute the premise of defendant's argument that, pursuant to O'Melveny, the FHFA becomes the Enterprises when acting as conservator. Plaintiffs assert that O'Melveny does not concern whether an entity is the United States or, if the decision can be read as addressing that issue, is distinguishable because it concerns receivers or is limited to conservators exercising traditional conservator powers. Second, plaintiffs argue that the FHFA has not shed its government status, even if it has stepped into the Enterprises' shoes, when it acts as conservator. Specifically, plaintiffs assert that the FHFA-C retains the FHFA's government status because (1) the FHFA-C has acted beyond the traditional conservator powers and (2) Congress expressed its intention for that result by precluding the conservator from being subject to the supervision of "any other agency." 12 U.S.C. § 4617 (emphasis added). Third, plaintiffs argue that their claims are against the United States, even if the FHFA-C steps into the shoes of the Enterprises, because the Enterprises are government instrumentalities.

In short, the parties disagree over the government status of the FHFA-C. The FHFA is indisputably the United States, see id. § 4511(a) (establishing the FHFA as an "independent agency of the Federal Government"), and so the only question is whether the FHFA sheds that status when it acts as conservator. In other jurisdictions, courts have held (with near unanimity) that the FHFA loses its government status pursuant to O'Melveny. In O'Melveny, the United States Supreme Court ("Supreme Court") explained that the Federal Deposit Insurance Corporation ("FDIC") "steps into [the] shoes" of a private company when acting as receiver and sheds its government character because the FDIC "succeed[s] to . . . all rights, titles, powers, and privileges of the [entity in receivership] . . . ." 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); see also AG Route Seven P'ship v. United States, 57 Fed. Cl. 521, 534 (2003) (citing O'Melveny for the proposition that the FDIC as receiver is a "private party, and not the government per se" because it "is merely standing in the shoes . . . of the defunct thrift").

[14] To determine whether this action is against the United States, the court need not reach plaintiffs' argument that Treasury and the FHFA-C formed a "control group." See Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 22-26.

The courts drawing from O'Melveny have concluded that the FHFA steps into the shoes of the Enterprises and sheds its government character when acting as conservator because Congress provided that the FHFA-C exercises the same rights with respect to the Enterprises as Congress granted to the FDIC as receiver. See, e.g., Herron v. Fannie Mae, 861 F.3d 160, 169 (D.C. Cir. 2017); cf. Ameristar Fin. Servicing Co. v. United States, 75 Fed. Cl. 807, 811 (2007) (concluding, with respect to the FDIC, that the step-into-the-shoes principle set forth in O'Melveny also applies in the conservator context).

a. The FHFA-C is not the United States if the FHFA steps into the Enterprises' shoes when acting as conservator.

Plaintiffs initially contend that defendant's reliance on O'Melveny is erroneous because, assuming that O'Melveny applies, the FHFA-C is the United States even though it steps into the Enterprises' shoes. Specifically, plaintiffs assert that the FHFA-C is the United States under the facts alleged because (1) the FHFA-C exercises nontraditional conservator powers, (2) Congress intended that the FHFA-C retain the FHFA's government status, and (3) the FHFA-C steps into the shoes of a government instrumentality. The court addresses each assertion in turn.

First, the FHFA-C did not become a government actor by exercising powers beyond those traditionally afforded to a conservator. As a threshold matter, plaintiffs have not alleged facts reflecting that the FHFA-C used such powers; the execution of the PSPA Amendments was a "quintessential conservatorship" function. Perry II, 864 F.3d at 607. More importantly, however, plaintiffs would not prevail even if the FHFA-C exercised nontraditional conservatorship powers in agreeing to the PSPA Amendments. When this argument was pressed in other jurisdictions, it was rejected:

> It may well be true that FHFA's actions would not be allowed under traditional principles of corporate or conservatorship law, but it does not follow that those actions are therefore governmental. Legislatures can expand conservatorship and similar powers without transforming conservators into agents of the government. Cf. Pegram v. Herdrich, 530 U.S. 211, 225-26 (2000) (explaining that the Employee Retirement Income Security Act altered the common law of trusts to permit certain actions that would otherwise violate the trustee's fiduciary duties).

Bhatti v. Fed. Hous. Fin. Agency, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (footnote omitted). The court agrees with that reasoning, and plaintiffs provide no authority that supports a contrary result. Although plaintiffs state that the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") decision in Waterview Management Co. v. FDIC, 105 F.3d 696 (D.C. Cir. 1997), supports their position, they are mistaken. Waterview is not on point because the D.C. Circuit did not hold that a conservator is per se the United States when acting pursuant to a congressional grant of broad powers. Rather, it held that, as a matter of statutory interpretation, the existence of a receivership did not preempt a prereceivership contract. Id. at 699-702.

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Second, Congress's instruction that the FHFA-C is not subject to the supervision of any other agency does not reflect congressional intent for the FHFA to retain its government status when acting as conservator even if it steps into the shoes of the Enterprises. Because the court only reaches this issue by assuming that O'Melveny is instructive, the statutory language concerning supervision of the FHFA-C does not support a finding of jurisdiction because the same language is present in the statute that the Supreme Court addressed in O'Melveny. See 512 U.S. at 85-86 (discussing 12 U.S.C. § 1821). Compare 12 U.S.C. § 1821(c)(3)(C) ("When acting as conservator or receiver . . . , [the FDIC] shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC's] rights, powers, and privileges."), with id. § 4617(a)(7) ("When acting as conservator or receiver, the [FHFA] shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the [FHFA].").

The third argument advanced by plaintiffs—that the FHFA-C is the United States because it steps into the shoes of a government instrumentality—also is not meritorious. A government instrumentality's actions are attributable to the United States for purposes of the Tucker Act. See Corr v. Metro. Wash. Airports Auth., 702 F.3d 1334, 1336 (Fed. Cir. 2012) (noting that a claim against a government instrumentality is a claim against the United States for purposes of the Little Tucker Act, 28 U.S.C. § 1346(a)(2)). The Supreme Court established in Lebron v. National Railroad Passenger Corp. that a company is a government instrumentality when (1) it is created by "special law," (2) it is established "for the furtherance of governmental objectives," and (3) the federal government "retains for itself permanent authority to appoint a majority of the [company's] directors . . . ." 513 U.S. 374, 400 (1995). After Lebron, the Supreme Court clarified that, for purposes of the instrumentality test, "the practical reality of federal control and supervision prevails over Congress' disclaimer of the [the entity's] governmental status." Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1233 (2015).

There is no dispute that the Enterprises satisfy the first two prongs of the Lebron test; Congress created the Enterprises by special law to achieve governmental objectives related to the housing market. See 12 U.S.C. § 4501; see also Herron, 861 F.3d at 167 (addressing claims involving Fannie and noting that "[t]his case satisfies the first two Lebron criteria"); Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 75 F.3d 1401, 1406-07 (9th Cir. 1996) (reaching same conclusion for Freddie). The status of the Enterprises, therefore, turns on the third prong: whether the government retains permanent authority to appoint a majority of the Enterprises' directors.

The Federal Circuit has not addressed the government-control prong with respect to the Enterprises, but courts in other jurisdictions have done so. Those decisions provide a starting point for the court. It appears that every court to consider the issue, with the exception of one district court, has held that the government does not exercise permanent control over the Enterprises. Sisti v. Fed. Hous. Fin. Agency, 324 F. Supp. 3d 273, 279 (D.R.I. 2018) (concluding that the government retains permanent authority to control the Enterprises after noting that "[t]he non-controlling precedent to date" has reached the opposite conclusion). Most of the courts that concluded that the government lacks permanent control over the Enterprises issued their decisions before the Supreme Court in Association of American Railroads emphasized the importance of evaluating the practical reality over nomenclature, and the other courts focused on the statutory purpose for the conservatorships rather than the Enterprises' actual situation. E.g., Herron, 861 F.3d at 169 (relying on the notion that a conservatorship is fundamentally temporary). In other words, the courts adopting the prevailing view considered the issue of control without regard for the Supreme Court's instruction to focus on the practical reality. The court, therefore, does not find those decisions persuasive.

The crux of the inquiry, as the Supreme Court mandates, is on the practical reality of the government's control over the Enterprises. Ass'n of Am. R.Rs., 135 S. Ct. at 1233. It is of no import that Congress nominally authorized a facially temporary conservatorship, see 12 U.S.C. § 4617(a) (permitting the FHFA to act as conservator to "reorganiz[e]" or "rehabilitat[e]" the Enterprises), because Congress's disclaimers are no substitute for the court's obligation to assess the government's actual control, Ass'n of Am. R.Rs., 135 S. Ct. at 1233. The court focuses on the length of the conservatorship because the FHFA-C wields complete control over the Enterprises so long as they are in conservatorship. See generally 12 U.S.C. § 4617.

Plaintiffs allege that the Enterprises will remain undercapitalized—and thus subject to conservatorship pursuant to 12 U.S.C. § 4617(a)(3)(J)—until the PSPAs, in their current form, are changed because the Enterprises cannot accumulate any capital under the existing terms of the PSPAs. Although the PSPAs could be further amended, plaintiffs' allegations reflect that Treasury and the FHFA-C will not do so because the purpose of the PSPA Amendments is to prevent the Enterprises from accumulating the necessary capital to become independent companies. Plaintiffs, in short, have alleged that the government intended, and has taken steps to ensure, that the conservatorships never end. Those facts, viewed in isolation, would support a conclusion that the practical reality is that the Enterprises are under permanent government control. The court's inquiry, however, is not limited to plaintiffs' allegations because it has taken judicial notice of relevant facts reflecting that the status quo has changed: The Treasury Secretary and the FHFA Director are now both committed to ending the conservatorships. Moreover, the idea that the Enterprises are permanently subject to government control because they can never accumulate the capital needed to exit the conservatorships is undermined by recent developments. Indeed, Treasury proposed amending the Net Worth Sweep to allow the Enterprises to retain more capital, and the FHFA Director testified during his confirmation hearing that, if confirmed, he would seek to increase the amount of capital that the Enterprises retain. Simply stated, the practical reality is that the Enterprises are not subject to permanent government control because the relevant parties are working to terminate the conservatorships.[15]

[15] Plaintiffs may disagree with the court's conclusion that events occurring after the PSPA Amendments are relevant to determining whether the Enterprises were under permanent government control during the events discussed in plaintiffs' complaint. Even if the court agreed that events occurring after the PSPA Amendments are not germane, plaintiffs still would not prevail because they allege that the conservatorships began as temporary measures. See 2d Am. Compl. ¶ 7 (noting the temporary nature of the conservatorships and quoting an FHFA publication stating that the conservatorships would be terminated once the Enterprises had been restored "to a safe and solvent condition"); id. (noting that the FHFA reassured the market that the Enterprises would return to normal business operations). Thus, the Enterprises were not under permanent government control before the PSPA Amendments.

In sum, the FHFA-C does not become the United States if the FHFA steps into the Enterprises' shoes when serving as conservator.

b. The FHFA-C retains the FHFA's government character because the FHFA-C does not step into the Enterprises' shoes.

The key inquiry, therefore, is whether the FHFA steps into the shoes of the Enterprises when acting as conservator. Defendant argues that the FHFA-C sheds its government character and assumes the identity of the Enterprises based on the reasoning in O'Melveny. Defendant's reliance on O'Melveny is misplaced. O'Melveny concerns a receiver stepping into the shoes of a failed bank. 512 U.S. at 86. The roles of a conservator and receiver are meaningfully different. In a recent decision, the United States District Court for the District of Rhode Island artfully explained the differences and their import for assessing whether the FHFA-C is the government:

> The O'Melveny Court held that FDIC, when acting as a receiver for a private entity, steps into the shoes of that private entity for state law claims. This holding makes sense given the purpose of receivership: "to preserve a company's assets, for the benefit of creditors, in the face of bankruptcy." When FDIC is appointed receiver, it must dispose of the received entity's assets, resolving obligations and claims made against the entity. Notably, "[i]n receivership, the receiver owes fiduciary duties to the creditors, which the corporation would otherwise owe to creditors during a period of insolvency." It logically follows, then, that the receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity.
>
> Conservatorship, in contrast, serves a different function. FHFA has described the purpose of conservatorship is "to establish control and oversight of a company to put it in a sound and solvent condition." Conservators, unlike receivers, have a fiduciary duty running to the corporation itself.
>
> This is "critically distinct" from the fiduciary duties owed as a receiver—the receiver does indeed "step into the shoes" of the entity by assuming the fiduciary duties of the entity, but the conservator does not: it remains distinct, and rather owes a duty to the entity. Given the difference in fiduciary duties, O'Melveny's "steps into the shoes" holding makes sense in the context of receivership, but not in the context of conservatorship.

Sisti, 324 F. Supp. 3d at 282-83 (citations and footnotes omitted). See generally Brian Taylor Goldman, The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State-Action, 17 J. Bus. & Sec. L. 11, 23-30 (2016). The district court, relying on the above analysis, declined to treat the FHFA-C as a private actor. Sisti, 324 F. Supp. 3d at 284. This court agrees with the reasoning and conclusion in Sisti: the FHFA does not shed its government character when acting as conservator because it does not step into the shoes of the Enterprises. Otherwise stated, the FHFA-C is the United States because it retains the FHFA's government character. Plaintiffs' claims, therefore, are against the United States for purposes of the Tucker Act.

B. The court lacks jurisdiction over plaintiffs' claim that sounds in tort.

1. Plaintiffs' fiduciary duty claim sounds in tort.

Defendant next argues that the court lacks jurisdiction over plaintiffs' fiduciary duty claim because the United States does not owe to each Enterprise's shareholders a fiduciary duty that is grounded in a statute or contract. Defendant asserts that such a fiduciary duty cannot be based on (1) HERA because, pursuant to the statute, the FHFA-C is only required to act in the government's and the Enterprises' best interests; or (2) the PSPAs because plaintiffs are not parties to those contracts. Plaintiffs, in their opposition to defendant's motion to dismiss, counter that their claim is based on a fiduciary duty rooted in both HERA and the PSPAs. As to HERA, plaintiffs assert that Congress made the FHFA-C a fiduciary by authorizing it to control the Enterprises, entrusting it with duties that are at the core of what it means to be a fiduciary, and using terminology—"conservator"—associated with a fiduciary. With respect to the PSPAs, plaintiffs argue that Treasury owes a fiduciary duty to the shareholders because it, acting with the FHFA-C, acquired control rights under the contract.

The court, pursuant to the Tucker Act, lacks jurisdiction over tort claims. 28 U.S.C. § 1491(a)(1). A breach of fiduciary duty is generally classified as a tort. Newby v. United States, 57 Fed. Cl. 382, 294 (2003). A fiduciary duty claim, however, does not sound in tort for purposes of the Tucker Act when the fiduciary relationship is founded on a money-mandating statute or a contractual provision between the claimant and United States. See Hopi Tribe v. United States, 782 F.3d 662, 667 (Fed. Cir. 2015) (statute); Cleveland Chair Co. v. United States, 557 F.2d 244, 246 (Ct. Cl. 1977) (contract); see also 28 U.S.C. § 1491(a)(1) (providing jurisdiction over claims "founded upon . . . any Act of Congress . . . or contract with the United States").

The initial issue is whether HERA establishes a fiduciary relationship between the FHFA-C and the Enterprises' shareholders. The court begins with the language of the statute. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). "If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect." Rosete v. Office of Pers. Mgmt., 48 F.3d 514, 517 (Fed. Cir. 1995); accord Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Congress provided in HERA that the FHFA-C is only required to act in the interests of itself or the Enterprises. 12 U.S.C. § 4617(b)(2)(J). That statement reflects a clear intent: the FHFA-C does not owe a fiduciary duty to shareholders because the conservator is not required to consider shareholders' interests.[16] See id.; see also

[16] The court's interpretation of HERA's plain language is buttressed by the fact that Congress seemingly made a deliberate decision to exclude shareholder interests from the FHFA-C's considerations. Congress modeled HERA on the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Jacobs v. Fed. Hous. Fin. Agency, 908 F.3d 884, 893 (3d Cir. 2018). Under FIRREA, Congress permitted the FDIC as conservator to consider the best interests of a bank, its depositors, or the FDIC. 12 U.S.C. § 1821(d)(2)(J)(ii). Although Congress permitted the FDIC to take into consideration the interests of its depositors, Congress omitted the analogue of depositors—shareholders—from the list of germane interests that the

Collins v. Mnuchin, 938 F.3d 553, 580 (5th Cir. 2019) (en banc) (noting that HERA "may permit" the FHFA-C to pursue actions that are "inconsistent with fiduciary duties"), petitions for cert. filed, 88 U.S.L.W. 3114 (U.S. Sept. 25, 2019) (No. 19-422), 88 U.S.L.W. 3146 (U.S. Oct. 25, 2019) (No. 19-563). The plain language controls, and therefore the court does not consider the peripheral considerations urged by plaintiffs such as the implications of the word "conservator," the FHFA-C's control over the Enterprises, or the FHFA-C's other powers. In sum, plaintiffs cannot establish jurisdiction for their fiduciary duty claim by relying on HERA.

Next, the court turns to whether Treasury, acting together with the FHFA-C, owed a fiduciary duty to the Enterprises' other shareholders because it acquired control rights by agreeing to the PSPAs. Plaintiffs' argument is premised on the state-law principle (which they term "general corporate law") that a controlling shareholder owes a fiduciary duty to the minority shareholders. The court is not convinced. First, plaintiffs' allegation of a fiduciary relationship is not founded on a contract within the meaning of the Tucker Act. Plaintiffs are not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs. They invoke the contracts solely to establish that Treasury, with the assistance of the FHFA-C, is a controlling shareholder and rely on that conclusion to argue that it has a fiduciary duty based on state law. The contract, otherwise stated, is one step removed from the purported genesis of the fiduciary duty—the application of state-law principles. That gap is too much in light of the court's obligation to narrowly construe the Tucker Act's waiver of sovereign immunity. See Smith, 855 F.2d at 1552 (noting that the Tucker Act is narrowly construed); see also Perry II, 864 F.3d at 619-20 (rejecting the legal theory that the Enterprises' shareholders' need to reference the PSPAs for their fiduciary duty claim was enough to conclude that the claim was rooted in a contract for purposes of the Tucker Act).

Second, plaintiffs fail to demonstrate the applicability of the state-law principles underlying their theory for why Treasury assumed fiduciary duties. Federal law governs the obligations Treasury incurred by entering into the PSPAs. See Boyle v. United Techs. Corp., 487 U.S. 500, 519 (1988) ("The proposition that federal common law continues to govern the 'obligations to and rights of the United States under its contracts' is nearly as old as Erie [v. Tompkins, 304 U.S. 64 (1938),] itself."). Although courts may shape federal law by drawing from state-law principles, plaintiffs do not explain why doing so is appropriate in this instance.

Third, plaintiffs do not prevail even if their fiduciary duty claim could be founded on a contract and federal common law incorporates the state-law principles regarding controlling shareholders' fiduciary obligations. Under Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders. See Ivanhoe Partners v. Newmont Min. Corp., 535 A.2d 1334, 1344 (Del. 1987); Parsch v. Massey, 79 Va. Cir. 446 (2009); see also Quadrant Structured Prod. Co. v. Vertin, 102 A.3d 155, 183 (Del. Ch. 2014) (acknowledging that those "who effectively control a corporation" owe a fiduciary duty to others).[17] To have the

conservator can consider when acting pursuant to HERA. Compare id. (FIRREA), with 12 U.S.C. § 4617(b)(2)(J) (HERA). The omission is telling.

[17] The court refers to Delaware and Virginia law because Fannie is a Delaware corporation, and Freddie is a Virginia corporation. When evaluating Virginia law, the court also looks to Delaware state court decisions because Virginia courts do so to resolve unsettled issues

requisite level of control, the controlling shareholder must (1) be able to exercise a majority of the corporation's voting power or (2) direct the corporation without owning a majority of stock. Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1113 (Del. 1994). The latter, effective exercise of control, "is not an easy test to satisfy"; the individual or group must be, "as a practical matter, . . . no differently situated than if they had majority voting control." In re PNB Holding Co. S'holders Litig., No. CIV.A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006).

Plaintiffs have not established that Treasury meets either control test. First, plaintiffs do not allege that Treasury owns any of the Enterprises' voting stock. Treasury purchased preferred stock and acquired the right to buy common (i.e., voting) stock, but there is no indication that Treasury exercised its warrants or otherwise acquired common stock.[18] Second, plaintiffs do not demonstrate that Treasury exercised effective control over the Enterprises or was, in plaintiffs' terms, a "dominant shareholder." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 29 (quoting Sisti, 324 F. Supp. 3d at 283 n.9). Although Treasury acquired the right to preclude the Enterprises from taking certain actions, Treasury did not control the Enterprises because it could not direct any action—it could only respond to certain requests made by the Enterprises. As a practical matter, therefore, Treasury is situated differently than if it had majority voting power.

Having rejected the contentions advanced by plaintiffs in their opposition brief, the court turns to an argument that appears for the first time in plaintiffs' supplemental brief, which was filed at the court's request after the initial round of briefing on defendant's omnibus motion to dismiss was complete, Fairholme II was decided, and the court held a status conference regarding further proceedings in the related cases.[19] In their supplemental brief, plaintiffs contend that their fiduciary duty claim was founded on a contention that Treasury and the FHFA-C acted as a "control group," that this contention was set forth in their opposition brief in the section addressing the court's jurisdiction over their fiduciary duty claim, and that the court did not, in Fairholme II, consider this contention. But no such contention was made in plaintiffs' opposition brief.

In their opposition brief, plaintiffs explained that under state law, multiple shareholders who are legally connected can form a "control group" and be "deemed a single, majority shareholder," and then asserted that Treasury and the FHFA-C were such a control group, acting in concert as the United States. See Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to

in the Commonwealth. E.g., U.S. Inspect Inc. v. McGreevy, No. 160966, 2000 WL 33232337, at *4 (Va. Cir. Ct. Nov. 27, 2000).

[18] Even if Treasury had exercised its option to buy a majority of the voting stock, it would not be a controlling shareholder because the FHFA-C succeeded to all of the shareholders' rights. See 12 U.S.C. § 4617(b)(2)(A) (noting that the FHFA-C, by operation of law, succeeds to all rights and powers of any Enterprise shareholder). Treasury, therefore, would have no voting power.

[19] As defendant notes, the court did not invite plaintiffs, after the status conference held March 5, 2020, to relitigate issues already decided in Fairholme II.

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Dismiss 22-26. In other words, plaintiffs advanced their control group contention solely to establish that their suit was against the United States. In the portion of their opposition devoted to countering defendant's jurisdictional attack on their fiduciary duty claim, plaintiffs asserted only two bases for a fiduciary duty; each one was treated separately as governing the conduct of either Treasury or the FHFA-C. They did not argue that the fiduciary duty arose from Treasury and the FHFA-C acting as a control group. Accordingly, the court did not consider plaintiffs' control group allegation as a foundation for any fiduciary duty claim in Fairholme II, among the arguments raised by the plaintiffs in these related cases.

Because plaintiffs' control group contention was not raised in their opposition brief in support of their fiduciary duty claim, it is waived. See United States v. Ford Motor Co., 463 F.3d 1267, 1277 (Fed. Cir. 2006) (explaining that "[a]rguments raised for the first time in a reply brief are not properly before this court"); Ironclad/EEI v. United States, 78 Fed. Cl. 351, 358 (2007) (noting that "under the law of this circuit, arguments not presented in a party's principal brief to the court are typically deemed to have been waived"). But even if plaintiffs' argument were not waived, it is not persuasive. In Fairholme II, the court explained why neither Treasury nor the FHFA-C owed a fiduciary duty to the shareholders of Fannie and Freddie. 147 Fed. Cl. at 37-40. The court is not persuaded that a control group composed of two entities, neither of which was bound by the fiduciary duty posited by plaintiffs, would be bound by a fiduciary duty simply because the entities are alleged to have worked in concert against the interests of the other shareholders of the Enterprises. Plaintiffs' attempt to graft a state law concept of a control group of shareholders onto a Tucker Act jurisdictional inquiry is not anchored in binding or even persuasive precedent, as explained in Fairholme II. Id. at 39-40. Having considered the allegations in plaintiffs' amended complaint, the timely arguments set forth in plaintiffs' opposition brief, and the untimely argument raised in plaintiffs' supplemental brief, the court concludes that it lacks jurisdiction over plaintiffs' fiduciary duty claim because it sounds in tort. Therefore, it dismisses count III of their amended complaint.

2. Plaintiffs' takings and illegal-exaction claims do not sound in tort.

Defendant also argues that plaintiffs' Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the FHFA-C. Plaintiffs counter that they have pleaded the predicates for takings and illegal-exaction claims, which means that it is irrelevant whether they also alleged facts that are germane to tortious actions.

When a party pleads the predicates for a takings claim or illegal-exaction claim, the court possesses jurisdiction to entertain such claims. See Hansen v. United States, 65 Fed. Cl. 76, 80-81 (2005) ("[S]o long as there is some material evidence in the record that establishes the predicates for a [claim covered by the Tucker Act,] . . . a plaintiff succeeds in demonstrating subject matter jurisdiction in this court . . . ."). Those claims, at a basic level, are contentions that the government expropriated private property lawfully (takings) or unlawfully (illegal exaction). See Orient Overseas Container Line (UK) Ltd. v. United States, 48 Fed. Cl. 284, 289 (2000) ("Takings claims arise because of a deprivation of property that is authorized by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation." (citing Dureiko v. United States, 209 F.3d 1345, 1359 (Fed. Cir. 2000);

Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-08 (Ct. Cl. 1967))). If a party alleges the necessary predicates for these claims, the court is not deprived of jurisdiction even if the complaint contains allegations that could support a tort claim. See El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1353 (Fed. Cir. 2004) ("That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims."); Rith Energy, Inc. v. United States, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that this court has jurisdiction over a takings claim "even if the government's action was subject to legal challenge on some other ground"). Here, plaintiffs plead the predicates for takings and illegal-exaction claims by alleging, in essence, that they were forced to give their property to the government because of lawful or unlawful government conduct. Therefore, it is of no import to the court's jurisdiction whether plaintiffs have alleged facts that would also support a tort claim.

C. The court lacks jurisdiction over plaintiffs' implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract.

Defendant argues next that the court lacks jurisdiction to entertain plaintiffs' implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract. Specifically, defendant asserts that plaintiffs have not established that they are intended beneficiaries independent of their status as shareholders and that any benefit that is related to their status as shareholders is insufficient for jurisdiction. Plaintiffs counter that they are intended third-party beneficiaries of implied contracts, between the FHFA and each Enterprise's board, in which the boards consented to the conservatorships in exchange for the FHFA-C operating the Enterprises as a fiduciary and returning them to sound condition. Specifically, plaintiffs assert that the intent to benefit the shareholders is evident from (1) the boards' consent to the conservatorships because shareholders would benefit from a conservator focused on returning the Enterprises to a better condition, and (2) the government acknowledging that the Enterprises' stock would remain outstanding while the Enterprises were in conservatorship.

The court's jurisdiction over contract claims is limited by the Tucker Act. Ransom v. United States, 900 F.2d 242, 244 (Fed. Cir. 1990). Of particular import here, ordinarily, a plaintiff must be in privity of contract with the United States to invoke this court's jurisdiction over a contract claim against the government. Fid. & Guar. Ins. Underwriters, Inc. v. United States, 805 F.3d 1082, 1087 (Fed. Cir. 2015). But privity is not required if "the plaintiff can demonstrate that it was an intended third-party beneficiary under the contract." Pac. Gas & Elec. Co. v. United States, 838 F.3d 1341, 1361 (Fed. Cir. 2016).

"Third party beneficiary status is an 'exceptional privilege.'" Glass v. United States, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (quoting German All. Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 230 (1912)). The conditions for attaining such status are "stringent." Anderson v. United States, 344 F.3d 1343, 1352 (Fed. Cir. 2003). "[S]hareholders seeking status to sue as third-party beneficiaries of an allegedly breached contract must 'demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.'" Castle v. United States, 301 F.3d 1328, 1338 (Fed. Cir. 2002) (quoting Glass, 258 F.3d at 1354). Specifically, "the contract must express the intent of the promissor to benefit the shareholder personally, independently of his or her status as shareholder." Glass, 258 F.3d at 1353-54. As a practical matter, the shareholder does not personally benefit independent of its status as a shareholder when the contractual promises pertain only to the treatment of the company. See FDIC v. United States, 342 F.3d 1313, 1320 (Fed. Cir. 2003) (noting that the broken promises concerned the treatment of the company such that the plaintiffs did not benefit independent of their status as shareholders); accord Maher v. United States, 314 F.3d 600, 605 (Fed. Cir. 2002) (concluding that the plaintiffs were not third-party beneficiaries when they failed to "establish[] that the government took on any obligations in the merger agreement for [the plaintiffs'] personal benefit, or even that the merger agreement contains any provisions pertaining to [the plaintiffs] personally").

As plaintiffs are not parties to the alleged implied contracts between the FHFA and the Enterprises, the relevant issue is whether plaintiffs are third-party beneficiaries of those agreements. They are not. First, it is of no import that the Enterprises, as plaintiffs argue, purportedly agreed to the conservatorships because that would serve the interests of shareholders. Indeed, "every action of a corporation is supposed to benefit its shareholders," but the "law has not viewed this general benefit as making every shareholder a third-party beneficiary." Suess v. United States, 33 Fed. Cl. 89, 94 (1995). Second, plaintiffs' allegations reflect that they only benefit from the alleged implied contracts by virtue of their shareholder status. The relevant promises concerned how the FHFA-C would operate the Enterprises; the crux of the purported agreements was the FHFA-C promising to operate the Enterprises as a fiduciary to preserve their assets and return them to sound condition. Because the promises in the alleged implied contracts were directed at the Enterprises, plaintiffs cannot be third-party beneficiaries of the alleged contract. See FDIC, 342 F.3d at 1320. Third, plaintiffs have not demonstrated that the FHFA intended that plaintiffs would benefit independently of their status as shareholders even if they did so benefit. Plaintiffs rely on the FHFA's statements that private stock would remain outstanding and shareholders would continue to hold an economic interest in their stock. Those factual statements, however, do not reflect that the FHFA intended to confer any specific benefit on plaintiffs independent of their role as shareholders. Because plaintiffs have not alleged facts reflecting that the FHFA intended to confer a personal benefit on them, they are not third-party beneficiaries. See Glass, 258 F.3d at 1353-54. In sum, the court lacks jurisdiction to entertain plaintiffs' implied-in-fact-contract claim because plaintiffs are neither parties to a contract with the government nor third-party beneficiaries of any such agreement. Therefore, the court dismisses count IV of their amended complaint.

V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiffs' claims, defendant challenges plaintiffs' standing to pursue their claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. Starr Int'l Co. v. United States, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is "assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties." Kowalski v. Tesmer, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that controls. See Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted."), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014). Thus, in a suit brought by shareholders, it is the substance of the allegations and not the label assigned to the allegations—i.e., direct or derivative—that matters. See Starr, 856 F.3d at 966-67; see also In re Sunrise Sec. Litig., 916 F.2d 874, 882 (3d Cir. 1990) ("Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties."). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based on the rights of the company. See Starr, 856 F.3d at 966-67; see also Weir v. Stagg, No. 09-21745-CIV, 2011 WL 13174531, at *9 (S.D. Fla. Feb. 7, 2011) ("Shareholders do not have standing to bring a direct action for injuries suffered by a corporation, but rather, must bring a derivative action."). A shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the corporation's injuries—to have standing to litigate those claims. See Starr, 856 F.3d at 966-67.

Defendant argues that plaintiffs lack standing because their claims, pled as direct claims, actually belong to the Enterprises and are therefore derivative in nature. The parties in this case and the related cases fully briefed and argued this issue prior to the court issuing the Fairholme II decision. The court concluded in Fairholme II that Fannie and Freddie shareholders lack standing to pursue direct claims that are derivative in nature. Thereafter, the court solicited short supplemental briefs from plaintiffs and defendant regarding the applicability of the holdings in Fairholme II to this case. In their supplemental brief, plaintiffs suggest that their allegations are materially different from those asserted in Fairholme for purposes of standing, while defendant contends in its supplemental brief that there are no material differences. All of the parties' arguments are addressed below.

A. Plaintiffs' allegations are not materially different from the allegations in Fairholme.

As an initial matter, plaintiffs contend that their allegations are materially different from those advanced in Fairholme in two respects, such that the standing inquiry would be affected. Plaintiffs first argue that the type of harm they have suffered and the type of relief they have requested distinguish their claims from the direct claims in Fairholme. In essence, plaintiffs attempt to distinguish what they characterize as the Fairholme plaintiffs' allegation of the expropriation of the Enterprises' assets from their allegation of the expropriation of their economic interests. As defendant points out, however, the direct claims in Fairholme and the claims in this case are virtually indistinguishable in nature. All four counts of the amended complaint in this case mirror, in every essential way, the direct takings, illegal-exaction, fiduciary duty, and breach-of-implied-contract claims in Fairholme. Expropriation of the shareholders' economic interests was alleged in Fairholme, just as it is alleged in the amended complaint in this case. Compare Fairholme II, 147 Fed. Cl. at 20, 46-47, with 2d Am. Compl. ¶¶ 91, 108-110. Thus, the standing analysis in Fairholme II is fully applicable to the claims presented here.

Plaintiffs next invoke their reliance on the allegation of the existence of a "control group," formed by Treasury and the FHFA-C, that dominated the Enterprises and injured them. In their view, this factual distinction in their amended complaint is significant because it was not discussed in Fairholme II. Plaintiffs fail to explain, however, how this factual distinction gives

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them standing to bring their claims. Plaintiffs apparently infer a logical connection between a control group of shareholders and a controlling shareholder, but the connection is not explained in a way that is helpful to the court. Indeed, in their supplemental brief plaintiffs cite primarily to a section of their opposition brief that does not address the topic of standing at all. If plaintiffs wished to advance a standing argument that specifically relied on the state law concept of a control group of shareholders and cases discussing such a phenomenon, no such argument was made in their opposition brief. Thus, any such standing argument that plaintiffs may be attempting to make in their supplemental brief, to the extent that one could be discerned, is waived as untimely.[20] See Ironclad/EEI, 78 Fed. Cl. at 358.

B. Plaintiffs' claims actually belong to the Enterprises.

Having determined that plaintiffs' allegations do not differ materially from those advanced in Fairholme, the court turns to defendant's contention that plaintiffs lack standing to litigate their claims. Defendant's standing argument is premised on its assertion that plaintiffs' claims actually belong to the Enterprises—and are therefore derivative in nature—because, to prevail, plaintiffs would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises. Plaintiffs counter that they assert direct claims because the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises' capital structure to plaintiffs' detriment, which renders the claims for such conduct both direct and derivative under the dual-nature exception.[21] Defendant replies that the Federal Circuit rejected the notion that a plaintiff states a direct claim by alleging it was targeted by the challenged action. Defendant also contends that the dual-nature exception is not applicable because Treasury was not a controlling shareholder, the Enterprises did not issue new shares, and the PSPA Amendments did not involve the reallocation of power.

Neither theory plaintiffs advance for why their claims are substantively direct, rather than derivative, is persuasive. First, it is of no import whether the government targeted shareholders with the PSPA Amendments. See Starr, 856 F.3d at 973 (noting that the plaintiffs did not "sufficiently explain why the Government's subjective motivations are relevant to the inquiry into direct standing"). The direct-versus-derivative inquiry "turns on the plaintiff's injury, not the defendant's motive." Pagan v. Calderon, 448 F.3d 16, 30 (1st Cir. 2006). Second, plaintiffs have not asserted claims that qualify as both direct and derivative based on the dual-nature exception. The Federal Circuit explained that, pursuant to this exception, shareholder claims may be both direct and derivative "when a 'reduction in [the] economic value and voting power

[20] Even if this argument were not waived, the court agrees with defendant that the control group scenario alleged by plaintiffs also fails to satisfy the criteria for dual-natured claims that might provide standing to a shareholder plaintiff asserting direct claims. See Section V.B, infra (discussing the criteria for dual-natured claims).

[21] The plaintiffs in the related cases also asserted that their claims must be construed as direct claims to vindicate important federal policies if shareholders cannot assert derivative claims because of HERA. But as this court held in Fairholme II, the shareholders of the Enterprises, notwithstanding HERA, have standing to assert derivative claims because of the FHFA-C's conflict of interest. 147 Fed. Cl. at 49-51.

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affected the minority stockholders uniquely . . . .'" Starr, 856 F.3d at 968 (quoting Gentile v. Rossette, 906 A.2d 91, 99 (Del. 2006)). Specifically, shareholder claims are both direct and derivative if

> "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value," and "(2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders."

Id. (quoting Gentile, 906 A.2d at 100). The exception does not apply here because Treasury was not a controlling shareholder at the time the PSPA Amendments were executed,[22] the PSPA Amendments did not involve the issuance of new shares, and shareholder voting power was not reallocated under the PSPA Amendments. It is not enough, contrary to plaintiffs' contention, that the government allegedly exacted economic value from the other shareholders by rearranging the corporate structure. See El Paso Pipeline GP Co. v. Brinckerhoff, 152 A.3d 1248, 1264 (Del. 2016) (applying Gentile and holding a plaintiff does not state a direct claim under the dual-nature exception by pleading the "extraction of solely economic value from the minority by a controlling stockholder"). Because plaintiffs have not established that their claims are substantively direct in nature, they cannot demonstrate that they have standing to litigate those claims.

Plaintiffs fare no better if the court moves beyond their arguments for why their claims are substantively direct in nature. Federal law governs whether plaintiffs' claims are direct or derivative. See Starr, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. Id.; see also Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 97 (1991) (noting the "presumption that state law should be incorporated into federal common law"). Under Delaware law, the test for whether a shareholder's claim is derivative or direct depends on the answers to two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004) (en banc). "Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow." Gentile, 906 A.2d at 99, discussed in Starr, 856 F.3d at 965. Such claims are derivative even "though the overpayment may diminish the value of the corporation's stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend." Protas v. Cavanagh, No. CIV.A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012); see also Hometown Fin. Inc. v. United States, 56 Fed. Cl. 477, 486 (2003) ("[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged

[22] Treasury is not a controlling shareholder for the reasons set forth in Section IV.B.1, supra.

injury to the corporation amount to nothing more than a diminution in stock value or a loss of dividends.").

Plaintiffs focus on the expropriation of the Enterprises' assets via compulsory payments of all profits. The gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury. Regardless of plaintiffs' label (direct) or theory (taking, illegal exaction, breach of fiduciary duty, or breach of implied contract) for their claims, the claims are substantively derivative in nature because they are premised on allegations of overpayment.[23] See Gentile, 906 A.2d at 99; see also Roberts, 889 F.3d at 409 (explaining that the plaintiffs asserted "classic derivative claims" when they alleged that "the [PSPA Amendments] illegally dissipated corporate assets by transferring them to Treasury"). Plaintiffs cannot transform their substantively derivative claims into direct claims by merely alleging that, as a result of overpayments, they were deprived of their stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiffs' purported "harms are 'merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.'" Protas, 2012 WL 1580969, at *6 (quoting Gentile, 906 A.2d at 99); see also Agostino v. Hicks, 845 A.2d 1110, 1122 (Del. Ch. 2004) ("[T]he inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation."). Because plaintiffs' claims are derivative in nature, plaintiffs lack standing to pursue those claims on their own behalf.

C. Plaintiffs' claims are direct claims, as pled, and cannot be deemed to be derivative claims.

Plaintiffs, while acknowledging that they assert only direct claims,[24] attempt to avoid a dismissal of those claims for lack of standing by contending that "[e]ven if [their] direct claims

[23] Plaintiffs would remain unsuccessful if their allegations of waste and mismanagement (styled as self dealing, overreach, or abuse of discretion) were construed to be indicative of some action other than overpayment. Any claims premised on waste and mismanagement are derivative in nature. Kramer v. W. Pac. Indus., Inc., 546 A.2d 348, 353 (Del. 1988) (noting that "mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature"). Plaintiffs' claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. See Hometown, 56 Fed. Cl. at 486 (stock prices); In re Straight Path Commc'ns Inc. Consol. S'holder Litig., No. CV 2017-0486-SG, 2017 WL 5565264, at *4 (Del. Ch. Nov. 20, 2017) ("Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . . .").

[24] Indeed, there is no dispute that the four claims plaintiffs assert in their amended complaint are direct claims. In each count plaintiffs emphasize that the harm to plaintiffs is direct. 2d Am. Compl. ¶¶ 111, 115, 121, 137. In addition, the relief requested by plaintiffs is for monetary relief payable to them, not to the Enterprises. Id. at 48; see also Pls.' Suppl. Br. on Outstanding Mot. to Dismiss 3-4 (arguing that payments to the Enterprises would be of no use to plaintiffs). Finally, the amended complaint contains a statement that plaintiffs' claims are direct

were deemed derivative, they still may assert them, under circuit precedent, because the [FHFA-C] as conservator has a manifest conflict of interest." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 39. The precedent upon which plaintiffs rely is the Federal Circuit's decision in First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279 (Fed. Cir. 1999).

In First Hartford, the Federal Circuit held that a shareholder of a company could bring a derivative claim, notwithstanding a succession clause, if the company was controlled by an entity with a conflict of interest. Id. at 1283; accord id. at 1295 (remarking that the purpose of derivative suits was to "permit shareholders to file suit on behalf of a corporation when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation"). The court in Fairholme II concluded that pursuant to First Hartford, the plaintiff who asserted derivative claims in Fairholme had standing to litigate those claims due to the FHFA-C's conflict of interest. 147 Fed. Cl. at 49-51.

If plaintiffs had asserted derivative claims in their amended complaint, the "conflict of interest" holding in First Hartford would have aided plaintiffs in their quest to establish standing. But they did not do so. Thus, their reliance on this holding in First Hartford is misplaced.

As for plaintiffs' suggestion that their direct claims could be deemed derivative, they identify no authority for that recharacterization of their claims, even though they had the opportunity to do so in their opposition brief and their supplemental brief. The court finds plaintiffs' "direct claims deemed derivative" argument, Pls.' Suppl. Br. on Outstanding Mot. to Dismiss 5 (emphasis removed), to be unsupported by authority and unpersuasive for the purpose of establishing plaintiffs' standing to bring the claims in their amended complaint.[25]

D. Plaintiffs' standing to bring direct claims is not established by another holding in First Hartford.

Finally, the court addresses an assertion in plaintiffs' opposition brief that was not explicitly addressed in Fairholme II. Only one sentence of that sixty-page brief was devoted to the following contention included among plaintiffs' standing arguments: "[T]he Federal Circuit has repeatedly recognized a direct claim where a shareholder alleged deprivation of a contingent property interest in a bank." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 38 (citing First Hartford, 194 F.3d at 1296; Cal. Hous. Sec., Inc. v. United States, 959 F.2d 955, 957 n.2 (Fed. Cir. 1992)). Defendant, in support of its challenge to plaintiffs' standing to bring their claims, clearly relied on more recent precedent, the Federal Circuit's decision in Starr, to argue that plaintiffs' claims were derivative claims, not direct claims. Plaintiffs, notwithstanding their citation to First Hartford and a footnote in a case discussed in First

in nature. See 2d Am. Compl. ¶ 105 ("[A]ny claim raised by Appaloosa that might be considered derivative on behalf of the Company is in fact direct, on behalf of Appaloosa itself.").

[25] As defendant notes, claims brought on behalf of the Enterprises are asserted in numerous shareholder derivative claims in these related cases.

Hartford, did not attempt, in any meaningful way, to explain why Starr should not be applied and followed in this case. Because plaintiffs' reliance on First Hartford as support for a shareholder's standing to bring direct claims is cursory and undeveloped, the court is within its discretion to deem this argument waived. See SmithKline Beecham Corp. v. Apotex Corp., 439 F.3d 1312, 1320 (Fed. Cir. 2006) (noting that the court has discretion on whether to consider undeveloped arguments).

Even if this argument were not waived, the Federal Circuit's Starr decision remains the binding precedent most on point. In Starr, the distinction between direct and derivative claims brought by shareholders is the focus of the Federal Circuit's standing analysis. 856 F.3d at 963-73. Just as here, the plaintiffs brought takings and illegal-exaction claims related to a government intervention, during a financial crisis, affecting the future of a corporation in which they owned shares. Id. at 958-61. Starr provides the test for determining whether such claims are direct or derivative in nature and requires that nominally direct claims—that are actually derivative claims—be dismissed for lack of standing. Id. at 973.

In the face of this binding precedent, the court cannot conclude that the holding in First Hartford, which concerns direct Fifth Amendment takings claims, is more relevant. It is true that in First Hartford shareholders of a bank in receivership could pursue their takings claims as direct claims against the United States. 194 F.3d at 1287. However, First Hartford does not address the distinction between direct and derivative claims. When faced with binding precedent that addresses a crucial distinction, such as Starr, and one that does not, such as First Hartford, the court follows the precedent most on point. Cf. Union Elec. Co. v. United States, 363 F.3d 1292, 1297 (Fed. Cir. 2004) ("[W]e have repeatedly held that the disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue." (citing Boeing N. Am., Inc. v. Roche, 298 F.3d 1274, 1282 (Fed. Cir. 2002))).

In sum, plaintiffs have not established that they have standing to litigate their claims because they do not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court dismisses plaintiffs' claims on standing grounds to the extent that it has subject-matter jurisdiction over those claims.[26]

VI. CONCLUSION

For the reasons stated above, the court **GRANTS** defendant's motion to dismiss and **DISMISSES** plaintiffs' complaint because the court lacks jurisdiction to entertain their breach of

[26] As explained above, the court lacks jurisdiction over plaintiffs' claims for breach of fiduciary duty and breach of implied contract. See supra Sections IV.B.1 (fiduciary duty), IV.C (contract). In addition, because all of plaintiffs' claims must be dismissed for lack of standing, the court need not reach defendant's remaining arguments that these claims should be dismissed for failure to state a claim upon which relief can be granted.

fiduciary duty and implied-in-fact-contract claims, and plaintiffs lack standing to pursue any of their claims. The clerk shall enter judgment accordingly. No costs.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

In the United States Court of Federal Claims

No. 18-371C
(Filed: June 8, 2020)

CSS, LLC, Plaintiff, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(1); RCFC 12(b)(6); Jurisdiction; Standing; Direct Claims; Instrumentalities; Coercion; Agent; Conservators; Conflict of Interest; Third-Party Beneficiaries; Stock; Shareholders; Fannie; Freddie; FHFA

Lawrence D. Rosenberg, Washington, DC, for plaintiff.

Kenneth M. Dintzer, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiff in this case challenges the actions of the United States during the conservatorships of the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie"). Specifically, plaintiff takes issue with the conservator for Fannie and Freddie (collectively, the "Enterprises") amending a funding agreement between the Enterprises and the United States Department of the Treasury ("Treasury"). Based on the revisions to that agreement, plaintiff seeks the return of money illegally exacted, damages for breach of contract and breach of fiduciary duty, and compensation for a taking pursuant to the Fifth Amendment to the United States Constitution ("Constitution"). Defendant moves to dismiss plaintiff's amended complaint, arguing that the court lacks subject-matter jurisdiction over plaintiff's claims, plaintiff lacks standing to pursue its claims, and plaintiff fails to state a claim upon which relief may be granted. For the reasons stated below, the court grants defendant's motion to dismiss.

I. BACKGROUND

A. The Enterprises are private companies that are under the control of a conservator.

1. The Enterprises operated independently before the financial crisis.

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities

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that are sold to investors.[1] 1st Am. Compl. ¶¶ 16-17; Fairholme II, 147 Fed. Cl. at 15. Congress chartered Fannie in 1938 and established Freddie in 1970. 1st Am. Compl. ¶¶ 16-17. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. Id. Freddie is organized under Virginia law, and Fannie is organized under Delaware law. Id. The Enterprises issued their own common and preferred stock. Id. ¶ 19. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. Fairholme II, 147 Fed. Cl. at 15. Those owning preferred stock, including plaintiff in this suit, acquired the right to receive dividends and a liquidation preference. 1st Am. Compl. ¶ 19.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. Id. ¶ 20. Although the Enterprises began recording losses in 2007, they were stable and adequately capitalized. Id. ¶¶ 22-23. Otherwise stated, the Enterprises were not in financial distress or otherwise at risk of insolvency. Id.

2. Congress created the Federal Housing Finance Agency to regulate the Enterprises and authorized the agency to serve as a conservator for each Enterprise.

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency ("FHFA") and provided it with supervisory and regulatory authority over the Enterprises. See 12 U.S.C. § 4511(a)-(b) (2018).[2] Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator ("FHFA-C") for each Enterprise to reorganize, rehabilitate, or wind up its affairs.[3] Id. § 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its obligations. Id. § 4617(a)(3).[4] The conservator, once appointed, functions independently; it is not "subject to the direction or supervision of any other agency of the United States or any State in the exercise of [its] rights, powers, and privileges . . . ." Id. § 4617(a)(7).

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[1] This background section is a less comprehensive version of the court's recitation of facts in a related case, Fairholme Funds, Inc. v. United States, 147 Fed. Cl. 1 (2019) ("Fairholme II"), motion to certify interlocutory appeal granted, 147 Fed. Cl. 126 (2020).

[2] Congress has not amended the relevant portions of HERA since enacting the law in 2008. The court, therefore, refers to the most recent version of the United States Code.

[3] To avoid any ambiguity, the court reiterates that it is using "FHFA" to refer to the agency acting in its regulatory role and "FHFA-C" when discussing the agency acting as a conservator.

[4] Congress enticed the Enterprises to consent to a conservatorship by insulating their board members from any liability to shareholders or creditors for agreeing in good faith to the FHFA's appointment of a conservator. 12 U.S.C. § 4617(a)(6).

Congress also delineated the scope of the FHFA-C's powers in HERA. See generally id. § 4617. As soon as it is appointed, the FHFA-C "immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . . ." Id. § 4617(b)(2)(A). Congress also conferred on the conservator the power to "[o]perate the [Enterprise]." Id. § 4617(b)(2)(B). Pursuant to that power, the conservator "may," among other things, "perform all functions of the [Enterprise]," "preserve and conserve the assets and property of the [Enterprise]," and "provide by contract for assistance in fulfilling any function . . . of the [conservator]." Id. The conservator "may" also "take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise]." Id. § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator "may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]" and "take any action authorized by [12 U.S.C. § 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA]." Id. § 4617(b)(2)(J). By describing the FHFA-C's role primarily in terms of what powers it "may" exercise, see generally id. § 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its powers, see United States v. Rodgers, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."). Simply stated, the FHFA has "extraordinarily broad flexibility to carry out its role as conservator." Perry Capital LLC v. Mnuchin, 864 F.3d 591, 606 (D.C. Cir. 2017) ("Perry II"), cert. denied, 138 S. Ct. 978 (2018).

3. Congress authorized Treasury to purchase securities issued by the Enterprises.

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(g) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. Id. §§ 1455(*l*)(4), 1719(g)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the availability of mortgage finance, and protect taxpayers. Id. §§ 1455(*l*)(1)(B), 1719(g)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

(i) The need for preferences or priorities regarding payments to the Government.

(ii) Limits on maturity or disposition of obligations or securities to be purchased.

(iii) The [Enterprise's] plan for the orderly resumption of private market funding or capital market access.

(iv) The probability of the [Enterprise] fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the [Enterprise's] status as a private shareholder-owned company.

(vi) Restrictions on the use of [Enterprise] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

Id. §§ 1455(*l*)(1)(C), 1719(g)(1)(C).

4. The FHFA became the conservator for each Enterprise.

Around the beginning of September 2008, the FHFA and Treasury sought to persuade each Enterprise's board of directors to consent to conservatorship. 1st Am. Compl. ¶ 33. The FHFA told each Enterprise's board that conservatorship would further the interests of the shareholders. Id. Around the same time, the FHFA made an offer to each board: consent to a conservatorship in exchange for the FHFA-C aiming to preserve and conserve the Enterprises' assets, attempting to restore the Enterprises to sound and solvent condition, and terminating the conservatorships when those goals were achieved. Id. ¶¶ 5, 7; Fairholme II, 147 Fed. Cl. at 17. Each Enterprise's board accepted that offer and consented to a conservatorship on September 6, 2008, with an understanding that the FHFA-C would operate in the aforementioned limited ways. Fairholme II, 147 Fed. Cl. at 17.

The conservatorships became effective on September 6, 2008, upon each Enterprise's board's consent. 1st Am. Compl. ¶¶ 33-34; see also 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when "[t]he [Enterprise], by resolution of its board of directors or its shareholders or members, consents to the appointment").

5. The FHFA-C contracted with Treasury to obtain funding for the Enterprises.

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement ("PSPA") with Treasury for each Enterprise. 1st Am. Compl. ¶ 6. Treasury entered into the agreements pursuant to its authority under HERA to buy the Enterprises' securities. Id. ¶¶ 6, 35. Under the PSPAs, Treasury committed to provide up to $100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. Id. ¶ 35. If an Enterprise's liabilities exceeded its assets, then the Enterprise could draw on Treasury's funding commitment in an amount equal to the difference between the Enterprise's liabilities and assets. Fairholme II, 147 Fed. Cl. at 17.

In return for Treasury's funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their respective common stock at a nominal price. 1st Am. Compl. ¶ 35. Treasury's preferred stock had an initial liquidation preference of $1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury's funding commitment. Id. In the event of a liquidation, Treasury was entitled to recover the full liquidation value of its shares before any other shareholder would receive compensation. Id. Second, Treasury bargained for the right to a

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quarterly cash dividend that would be equal, per annum, to 10% of its liquidation preference. Id. An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. Id. Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. Id. ¶¶ 35, 41. Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. Id. ¶ 36.

The FHFA-C and Treasury amended each Enterprise's PSPA on May 6, 2009, to increase Treasury's funding commitment to each Enterprise from $100 billion to $200 billion. Id. ¶ 43. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed $200 billion. Id. ¶ 44.

6. The Enterprises' finances improved during their conservatorships.

In the early stages of the conservatorships, each Enterprise's net worth decreased as it reported losses. Fairholme II, 147 Fed. Cl. at 18. Some of the losses resulted from the FHFA-C writing down the value of deferred tax assets.[5] Id. Notwithstanding those on-paper losses, as of late 2009, Fannie had drawn only $60 billion from Treasury, and Freddie had only drawn $51 billion. 1st Am. Compl. ¶ 45.

By 2011 and into 2012, the Enterprises' financial outlooks were promising. In addition to an improvement in the housing market, the Enterprises had improved their financial performance. Id. ¶ 50. They were positioned to further improve their financial condition by revising their valuations of deferred tax assets because of growing profits, and by increasing their earnings due to reduced credit losses. Id. The FHFA-C and Treasury were aware of those forthcoming changes and the Enterprises' improving outlooks. Id. ¶ 8. In August 2012, Treasury and FHFA-C knew that the Enterprises would soon experience improved profitability and received projections reflecting that the Enterprises would have positive comprehensive income in 2012. Id. ¶¶ 51-52. Otherwise stated, the FHFA-C and Treasury knew, by early August 2012, that the Enterprises were poised to generate profits in excess of their respective dividend obligations to Treasury. Id. ¶ 50.

7. Treasury and the FHFA-C agreed to a third amendment to the PSPAs.

At an unspecified time prior to August 2012, Treasury and the FHFA-C began considering a third amendment to each PSPA. Treasury was the driving force behind the initiative to amend the PSPAs' terms. Id. ¶¶ 56, 68. Indeed, an FHFA official reported in early

[5] A deferred tax asset is an asset that may be used to offset future tax liability. Fairholme II, 147 Fed. Cl. at 18 n.4. A company must write down the value of that deferred asset if it is unlikely to be used to offset future taxable profits. Id. This write down occurs, for example, if a company predicts it will not be profitable in the future. Id.

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August 2012 that Treasury was making a "renewed push" to implement a new amendment. Id. ¶ 64 (quoting the FHFA official). The FHFA-C learned of the proposed changes before the Enterprises; Treasury informed the Enterprises that the new terms were forthcoming and announced the changes to the Enterprises. Id. ¶ 66. Treasury officials who were involved with the process do not recall Treasury making any backup or contingency plans in the event that the FHFA-C rejected the proposed terms. Fairholme II, 147 Fed. Cl. at 19. The FHFA-C accepted the changes without advocating for different terms. Id.

Treasury and the FHFA-C decided to announce the changed terms in mid-August 2012 because, according to Treasury, the Enterprises would be reporting earnings exceeding their dividend obligation at the beginning of that month. Id. On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA ("PSPA Amendment"). 1st Am. Compl. ¶¶ 2, 9, 53. A key component of the amended PSPAs is the requirement—referred to here as the "Net Worth Sweep"—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise's net worth (except for a small capital reserve amount) rather than a dividend based on a set percentage of the liquidation preference.[6] Id. ¶ 53. Additionally, under the amended PSPAs, the Enterprises are not obligated to pay a periodic commitment fee. Id. ¶ 64.

a. Treasury wanted to ensure that it benefited from the new terms.

With the PSPAs, Treasury sought to secure a more beneficial arrangement for itself, as a representative for taxpayers. During the lead-up to the PSPA Amendments, a Treasury official acknowledged in an internal communication that the government had resolved to "ensure existing common equity holders will not have access to any positive earnings from the [Enterprises] in the future." Id. ¶ 56 (emphasis removed) (quoting the document). Treasury recognized its goal of obtaining all of the Enterprises' profits by executing the PSPA Amendments; it intended to take "every dollar of earnings that [the Enterprises] generate[] . . . to benefit taxpayers." Id. ¶ 10 (quoting a Treasury announcement).

b. The FHFA-C agreed to changes that benefit Treasury.

For its part, the FHFA-C was operating under the belief that Treasury would benefit from the PSPA Amendments. The FHFA-C prioritized Treasury's interests over the fate of the Enterprises and the interests of their shareholders. Id. ¶ 76. Mel Watt—a former FHFA Director—commented at the time that he did not "lay awake at night worrying what's fair to the shareholders." Id. (quoting an interview).

c. Treasury and the FHFA understood that the PSPA Amendments would not facilitate the Enterprises exiting conservatorship.

[6] The capital reserve for each Enterprise started at $3 billion and was set to decrease to $0 by January 2018, but the Enterprises and Treasury agreed in December 2017 to reset the capital reserve amount to $3 billion in the first quarter of 2018. 1st Am. Compl. ¶ 53; Fairholme II, 147 Fed. Cl. at 19 n.5.

Treasury was aware that the new terms of the PSPAs were not conducive to the Enterprises exiting conservatorship. Treasury acknowledged that its goal was to facilitate the "wind down" of the Enterprises. Id. ¶ 56 (quoting a Treasury report). At the time of the PSPA Amendments, Treasury explained that the new deal would ensure that the Enterprises "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." Id. ¶ 69 (emphasis removed) (quoting Treasury press release).

The FHFA shared a similar sentiment. The FHFA's former Acting Director, Edward DeMarco, testified before the United States Senate that the PSPA Amendments "reinforce the notion that the [Enterprises] will not be building capital as a potential step to regaining their former corporate status." Id. ¶ 76 (emphasis removed) (quoting the testimony). Indeed, the FHFA explained to Congress that its vision for the future included a housing industry without Fannie and Freddie. Fairholme II, 147 Fed. Cl. at 20.

d. Treasury has benefited from the PSPA Amendments at the expense of the Enterprises and other shareholders.

There are four significant effects that flowed from the PSPA Amendments. First, plaintiff lost its economic interests in the Enterprises because, under the new terms, private shareholders can never receive dividends or liquidation distributions. 1st Am. Compl. ¶¶ 2, 9, 88-89. Second, Treasury acquired plaintiff's economic interests in the Enterprises because Treasury now possesses "the entire value" of the Enterprises. Id. ¶ 93. Third, Treasury reaped a windfall of $128.9 billion in comparison to what it would have received absent changes to the PSPAs. Id. ¶¶ 85-86 (alleging that the Enterprises paid Treasury $223.6 billion under the PSPA Amendments but would have only paid Treasury $94.7 billion under the previous terms). Fourth, the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink of insolvency. Id. ¶¶ 54, 87.

8. Treasury and the FHFA are committed to ending the conservatorships.

On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the Treasury Secretary to develop, "as soon as practicable," a plan for "[e]nding the conservatorships of the [Enterprises] upon the completion of specified reforms . . . ."[7]

[7] The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source, the Federal Register. See Murakami v. United States, 46 Fed. Cl. 731, 739 (2000) (noting that the court may take judicial notice of government documents), aff'd, 398 F.3d 1342, 1354-55 (Fed. Cir. 2005); see also Democracy Forward Found. v. White House Office of Am. Innovation, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) ("[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum."). See generally Fed. R. Evid. 201 (discussing judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the court may consider facts derived from sources subject to judicial notice without converting the motion into one for summary judgment. Sebastian v. United States, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

Memorandum on Federal Housing Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must include proposals for "[s]etting the conditions necessary for the termination of the conservatorships" and outlined some of those conditions. Id. at 12,480. Subsequently, Treasury issued a plan in which it advocated for "begin[ning] the process of ending the [Enterprises'] conservatorships."[8] U.S. Dep't of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf [https://perma.cc/RGH8-N385]; accord id. at 26 ("It is, after 11 years, time to bring the conservatorships to an end."). As part of the plan to end the conservatorships, Treasury proposed that it and the FHFA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. Id. at 26-27.

The FHFA shares Treasury's goals with respect to the conservatorships. Mark Calabria, the current FHFA Director, testified during his confirmation hearing that he wanted to end the conservatorships.[9] 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony). See generally Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs, 116th Cong. 10-40, 74-75, 148-85 (2019) [hereinafter Calabria Testimony] (documenting Mr. Calabria's testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that each Enterprise retains. Calabria Testimony, supra, at 150; see also id. at 25 ("I support the idea of having significantly more capital at the [Enterprises].").

B. Plaintiff owns Fannie and Freddie stock.

There is one plaintiff in this case: CSS, LLC ("CSS"). CSS is an Illinois limited liability company. 1st Am. Compl. ¶ 13. CSS owned Fannie preferred stock and Freddie preferred stock at the time of the Net Worth Sweep. Id. The shares owned by plaintiff were primarily purchased after the conservatorships were established in 2008. Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 1.

II. PROCEDURAL HISTORY

Plaintiff filed its complaint on March 8, 2018. This case was coordinated with similar, related cases assigned to the undersigned judge.[10] Plaintiff filed its first amended complaint in this case on August 16, 2018. In its amended complaint, plaintiff presents four claims. Plaintiff first asserts that the Net Worth Sweep constitutes a Fifth Amendment taking (count I) of its

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[8] The court takes judicial notice of Treasury's reform plan because it is a government record available from a reliable source, Treasury's website. See supra note 7.

[9] The court takes judicial notice of the relevant testimony because the statements are recorded in government documents. See supra note 7.

[10] A fuller recitation of the procedural history of this case and related cases is provided in Fairholme II, 147 Fed. Cl. at 21-23.

economic interest in its stock. Plaintiff next asserts that the Net Worth Sweep constitutes an illegal exaction (count II) of that same economic interest because the (1) FHFA was operating unconstitutionally and (2) FHFA-C and Treasury exceeded their statutory authority when they approved the PSPA Amendments. Plaintiff also pleads a breach-of-fiduciary-duty claim ("fiduciary duty claim") (count III) premised on the Net Worth Sweep being unreasonable, arbitrary, and contrary to the duty owed to CSS as a shareholder. Additionally, plaintiff asserts a breach-of-implied-contract claim (count IV) based on a purported agreement by which the Enterprises consented to the conservatorship in exchange for the FHFA agreeing to preserve the Enterprises' assets with the goal of making them safe and solvent. Specifically, plaintiff asserts that each dividend payment under the Net Worth Sweep constitutes a breach because it depletes the Enterprises' assets in a manner that undermines the goals of conservatorship.

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case and eleven related cases before the undersigned.[11] The plaintiffs in each of the twelve cases filed a response brief on their respective dockets; some of the plaintiffs relied on a joint brief filed in six of the cases, others, as is the case here, filed a combined brief for five of the cases in which the plaintiffs are all represented by the same counsel. Defendant filed its omnibus reply brief in each of the cases on May 6, 2019. The parties have fully briefed defendant's motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiff in this case has adopted the favorable arguments made by the plaintiffs in the related cases to the extent that such arguments are relevant.[12] Defendant's motion to dismiss is now ripe for adjudication.

III. STANDARD OF REVIEW

In ruling on a motion to dismiss a complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), the court generally assumes that the allegations in the complaint are true and construes those allegations in the plaintiff's favor. Trusted Integration, Inc. v. United States, 659 F.3d 1159, 1163 (Fed. Cir. 2011). With respect to RCFC 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of the evidence, that the court possesses subject-matter jurisdiction. Id. The allegations in the complaint must include "the facts essential to show jurisdiction." McNutt v. Gen. Motors

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[11] The eleven related cases are Fairholme Funds, Inc. v. United States, No. 13-465C; Washington Federal v. United States, No. 13-385C; Cacciapalle v. United States, No. 13-466C; Fisher v. United States, No. 13-608C; Arrowood Indemnity Company v. United States, No. 13-698C; Reid v. United States, No. 14-152C; Rafter v. United States, No. 14-740C; Owl Creek Asia I, L.P. v. United States, No. 18-281C; Akanthos Opportunity Master Fund, L.P. v. United States, No. 18-369C; Appaloosa Investment Limited Partnership I v. United States, No. 18-370C; and Mason Capital L.P. v. United States, No. 18-529C.

[12] The court addresses in this opinion some arguments that were made primarily by the plaintiffs in the related cases to provide context for the resolution of defendant's motion to dismiss. In addition, to the extent that any of plaintiff's less-developed arguments are not discussed in this opinion, the court found such arguments to be unpersuasive.

Acceptance Corp., 298 U.S. 178, 189 (1936). And, if such jurisdictional facts are challenged in a motion to dismiss, the plaintiff "must support them by competent proof." Id.; accord Land v. Dollar, 330 U.S. 731, 735 & n.4 (1947) ("[W]hen a question of the District Court's jurisdiction is raised, . . . the court may inquire by affidavits or otherwise, into the facts as they exist." (citations omitted)). If the court finds that it lacks subject-matter jurisdiction, it must, pursuant to RCFC 12(h)(3), dismiss the complaint.

A claim that survives a jurisdictional challenge remains subject to dismissal under RCFC 12(b)(6) if it does not provide a basis for the court to grant relief. Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002) ("A motion to dismiss . . . for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy."). To survive a motion to dismiss under RCFC 12(b)(6), a plaintiff must include in the complaint "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Indeed, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 814-19 (1982).

IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a "threshold matter." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998). Subject-matter jurisdiction cannot be waived or forfeited because it "involves a court's power to hear a case." Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it is "an inflexible matter that must be considered before proceeding to evaluate the merits of a case." Matthews v. United States, 72 Fed. Cl. 274, 278 (2006); accord K-Con Bldg. Sys., Inc. v. United States, 778 F.3d 1000, 1004-05 (Fed. Cir. 2015). Either party, or the court sua sponte, may challenge the court's subject-matter jurisdiction at any time. Arbaugh, 546 U.S. at 506; see also Jeun v. United States, 128 Fed. Cl. 203, 209-10 (2016) (collecting cases).

The ability of the United States Court of Federal Claims ("Court of Federal Claims") to entertain suits against the United States is limited. "The United States, as sovereign, is immune from suit save as it consents to be sued." United States v. Sherwood, 312 U.S. 584, 586 (1941). The waiver of immunity "may not be inferred, but must be unequivocally expressed." United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003). Any such waiver must be narrowly construed. Smith v. Orr, 855 F.2d 1544, 1552 (Fed. Cir. 1988). The Tucker Act, the principal statute governing the jurisdiction of this court, waives sovereign immunity for claims against the United States, not sounding in tort, that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (2018); White Mountain, 537 U.S. at 472. However, the Tucker Act is merely a jurisdictional statute and "does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 298 (1976). Instead, the substantive right must appear in another source of law, such as a "money-mandating

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constitutional provision, statute or regulation that has been violated, or an express or implied contract with the United States." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc).

Defendant challenges the court's jurisdiction to entertain plaintiff's claims on a number of bases. Specifically, defendant argues that plaintiff has not asserted claims against the United States and that the court lacks jurisdiction over the subject matter of certain claims. The court addresses these contentions in turn.[13]

A. Plaintiff has asserted claims against the United States.

The court first considers whether plaintiff has asserted claims against the United States, a necessary element of jurisdiction in the Court of Federal Claims. As set forth in its amended complaint, all of plaintiff's claims are premised on actions taken by the FHFA-C and Treasury. Defendant argues that the court lacks jurisdiction to consider any claims premised on the FHFA-C's or Treasury's conduct. In response, plaintiff contends that it has asserted claims against the government because (1) Treasury was involved in the challenged conduct, (2) the FHFA-C was coerced by the government, (3) the FHFA-C was the government's agent, and (4) the FHFA-C, in collaboration with Treasury, is a government actor. The court addresses each contention in turn.

1. The court cannot exercise jurisdiction based on allegations of Treasury's involvement.

Plaintiff initially argues that the court has jurisdiction over its Fifth Amendment takings and illegal-exaction claims because it has alleged the involvement of Treasury—indisputably a part of the federal government—in the action underlying these claims, i.e., the Net Worth Sweep. Defendant counters that Treasury alone could not have implemented the PSPA Amendments, and Treasury's role as a counterparty to the voluntary agreement with the Enterprises is not sufficient to establish jurisdiction over plaintiff's takings claim. Defendant further asserts that the court's order allowing jurisdictional discovery reflects that plaintiff's allegations concerning Treasury alone are insufficient to confer jurisdiction.

The parties' dispute on the import of allegations concerning Treasury is ultimately immaterial in light of the court's determination, explained below, that the FHFA-C—the other party involved in the PSPA Amendments—is the United States. Nonetheless, the court notes, as defendant asserts, that it implicitly acknowledged in its February 26, 2014 discovery order, issued in Fairholme and related cases, that the allegations concerning Treasury alone were insufficient to support jurisdiction. In that order, the court permitted the plaintiffs in those related cases to conduct fact discovery on whether the FHFA-C was "the 'United States' for purposes of the Tucker Act." Fairholme Funds, Inc. v. United States, 114 Fed. Cl. 718, 721

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[13] In Fairholme II, the court addressed additional jurisdictional concerns that were not raised or are not implicated in this case. See generally 147 Fed. Cl. at 24-25 (rejecting defendant's contention that the claims of the Fairholme plaintiffs were barred by 28 U.S.C. § 1500), 34-37 (rejecting the contention of a putative intervenor that the Court of Federal Claims lacks jurisdiction to entertain Fifth Amendment takings claims).

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(2014). The aforementioned discovery would have been unnecessary (and unwarranted) if, as plaintiff asserts here, the court has jurisdiction over plaintiff's claims based on its allegations concerning Treasury.

2. The FHFA-C was not coerced into approving the PSPA Amendments.

Plaintiff also argues that the FHFA-C is the United States because the FHFA-C was coerced into approving the PSPA Amendments by Treasury. Defendant counters that the FHFA-C was not coerced by Treasury because the FHFA-C had a choice of whether to accept or reject the PSPA Amendments. Defendant asserts that there is no coercion if a party has a choice, regardless of however difficult refusal of a particular option may be. Indeed, defendant contends that plaintiff fails to proffer any allegations that Treasury required the FHFA-C to enter into the agreements against its will. Defendant further asserts that other courts have declined to conclude that the FHFA-C felt compelled to follow Treasury based on allegations that Treasury invented the amendment concept or led the process.

a. The court has jurisdiction over claims based on actions that resulted from government coercion.

The court has jurisdiction over claims premised on the FHFA-C's actions if Treasury's "influence over the" FHFA-C "was coercive rather than merely persuasive." A & D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1154 (Fed. Cir. 2014). The line between coercion and persuasion "is highly fact-specific." Id. Precedent from the United States Court of Appeals for the Federal Circuit ("Federal Circuit") frames the contours of the inquiry. In Langenegger v. United States, the plaintiffs pleaded that the United States coerced El Salvador by threatening to withhold financial and military assistance unless El Salvador passed legislation expropriating private property. 756 F.2d 1565, 1567 (Fed. Cir. 1985). The Federal Circuit disagreed with the plaintiffs' characterization of the threats because "[d]iplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of [coercion], however difficult refusal may be as a practical matter." Id. at 1572. Similarly, the Federal Circuit concluded in B & G Enterprises, Ltd. v. United States that California was not coerced into enacting restrictions on smoking, notwithstanding the federal government conditioning grants on states enacting such limits. 220 F.3d 1318, 1321, 1325 (Fed. Cir. 2000); see also A & D Auto, 748 F.3d at 1155 (explaining that "coercion was not established" in B & G). The court explained that "it was California's decision to create [the] restrictions[;] . . . Congress may have provided the bait, but California decided to bite." B & G, 220 F.3d at 1325. In A & D Auto, the Federal Circuit addressed coercion in the context of the government allegedly conditioning vital financial assistance to bankrupt automobile companies on those companies terminating some of their franchise agreements. 748 F.3d at 1145. Unable to resolve the issue due to gaps in the record, the court noted in dicta that a relevant consideration was "whether the government financing was essential to the companies." Id.

A common thread runs through the Federal Circuit's decisions: the importance of choice. A nonfederal actor is not coerced when it can choose to go against the wishes of the United States, even if doing so will cause significant hardships, Langenegger, 756 F.2d at 1567, or result in a loss of prospective benefits, id.; B & G, 220 F.3d at 1325. But there is no choice, in any meaningful sense, when there is only one realistic option. A & D Auto, 748 F.3d at 1145 (noting the importance of considering whether the companies could survive without accepting the government's offer); cf. Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) (noting that, with respect to Congress's spending powers, "the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions"). Put differently, the nonfederal actor must make a voluntary decision, which it cannot do if there is only one realistic option. See BMR Gold Corp. v. United States, 41 Fed. Cl. 277, 282 (1998) (finding that the "the necessary element of coerciveness" for a taking was missing because the plaintiff granted the military permission to cross his land); accord Henn v. Nat'l Geographic Soc., 819 F.2d 824, 826 (7th Cir. 1987) (noting that hard choices remain voluntary when they are not akin to "Don Corleone's '[m]ake him an offer he can't refuse'"). In sum, the FHFA-C was not coerced if it voluntarily chose to enter into the PSPA Amendments.

b. Plaintiff has not established that Treasury coerced the FHFA-C into approving the PSPA Amendments.

In support of its contention that Treasury coerced the FHFA-C into approving the PSPA Amendments, plaintiff alleges that Treasury proposed the terms of the amendments and used its influence over the FHFA-C to ensure compliance with Treasury's wishes. Those allegations are not enough to establish coercion. First, given the Enterprises' improving financial condition and Treasury's existing funding commitment, the FHFA-C's decision to execute the PSPA Amendments was voluntary because it could reject the deals without imperiling the Enterprises. The facts here, therefore, are diametrically opposed to the circumstances in A & D Auto that the Federal Circuit suggested may support coercion because the automobile dealers faced insolvency if they did not accede to the financing terms. See 748 F.3d at 1145. Second, the FHFA-C's lack of protestation is informative. "[T]he very fact that FHFA[-C] itself [did] not br[ing] suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA[-C] was an independent, willing participant in its negotiations with the Treasury." Robinson v. Fed. Hous. Fin. Agency, 223 F. Supp. 3d 659, 668 (E.D. Ky. 2016), aff'd, 876 F.3d 220 (6th Cir. 2017). The court's conclusion is bolstered by the fact that another court has held that materially similar allegations to those at issue here did not "come close to a reasonable inference that [the] FHFA[-C] considered itself bound to do whatever Treasury ordered." Perry Capital LLC v. Lew, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) ("Perry I"), aff'd in part, rev'd in part sub nom. Perry II, 864 F.3d at 591. This court agrees with the reasoning in Perry I: the PSPA Amendments were executed by sophisticated parties, and many agreements arise from a party's proposal being accepted by the other party. Id. Plaintiff has not established that the FHFA-C was coerced into approving the PSPA Amendments by Treasury.

3. The FHFA-C is not Treasury's agent.

Plaintiff further argues that the FHFA-C's actions are attributable to the United States because the FHFA-C is Treasury's agent. Defendant counters that plaintiff has not pleaded an agency relationship because Treasury does not control the FHFA-C's operations. Indeed, defendant notes that Treasury is statutorily barred from exercising such control.

The United States is subject to claims in this court for the actions of a third party "if [that] party is acting as the government's agent . . . ." A & D Auto, 748 F.3d at 1154. "An essential element of agency is the principal's right to control the agent's actions." Hollingsworth v. Perry, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01 cmt. f (Am. Law. Inst. 2005)); accord O'Neill v. Dep't of Hous. & Urban Dev., 220 F.3d 1354, 1360 (Fed. Cir. 2000) (acknowledging that the common-law meaning of agency requires, among other things, that the principal has the right to control the agent's conduct); see also Preseault v. United States, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (concluding that a state's actions were attributable to the United States when the state acted pursuant to the Interstate Commerce Commission's order); Hendler v. United States, 952 F.2d 1364, 1378-79 (Fed. Cir. 1991) (attributing a state's actions to the United States when the state acted under authority flowing from an Environmental Protection Agency order). The facts, as alleged, do not reflect that Treasury controlled the FHFA-C's actions because Congress explicitly precluded the FHFA-C from being subservient to another agency, 12 U.S.C. § 4617(a)(7) (providing that the FHFA-C cannot be subject to the "direction or supervision" of any other agency), and plaintiff has not alleged facts indicating that Treasury exercised such control notwithstanding the statutory bar. Although the FHFA-C was required by the PSPAs to obtain Treasury's approval for certain actions (e.g., issuing dividends), the PSPAs did not provide Treasury with the right to unilaterally order amendments. Moreover, plaintiff describes an FHFA-C that made decisions independently: Treasury sought to influence the opinions of the FHFA-C's senior officials; Treasury "push[ed]" for the PSPA Amendments; and the FHFA-C agreed to the PSPA Amendments. 1st Am. Compl. ¶¶ 2, 62, 64. Simply stated, plaintiff has not alleged facts establishing that Treasury exercised the control over the FHFA-C that is necessary for an agency relationship.

4. The FHFA-C is the United States because the FHFA-C retains the FHFA's governmental character.

In addition, plaintiff contends that the FHFA-C is itself a government actor.[14] Defendant disagrees. First, relying on O'Melveny & Myers v. Fed. Deposit Ins. Corp., 412 U.S. 79 (1994), defendant argues that the FHFA-C is not the United States because the FHFA-C stands in the Enterprises' shoes. Specifically, defendant asserts that Congress's decision to have the FHFA-C succeed to the Enterprises' rights reflects that Congress intended that the FHFA-C step into the Enterprises' private shoes and shed its government character. Second, defendant argues that the FHFA-C's exercise of nontraditional conservatorship powers is immaterial because Congress can expand the conservator's role without transforming it into a government actor. Third, defendant argues that the Enterprises are not government instrumentalities—which means that the FHFA did not step into the shoes of a government actor when it became the Enterprises' conservator—because the government does not retain permanent authority to appoint the Enterprises' directors. Defendant contends that the government only has temporary, albeit indefinite, control over the Enterprises because the conservatorships are not permanent.

[14] To determine whether this action is against the United States, the court need not reach plaintiff's argument that Treasury and the FHFA-C formed a "control group." See Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 22-26.

In response, plaintiff disputes the premise of defendant's argument that, pursuant to O'Melveny, the FHFA becomes the Enterprises when acting as conservator. Plaintiff asserts that O'Melveny does not concern whether an entity is the United States or, if the decision can be read as addressing that issue, is distinguishable because it concerns receivers or is limited to conservators exercising traditional conservator powers. Second, plaintiff argues that the FHFA has not shed its government status, even if it has stepped into the Enterprises' shoes, when it acts as conservator. Specifically, plaintiff asserts that the FHFA-C retains the FHFA's government status because (1) the FHFA-C has acted beyond the traditional conservator powers and (2) Congress expressed its intention for that result by precluding the conservator from being subject to the supervision of "any other agency." 12 U.S.C. § 4617 (emphasis added). Third, plaintiff argues that its claims are against the United States, even if the FHFA-C steps into the shoes of the Enterprises, because the Enterprises are government instrumentalities.

In short, the parties disagree over the government status of the FHFA-C. The FHFA is indisputably the United States, see id. § 4511(a) (establishing the FHFA as an "independent agency of the Federal Government"), and so the only question is whether the FHFA sheds that status when it acts as conservator. In other jurisdictions, courts have held (with near unanimity) that the FHFA loses its government status pursuant to O'Melveny. In O'Melveny, the United States Supreme Court ("Supreme Court") explained that the Federal Deposit Insurance Corporation ("FDIC") "steps into [the] shoes" of a private company when acting as receiver and sheds its government character because the FDIC "succeed[s] to . . . all rights, titles, powers, and privileges of the [entity in receivership] . . . ." 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); see also AG Route Seven P'ship v. United States, 57 Fed. Cl. 521, 534 (2003) (citing O'Melveny for the proposition that the FDIC as receiver is a "private party, and not the government per se" because it "is merely standing in the shoes . . . of the defunct thrift"). The courts drawing from O'Melveny have concluded that the FHFA steps into the shoes of the Enterprises and sheds its government character when acting as conservator because Congress provided that the FHFA-C exercises the same rights with respect to the Enterprises as Congress granted to the FDIC as receiver. See, e.g., Herron v. Fannie Mae, 861 F.3d 160, 169 (D.C. Cir. 2017); cf. Ameristar Fin. Servicing Co. v. United States, 75 Fed. Cl. 807, 811 (2007) (concluding, with respect to the FDIC, that the step-into-the-shoes principle set forth in O'Melveny also applies in the conservator context).

a. The FHFA-C is not the United States if the FHFA steps into the Enterprises' shoes when acting as conservator.

Plaintiff initially contends that defendant's reliance on O'Melveny is erroneous because, assuming that O'Melveny applies, the FHFA-C is the United States even though it steps into the Enterprises' shoes. Specifically, plaintiff asserts that the FHFA-C is the United States under the facts alleged because (1) the FHFA-C exercises nontraditional conservator powers, (2) Congress intended that the FHFA-C retain the FHFA's government status, and (3) the FHFA-C steps into the shoes of a government instrumentality. The court addresses each assertion in turn.

First, the FHFA-C did not become a government actor by exercising powers beyond those traditionally afforded to a conservator. As a threshold matter, plaintiff has not alleged facts reflecting that the FHFA-C used such powers; the execution of the PSPA Amendments was a

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"quintessential conservatorship" function. Perry II, 864 F.3d at 607. More importantly, however, plaintiff would not prevail even if the FHFA-C exercised nontraditional conservatorship powers in agreeing to the PSPA Amendments. When this argument was pressed in other jurisdictions, it was rejected:

> It may well be true that FHFA's actions would not be allowed under traditional principles of corporate or conservatorship law, but it does not follow that those actions are therefore governmental. Legislatures can expand conservatorship and similar powers without transforming conservators into agents of the government. Cf. Pegram v. Herdrich, 530 U.S. 211, 225-26 (2000) (explaining that the Employee Retirement Income Security Act altered the common law of trusts to permit certain actions that would otherwise violate the trustee's fiduciary duties).

Bhatti v. Fed. Hous. Fin. Agency, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (footnote omitted). The court agrees with that reasoning, and plaintiff provides no authority that supports a contrary result. Although plaintiff states that the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") decision in Waterview Management Co. v. FDIC, 105 F.3d 696 (D.C. Cir. 1997), supports its position, it is mistaken. Waterview is not on point because the D.C. Circuit did not hold that a conservator is per se the United States when acting pursuant to a congressional grant of broad powers. Rather, it held that, as a matter of statutory interpretation, the existence of a receivership did not preempt a prereceivership contract. Id. at 699-702.

Second, Congress's instruction that the FHFA-C is not subject to the supervision of any other agency does not reflect congressional intent for the FHFA to retain its government status when acting as conservator even if it steps into the shoes of the Enterprises. Because the court only reaches this issue by assuming that O'Melveny is instructive, the statutory language concerning supervision of the FHFA-C does not support a finding of jurisdiction because the same language is present in the statute that the Supreme Court addressed in O'Melveny. See 512 U.S. at 85-86 (discussing 12 U.S.C. § 1821). Compare 12 U.S.C. § 1821(c)(3)(C) ("When acting as conservator or receiver . . . , [the FDIC] shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC's] rights, powers, and privileges."), with id. § 4617(a)(7) ("When acting as conservator or receiver, the [FHFA] shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the [FHFA].").

The third argument advanced by plaintiff—that the FHFA-C is the United States because it steps into the shoes of a government instrumentality—also is not meritorious. A government instrumentality's actions are attributable to the United States for purposes of the Tucker Act. See Corr v. Metro. Wash. Airports Auth., 702 F.3d 1334, 1336 (Fed. Cir. 2012) (noting that a claim against a government instrumentality is a claim against the United States for purposes of the Little Tucker Act, 28 U.S.C. § 1346(a)(2)). The Supreme Court established in Lebron v. National Railroad Passenger Corp. that a company is a government instrumentality when (1) it is created by "special law," (2) it is established "for the furtherance of governmental objectives," and (3) the federal government "retains for itself permanent authority to appoint a majority of the [company's] directors . . . ." 513 U.S. 374, 400 (1995). After Lebron, the Supreme Court clarified that, for purposes of the instrumentality test, "the practical reality of federal control and supervision prevails over Congress' disclaimer of the [the entity's] governmental status." Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1233 (2015).

There is no dispute that the Enterprises satisfy the first two prongs of the Lebron test; Congress created the Enterprises by special law to achieve governmental objectives related to the housing market. See 12 U.S.C. § 4501; see also Herron, 861 F.3d at 167 (addressing claims involving Fannie and noting that "[t]his case satisfies the first two Lebron criteria"); Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 75 F.3d 1401, 1406-07 (9th Cir. 1996) (reaching same conclusion for Freddie). The status of the Enterprises, therefore, turns on the third prong: whether the government retains permanent authority to appoint a majority of the Enterprises' directors.

The Federal Circuit has not addressed the government-control prong with respect to the Enterprises, but courts in other jurisdictions have done so. Those decisions provide a starting point for the court. It appears that every court to consider the issue, with the exception of one district court, has held that the government does not exercise permanent control over the Enterprises. Sisti v. Fed. Hous. Fin. Agency, 324 F. Supp. 3d 273, 279 (D.R.I. 2018) (concluding that the government retains permanent authority to control the Enterprises after noting that "[t]he non-controlling precedent to date" has reached the opposite conclusion). Most of the courts that concluded that the government lacks permanent control over the Enterprises issued their decisions before the Supreme Court in Association of American Railroads emphasized the importance of evaluating the practical reality over nomenclature, and the other courts focused on the statutory purpose for the conservatorships rather than the Enterprises' actual situation. E.g., Herron, 861 F.3d at 169 (relying on the notion that a conservatorship is fundamentally temporary). In other words, the courts adopting the prevailing view considered the issue of control without regard for the Supreme Court's instruction to focus on the practical reality. The court, therefore, does not find those decisions persuasive.

The crux of the inquiry, as the Supreme Court mandates, is on the practical reality of the government's control over the Enterprises. Ass'n of Am. R.Rs., 135 S. Ct. at 1233. It is of no import that Congress nominally authorized a facially temporary conservatorship, see 12 U.S.C. § 4617(a) (permitting the FHFA to act as conservator to "reorganiz[e]" or "rehabilitat[e]" the Enterprises), because Congress's disclaimers are no substitute for the court's obligation to assess the government's actual control, Ass'n of Am. R.Rs., 135 S. Ct. at 1233. The court focuses on the length of the conservatorship because the FHFA-C wields complete control over the Enterprises so long as they are in conservatorship. See generally 12 U.S.C. § 4617.

Plaintiff alleges that the Enterprises will remain undercapitalized—and thus subject to conservatorship pursuant to 12 U.S.C. § 4617(a)(3)(J)—until the PSPAs, in their current form, are changed because the Enterprises cannot accumulate any capital under the existing terms of the PSPAs. Although the PSPAs could be further amended, plaintiff's allegations reflect that Treasury and the FHFA-C will not do so because the purpose of the PSPA Amendments is to prevent the Enterprises from accumulating the necessary capital to become independent companies. Plaintiff, in short, has alleged that the government intended, and has taken steps to ensure, that the conservatorships never end. Those facts, viewed in isolation, would support a conclusion that the practical reality is that the Enterprises are under permanent government control. The court's inquiry, however, is not limited to plaintiff's allegations because it has taken judicial notice of relevant facts reflecting that the status quo has changed: the Treasury Secretary and the FHFA Director are now both committed to ending the conservatorships. Moreover, the idea that the Enterprises are permanently subject to government control because they can never accumulate the capital needed to exit the conservatorships is undermined by recent developments. Indeed, Treasury proposed amending the Net Worth Sweep to allow the Enterprises to retain more capital, and the FHFA Director testified during his confirmation hearing that, if confirmed, he would seek to increase the amount of capital that the Enterprises retain. Simply stated, the practical reality is that the Enterprises are not subject to permanent government control because the relevant parties are working to terminate the conservatorships.[15]

In sum, the FHFA-C does not become the United States if the FHFA steps into the Enterprises' shoes when serving as conservator.

b. The FHFA-C retains the FHFA's government character because the FHFA-C does not step into the Enterprises' shoes.

The key inquiry, therefore, is whether the FHFA steps into the shoes of the Enterprises when acting as conservator. Defendant argues that the FHFA-C sheds its government character and assumes the identity of the Enterprises based on the reasoning in O'Melveny. Defendant's reliance on O'Melveny is misplaced. O'Melveny concerns a receiver stepping into the shoes of a failed bank. 512 U.S. at 86. The roles of a conservator and receiver are meaningfully different. In a recent decision, the United States District Court for the District of Rhode Island artfully explained the differences and their import for assessing whether the FHFA-C is the government:

> The O'Melveny Court held that FDIC, when acting as a receiver for a private entity, steps into the shoes of that private entity for state law claims. This holding makes sense given the purpose of receivership: "to preserve a company's assets, for the benefit of creditors, in the face of bankruptcy." When FDIC is appointed receiver, it must dispose of the received entity's assets, resolving obligations and claims made against the entity. Notably, "[i]n receivership, the receiver owes fiduciary duties to the creditors, which the corporation would otherwise owe to creditors during a period of insolvency." It logically follows, then, that the

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[15] Plaintiff may disagree with the court's conclusion that events occurring after the PSPA Amendments are relevant to determining whether the Enterprises were under permanent government control during the events discussed in plaintiff's complaint. Even if the court agreed that events occurring after the PSPA Amendments are not germane, plaintiff still would not prevail because it alleges that the conservatorships began as temporary measures. See 1st Am. Compl. ¶ 7 (noting the temporary nature of the conservatorships and quoting an FHFA publication stating that the conservatorships would be terminated once the Enterprises had been restored "to a safe and solvent condition"); id. (noting that the FHFA reassured the market that the Enterprises would return to normal business operations). Thus, the Enterprises were not under permanent government control before the PSPA Amendments.

receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity.

> Conservatorship, in contrast, serves a different function. FHFA has described the purpose of conservatorship is "to establish control and oversight of a company to put it in a sound and solvent condition." Conservators, unlike receivers, have a fiduciary duty running to the corporation itself.
>
> This is "critically distinct" from the fiduciary duties owed as a receiver—the receiver does indeed "step into the shoes" of the entity by assuming the fiduciary duties of the entity, but the conservator does not: it remains distinct, and rather owes a duty to the entity. Given the difference in fiduciary duties, O'Melveny's "steps into the shoes" holding makes sense in the context of receivership, but not in the context of conservatorship.

Sisti, 324 F. Supp. 3d at 282-83 (citations and footnotes omitted). See generally Brian Taylor Goldman, The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State-Action, 17 J. Bus. & Sec. L. 11, 23-30 (2016). The district court, relying on the above analysis, declined to treat the FHFA-C as a private actor. Sisti, 324 F. Supp. 3d at 284. This court agrees with the reasoning and conclusion in Sisti: the FHFA does not shed its government character when acting as conservator because it does not step into the shoes of the Enterprises. Otherwise stated, the FHFA-C is the United States because it retains the FHFA's government character. Plaintiff's claims, therefore, are against the United States for purposes of the Tucker Act.

B. The court lacks jurisdiction over plaintiff's claim that sounds in tort.

1. Plaintiff's fiduciary duty claim sounds in tort.

Defendant next argues that the court lacks jurisdiction over plaintiff's fiduciary duty claim because the United States does not owe to each Enterprise's shareholders a fiduciary duty that is grounded in a statute or contract. Defendant asserts that such a fiduciary duty cannot be based on (1) HERA because, pursuant to the statute, the FHFA-C is only required to act in the government's and the Enterprises' best interests; or (2) the PSPAs because plaintiff is not a party to those contracts. Plaintiff, in its opposition to defendant's motion to dismiss, counters that its claim is based on a fiduciary duty rooted in both HERA and the PSPAs. As to HERA, plaintiff asserts that Congress made the FHFA-C a fiduciary by authorizing it to control the Enterprises, entrusting it with duties that are at the core of what it means to be a fiduciary, and using terminology—"conservator"—associated with a fiduciary. With respect to the PSPAs, plaintiff argues that Treasury owes a fiduciary duty to the shareholders because it, acting with the FHFA-C, acquired control rights under the contract.

The court, pursuant to the Tucker Act, lacks jurisdiction over tort claims. 28 U.S.C. § 1491(a)(1). A breach of fiduciary duty is generally classified as a tort. Newby v. United States, 57 Fed. Cl. 382, 294 (2003). A fiduciary duty claim, however, does not sound in tort for purposes of the Tucker Act when the fiduciary relationship is founded on a money-mandating statute or a contractual provision between the claimant and United States. See Hopi Tribe v.

United States, 782 F.3d 662, 667 (Fed. Cir. 2015) (statute); Cleveland Chair Co. v. United States, 557 F.2d 244, 246 (Ct. Cl. 1977) (contract); see also 28 U.S.C. § 1491(a)(1) (providing jurisdiction over claims "founded upon . . . any Act of Congress . . . or contract with the United States").

The initial issue is whether HERA establishes a fiduciary relationship between the FHFA-C and the Enterprises' shareholders. The court begins with the language of the statute. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). "If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect." Rosete v. Office of Pers. Mgmt., 48 F.3d 514, 517 (Fed. Cir. 1995); accord Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Congress provided in HERA that the FHFA-C is only required to act in the interests of itself or the Enterprises. 12 U.S.C. § 4617(b)(2)(J). That statement reflects a clear intent: the FHFA-C does not owe a fiduciary duty to shareholders because the conservator is not required to consider shareholders' interests.[16] See id.; see also Collins v. Mnuchin, 938 F.3d 553, 580 (5th Cir. 2019) (en banc) (noting that HERA "may permit" the FHFA-C to pursue actions that are "inconsistent with fiduciary duties"), petitions for cert. filed, 88 U.S.L.W. 3114 (U.S. Sept. 25, 2019) (No. 19-422), 88 U.S.L.W. 3146 (U.S. Oct. 25, 2019) (No. 19-563). The plain language controls, and therefore the court does not consider the peripheral considerations urged by plaintiff such as the implications of the word "conservator," the FHFA-C's control over the Enterprises, or the FHFA-C's other powers. In sum, plaintiff cannot establish jurisdiction for its fiduciary duty claim by relying on HERA.

Next, the court turns to whether Treasury, acting together with the FHFA-C, owed a fiduciary duty to the Enterprises' other shareholders because it acquired control rights by agreeing to the PSPAs. Plaintiff's argument is premised on the state-law principle (which it terms "general corporate law") that a controlling shareholder owes a fiduciary duty to the minority shareholders. The court is not convinced. First, plaintiff's allegation of a fiduciary relationship is not founded on a contract within the meaning of the Tucker Act. Plaintiff is not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs. It invokes the contracts solely to establish that Treasury, with the assistance of the FHFA-C, is a controlling shareholder and relies on that conclusion to argue that Treasury has a fiduciary duty based on state law. The contract, otherwise stated, is one step removed from the purported genesis of the fiduciary duty—the application of state-law principles. That gap is too much in light of the court's obligation to narrowly construe the Tucker Act's waiver of sovereign immunity. See

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[16] The court's interpretation of HERA's plain language is buttressed by the fact that Congress seemingly made a deliberate decision to exclude shareholder interests from the FHFA-C's considerations. Congress modeled HERA on the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Jacobs v. Fed. Hous. Fin. Agency, 908 F.3d 884, 893 (3d Cir. 2018). Under FIRREA, Congress permitted the FDIC as conservator to consider the best interests of a bank, its depositors, or the FDIC. 12 U.S.C. § 1821(d)(2)(J)(ii). Although Congress permitted the FDIC to take into consideration the interests of its depositors, Congress omitted the analogue of depositors—shareholders—from the list of germane interests that the conservator can consider when acting pursuant to HERA. Compare id. (FIRREA), with 12 U.S.C. § 4617(b)(2)(J) (HERA). The omission is telling.

Smith, 855 F.2d at 1552 (noting that the Tucker Act is narrowly construed); see also Perry II, 864 F.3d at 619-20 (rejecting the legal theory that the Enterprises' shareholders' need to reference the PSPAs for their fiduciary duty claim was enough to conclude that the claim was rooted in a contract for purposes of the Tucker Act).

Second, plaintiff fails to demonstrate the applicability of the state-law principles underlying its theory for why Treasury assumed fiduciary duties. Federal law governs the obligations Treasury incurred by entering into the PSPAs. See Boyle v. United Techs. Corp., 487 U.S. 500, 519 (1988) ("The proposition that federal common law continues to govern the 'obligations to and rights of the United States under its contracts' is nearly as old as Erie [v. Tompkins, 304 U.S. 64 (1938),] itself."). Although courts may shape federal law by drawing from state-law principles, plaintiff does not explain why doing so is appropriate in this instance.

Third, plaintiff does not prevail even if its fiduciary duty claim could be founded on a contract and federal common law incorporates the state-law principles regarding controlling shareholders' fiduciary obligations. Under Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders. See Ivanhoe Partners v. Newmont Min. Corp., 535 A.2d 1334, 1344 (Del. 1987); Parsch v. Massey, 79 Va. Cir. 446 (2009); see also Quadrant Structured Prod. Co. v. Vertin, 102 A.3d 155, 183 (Del. Ch. 2014) (acknowledging that those "who effectively control a corporation" owe a fiduciary duty to others).[17] To have the requisite level of control, the controlling shareholder must (1) be able to exercise a majority of the corporation's voting power or (2) direct the corporation without owning a majority of stock. Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1113 (Del. 1994). The latter, effective exercise of control, "is not an easy test to satisfy"; the individual or group must be, "as a practical matter, . . . no differently situated than if they had majority voting control." In re PNB Holding Co. S'holders Litig., No. CIV.A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006).

Plaintiff has not established that Treasury meets either control test. First, plaintiff does not allege that Treasury owns any of the Enterprises' voting stock. Treasury purchased preferred stock and acquired the right to buy common (i.e., voting) stock, but there is no indication that Treasury exercised its warrants or otherwise acquired common stock.[18] Second, plaintiff does not demonstrate that Treasury exercised effective control over the Enterprises or was, in plaintiff's terms, a "dominant shareholder." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 29 (quoting Sisti, 324 F. Supp. 3d at 283 n.9). Although Treasury acquired the

[17] The court refers to Delaware and Virginia law because Fannie is a Delaware corporation, and Freddie is a Virginia corporation. When evaluating Virginia law, the court also looks to Delaware state court decisions because Virginia courts do so to resolve unsettled issues in the Commonwealth. E.g., U.S. Inspect Inc. v. McGreevy, No. 160966, 2000 WL 33232337, at *4 (Va. Cir. Ct. Nov. 27, 2000).

[18] Even if Treasury had exercised its option to buy a majority of the voting stock, it would not be a controlling shareholder because the FHFA-C succeeded to all of the shareholders' rights. See 12 U.S.C. § 4617(b)(2)(A) (noting that the FHFA-C, by operation of law, succeeds to all rights and powers of any Enterprise shareholder). Treasury, therefore, would have no voting power.

right to preclude the Enterprises from taking certain actions, Treasury did not control the Enterprises because it could not direct any action—it could only respond to certain requests made by the Enterprises. As a practical matter, therefore, Treasury is situated differently than if it had majority voting power.

Having rejected the contentions advanced by plaintiff in its opposition brief, the court turns to an argument that appears for the first time in plaintiff's supplemental brief, which was filed at the court's request after the initial round of briefing on defendant's omnibus motion to dismiss was complete, Fairholme II was decided, and the court held a status conference regarding further proceedings in the related cases.[19] In its supplemental brief, plaintiff contends that its fiduciary duty claim was founded on a contention that Treasury and the FHFA-C acted as a "control group," that this contention was set forth in its opposition brief in the section addressing the court's jurisdiction over its fiduciary duty claim, and that the court did not, in Fairholme II, consider this contention. But no such contention was made in plaintiff's opposition brief.

In its opposition brief, plaintiff explained that under state law, multiple shareholders who are legally connected can form a "control group" and be "deemed a single, majority shareholder," and then asserted that Treasury and the FHFA-C were such a control group, acting in concert as the United States. See Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 22-26. In other words, plaintiff advanced its control group contention solely to establish that its suit was against the United States. In the portion of its opposition devoted to countering defendant's jurisdictional attack on its fiduciary duty claim, plaintiff asserted only two bases for a fiduciary duty; each one was treated separately as governing the conduct of either Treasury or the FHFA-C. It did not argue that the fiduciary duty arose from Treasury and the FHFA-C acting as a control group. Accordingly, the court did not consider plaintiff's control group allegation as a foundation for any fiduciary duty claim in Fairholme II, among the arguments raised by the plaintiffs in these related cases.

Because plaintiff's control group contention was not raised in its opposition brief in support of its fiduciary duty claim, it is waived. See United States v. Ford Motor Co., 463 F.3d 1267, 1277 (Fed. Cir. 2006) (explaining that "[a]rguments raised for the first time in a reply brief are not properly before this court"); Ironclad/EEI v. United States, 78 Fed. Cl. 351, 358 (2007) (noting that "under the law of this circuit, arguments not presented in a party's principal brief to the court are typically deemed to have been waived"). But even if plaintiff's argument were not waived, it is not persuasive. In Fairholme II, the court explained why neither Treasury nor the FHFA-C owed a fiduciary duty to the shareholders of Fannie and Freddie. 147 Fed. Cl. at 37-40. The court is not persuaded that a control group composed of two entities, neither of which was bound by the fiduciary duty posited by plaintiff, would be bound by a fiduciary duty simply because the entities are alleged to have worked in concert against the interests of the other shareholders of the Enterprises. Plaintiff's attempt to graft a state law concept of a control group of shareholders onto a Tucker Act jurisdictional inquiry is not anchored in binding or even

[19] As defendant notes, the court did not invite plaintiff, after the status conference held March 5, 2020, to relitigate issues already decided in Fairholme II.

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persuasive precedent, as explained in Fairholme II. Id. at 39-40. Having considered the allegations in plaintiff's amended complaint, the timely arguments set forth in plaintiff's opposition brief, and the untimely argument raised in plaintiff's supplemental brief, the court concludes that it lacks jurisdiction over plaintiff's fiduciary duty claim because it sounds in tort. Therefore, it dismisses count III of plaintiff's amended complaint.

2. Plaintiff's takings and illegal-exaction claims do not sound in tort.

Defendant also argues that plaintiff's Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the FHFA-C. Plaintiff counters that it has pleaded the predicates for takings and illegal-exaction claims, which means that it is irrelevant whether it also alleged facts that are germane to tortious actions.

When a party pleads the predicates for a takings claim or illegal-exaction claim, the court possesses jurisdiction to entertain such claims. See Hansen v. United States, 65 Fed. Cl. 76, 80-81 (2005) ("[S]o long as there is some material evidence in the record that establishes the predicates for a [claim covered by the Tucker Act,] . . . a plaintiff succeeds in demonstrating subject matter jurisdiction in this court . . . ."). Those claims, at a basic level, are contentions that the government expropriated private property lawfully (takings) or unlawfully (illegal exaction). See Orient Overseas Container Line (UK) Ltd. v. United States, 48 Fed. Cl. 284, 289 (2000) ("Takings claims arise because of a deprivation of property that is authorized by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation." (citing Dureiko v. United States, 209 F.3d 1345, 1359 (Fed. Cir. 2000); Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-08 (Ct. Cl. 1967))). If a party alleges the necessary predicates for these claims, the court is not deprived of jurisdiction even if the complaint contains allegations that could support a tort claim. See El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1353 (Fed. Cir. 2004) ("That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims."); Rith Energy, Inc. v. United States, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that this court has jurisdiction over a takings claim "even if the government's action was subject to legal challenge on some other ground"). Here, plaintiff pleads the predicates for takings and illegal-exaction claims by alleging, in essence, that it was forced to give its property to the government because of lawful or unlawful government conduct. Therefore, it is of no import to the court's jurisdiction whether plaintiff has alleged facts that would also support a tort claim.

C. The court lacks jurisdiction over plaintiff's implied-in-fact-contract claim because plaintiff is not a third-party beneficiary of such a contract.

Defendant argues next that the court lacks jurisdiction to entertain plaintiff's implied-in-fact-contract claim because plaintiff is not a third-party beneficiary of such a contract. Specifically, defendant asserts that plaintiff has not established that it is an intended beneficiary independent of its status as a shareholder and that any benefit that is related to its status as a shareholder is insufficient for jurisdiction. Plaintiff counters that it is an intended third-party beneficiary of implied contracts, between the FHFA and each Enterprise's board, in which the boards consented to the conservatorships in exchange for the FHFA-C operating the Enterprises as a fiduciary and returning them to sound condition. Specifically, plaintiff asserts that the intent to benefit the shareholders is evident from (1) the boards' consent to the conservatorships because shareholders would benefit from a conservator focused on returning the Enterprises to a better condition, and (2) the government acknowledging that the Enterprises' stock would remain outstanding while the Enterprises were in conservatorship.

The court's jurisdiction over contract claims is limited by the Tucker Act. Ransom v. United States, 900 F.2d 242, 244 (Fed. Cir. 1990). Of particular import here, ordinarily, a plaintiff must be in privity of contract with the United States to invoke this court's jurisdiction over a contract claim against the government. Fid. & Guar. Ins. Underwriters, Inc. v. United States, 805 F.3d 1082, 1087 (Fed. Cir. 2015). But privity is not required if "the plaintiff can demonstrate that it was an intended third-party beneficiary under the contract." Pac. Gas & Elec. Co. v. United States, 838 F.3d 1341, 1361 (Fed. Cir. 2016).

"Third party beneficiary status is an 'exceptional privilege.'" Glass v. United States, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (quoting German All. Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 230 (1912)). The conditions for attaining such status are "stringent." Anderson v. United States, 344 F.3d 1343, 1352 (Fed. Cir. 2003). "[S]hareholders seeking status to sue as third-party beneficiaries of an allegedly breached contract must 'demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.'" Castle v. United States, 301 F.3d 1328, 1338 (Fed. Cir. 2002) (quoting Glass, 258 F.3d at 1354). Specifically, "the contract must express the intent of the promissor to benefit the shareholder personally, independently of his or her status as shareholder." Glass, 258 F.3d at 1353-54. As a practical matter, the shareholder does not personally benefit independent of its status as a shareholder when the contractual promises pertain only to the treatment of the company. See FDIC v. United States, 342 F.3d 1313, 1320 (Fed. Cir. 2003) (noting that the broken promises concerned the treatment of the company such that the plaintiffs did not benefit independent of their status as shareholders); accord Maher v. United States, 314 F.3d 600, 605 (Fed. Cir. 2002) (concluding that the plaintiffs were not third-party beneficiaries when they failed to "establish[] that the government took on any obligations in the merger agreement for [the plaintiffs'] personal benefit, or even that the merger agreement contains any provisions pertaining to [the plaintiffs] personally").

As plaintiff is not a party to the alleged implied contracts between the FHFA and the Enterprises, the relevant issue is whether plaintiff is a third-party beneficiary of those agreements. It is not. First, it is of no import that the Enterprises, as plaintiff argues, purportedly agreed to the conservatorships because that would serve the interests of shareholders. Indeed, "every action of a corporation is supposed to benefit its shareholders," but the "law has not viewed this general benefit as making every shareholder a third-party beneficiary." Suess v. United States, 33 Fed. Cl. 89, 94 (1995). Second, plaintiff's allegations reflect that it only benefits from the alleged implied contracts by virtue of its shareholder status. The relevant promises concerned how the FHFA-C would operate the Enterprises; the crux of the purported agreements was the FHFA-C promising to operate the Enterprises as a fiduciary to preserve their assets and return them to sound condition. Because the promises in the alleged implied contracts were directed at the Enterprises, plaintiff cannot be a third-party beneficiary of the alleged contract. See FDIC, 342 F.3d at 1320. Third, plaintiff has not demonstrated that the FHFA

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intended that plaintiff would benefit independently of its status as a shareholder even if it did so benefit. Plaintiff relies on the FHFA's statements that private stock would remain outstanding and shareholders would continue to hold an economic interest in their stock. Those factual statements, however, do not reflect that the FHFA intended to confer any specific benefit on plaintiff independent of its role as a shareholder. Because plaintiff has not alleged facts reflecting that the FHFA intended to confer a personal benefit on it, it is not a third-party beneficiary. See Glass, 258 F.3d at 1353-54. In sum, the court lacks jurisdiction to entertain plaintiff's implied-in-fact-contract claim because plaintiff is neither a party to a contract with the government nor a third-party beneficiary of any such agreement. Therefore, the court dismisses count IV of its amended complaint.

V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiff's claims, defendant challenges plaintiff's standing to pursue its claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. Starr Int'l Co. v. United States, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is "assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties." Kowalski v. Tesmer, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that controls. See Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted."), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014). Thus, in a suit brought by a shareholder, it is the substance of the allegations and not the label assigned to the allegations—i.e., direct or derivative—that matters. See Starr, 856 F.3d at 966-67; see also In re Sunrise Sec. Litig., 916 F.2d 874, 882 (3d Cir. 1990) ("Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties."). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based on the rights of the company. See Starr, 856 F.3d at 966-67; see also Weir v. Stagg, No. 09-21745-CIV, 2011 WL 13174531, at *9 (S.D. Fla. Feb. 7, 2011) ("Shareholders do not have standing to bring a direct action for injuries suffered by a corporation, but rather, must bring a derivative action."). A shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the corporation's injuries—to have standing to litigate those claims. See Starr, 856 F.3d at 966-67.

Defendant argues that plaintiff lacks standing because its claims, pled as direct claims, actually belong to the Enterprises and are therefore derivative in nature. The parties in this case and the related cases fully briefed and argued this issue prior to the court issuing the Fairholme II decision. The court concluded in Fairholme II that Fannie and Freddie shareholders lack standing to pursue direct claims that are derivative in nature. Thereafter, the court solicited short supplemental briefs from plaintiff and defendant regarding the applicability of the holdings in Fairholme II to this case. In its supplemental brief, plaintiff suggests that its allegations are materially different from those asserted in Fairholme for purposes of standing, while defendant

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contends in its supplemental brief that there are no material differences. All of the parties' arguments are addressed below.

A. Plaintiffs' allegations are not materially different from the allegations in Fairholme.

As an initial matter, plaintiff contends that its allegations are materially different from those advanced in Fairholme in two respects, such that the standing inquiry would be affected. Plaintiff first argues that the type of harm it has suffered and the type of relief it has requested distinguish its claims from the direct claims in Fairholme. In essence, plaintiff attempts to distinguish what it characterizes as the Fairholme plaintiffs' allegation of the expropriation of the Enterprises' assets from its allegation of the expropriation of its economic interests. As defendant points out, however, the direct claims in Fairholme and the claims in this case are virtually indistinguishable in nature. All four counts of the amended complaint in this case mirror, in every essential way, the direct takings, illegal-exaction, fiduciary duty, and breach-of-implied-contract claims in Fairholme. Expropriation of the shareholders' economic interests was alleged in Fairholme, just as it is alleged in the first amended complaint in this case. Compare Fairholme II, 147 Fed. Cl. at 20, 46-47, with 1st Am. Compl. ¶¶ 88, 105-107. Thus, the standing analysis in Fairholme II is fully applicable to the claims presented here.

Plaintiff next invokes its reliance on the allegation of the existence of a "control group," formed by Treasury and the FHFA-C, that dominated the Enterprises and injured it. In its view, this factual distinction in its first amended complaint is significant because it was not discussed in Fairholme II. Plaintiff fails to explain, however, how this factual distinction gives it standing to bring its direct claims. Plaintiff apparently infers a logical connection between a control group of shareholders and a controlling shareholder, but the connection is not explained in a way that is helpful to the court. Indeed, in its supplemental brief plaintiff cites primarily to a section of its opposition brief that does not address the topic of standing at all. If plaintiff wished to advance a standing argument that specifically relied on the state law concept of a control group of shareholders and cases discussing such a phenomenon, no such argument was made in its opposition brief. Thus, any such standing argument that plaintiff may be attempting to make in its supplemental brief, to the extent that one could be discerned, is waived as untimely.[20] See Ironclad/EEI, 78 Fed. Cl. at 358.

B. Plaintiff's claims actually belong to the Enterprises.

Having determined that plaintiff's allegations do not differ materially from those advanced in Fairholme, the court turns to defendant's contention that plaintiff lacks standing to litigate its claims. Defendant's standing argument is premised on its assertion that plaintiff's claims actually belong to the Enterprises—and are therefore derivative in nature—because, to prevail, plaintiff would need to establish an injury to the Enterprises and any relief would accrue

[20] Even if this argument were not waived, the court agrees with defendant that the control group scenario alleged by plaintiff also fails to satisfy the criteria for dual-natured claims that might provide standing to a shareholder plaintiff asserting direct claims. See Section V.B, infra (discussing the criteria for dual-natured claims).

to the Enterprises. Plaintiff counters that it asserts direct claims because the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises' capital structure to plaintiff's detriment, which renders the claims for such conduct both direct and derivative under the dual-nature exception.[21] Defendant replies that the Federal Circuit rejected the notion that a plaintiff states a direct claim by alleging it was targeted by the challenged action. Defendant also contends that the dual-nature exception is not applicable because Treasury was not a controlling shareholder, the Enterprises did not issue new shares, and the PSPA Amendments did not involve the reallocation of power.

Neither theory plaintiff advances for why its claims are substantively direct, rather than derivative, is persuasive. First, it is of no import whether the government targeted shareholders with the PSPA Amendments. See Starr, 856 F.3d at 973 (noting that the plaintiffs did not "sufficiently explain why the Government's subjective motivations are relevant to the inquiry into direct standing"). The direct-versus-derivative inquiry "turns on the plaintiff's injury, not the defendant's motive." Pagan v. Calderon, 448 F.3d 16, 30 (1st Cir. 2006). Second, plaintiff has not asserted claims that qualify as both direct and derivative based on the dual-nature exception. The Federal Circuit explained that, pursuant to this exception, shareholder claims may be both direct and derivative "when a 'reduction in [the] economic value and voting power affected the minority stockholders uniquely . . . .'" Starr, 856 F.3d at 968 (quoting Gentile v. Rossette, 906 A.2d 91, 99 (Del. 2006)). Specifically, shareholder claims are both direct and derivative if

> "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value," and "(2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders."

Id. (quoting Gentile, 906 A.2d at 100). The exception does not apply here because Treasury was not a controlling shareholder at the time the PSPA Amendments were executed,[22] the PSPA Amendments did not involve the issuance of new shares, and shareholder voting power was not reallocated under the PSPA Amendments. It is not enough, contrary to plaintiff's contention, that the government allegedly exacted economic value from the other shareholders by rearranging the corporate structure. See El Paso Pipeline GP Co. v. Brinckerhoff, 152 A.3d 1248, 1264 (Del. 2016) (applying Gentile and holding a plaintiff does not state a direct claim under the dual-nature exception by pleading the "extraction of solely economic value from the

[21] The plaintiffs in the related cases also asserted that their claims must be construed as direct claims to vindicate important federal policies if shareholders cannot assert derivative claims because of HERA. But as this court held in Fairholme II, the shareholders of the Enterprises, notwithstanding HERA, have standing to assert derivative claims because of the FHFA-C's conflict of interest. 147 Fed. Cl. at 49-51.

[22] Treasury is not a controlling shareholder for the reasons set forth in Section IV.B.1, supra.

minority by a controlling stockholder"). Because plaintiff has not established that its claims are substantively direct in nature, it cannot demonstrate that it has standing to litigate those claims.

Plaintiff fares no better if the court moves beyond its arguments for why its claims are substantively direct in nature. Federal law governs whether plaintiff's claims are direct or derivative. See Starr, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. Id.; see also Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 97 (1991) (noting the "presumption that state law should be incorporated into federal common law"). Under Delaware law, the test for whether a shareholder's claim is derivative or direct depends on the answers to two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004) (en banc). "Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow." Gentile, 906 A.2d at 99, discussed in Starr, 856 F.3d at 965. Such claims are derivative even "though the overpayment may diminish the value of the corporation's stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend." Protas v. Cavanagh, No. CIV.A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012); see also Hometown Fin. Inc. v. United States, 56 Fed. Cl. 477, 486 (2003) ("[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to nothing more than a diminution in stock value or a loss of dividends.").

Plaintiff focuses on the expropriation of the Enterprises' assets via compulsory payments of all profits. The gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury. Regardless of plaintiff's label (direct) or theory (taking, illegal exaction, breach of fiduciary duty, or breach of implied contract) for its claims, the claims are substantively derivative in nature because they are premised on allegations of overpayment.[23] See Gentile, 906 A.2d at 99; see also Roberts, 889 F.3d at 409 (explaining that the plaintiffs asserted "classic derivative claims" when they alleged that "the [PSPA Amendments] illegally dissipated corporate assets by transferring them to

[23] Plaintiff would remain unsuccessful if its allegations of waste and mismanagement (styled as self dealing, overreach, or abuse of discretion) were construed to be indicative of some action other than overpayment. Any claims premised on waste and mismanagement are derivative in nature. Kramer v. W. Pac. Indus., Inc., 546 A.2d 348, 353 (Del. 1988) (noting that "mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature"). Plaintiff's claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. See Hometown, 56 Fed. Cl. at 486 (stock prices); In re Straight Path Commc'ns Inc. Consol. S'holder Litig., No. CV 2017-0486-SG, 2017 WL 5565264, at *4 (Del. Ch. Nov. 20, 2017) ("Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . . .").

Treasury"). Plaintiff cannot transform its substantively derivative claims into direct claims by merely alleging that, as a result of overpayments, it was deprived of its stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiff's purported "harms are 'merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.'" Protas, 2012 WL 1580969, at *6 (quoting Gentile, 906 A.2d at 99); see also Agostino v. Hicks, 845 A.2d 1110, 1122 (Del. Ch. 2004) ("[T]he inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation."). Because plaintiff's claims are derivative in nature, plaintiff lacks standing to pursue those claims on its own behalf.

C. Plaintiff's claims are direct claims, as pled, and cannot be deemed to be derivative claims.

Plaintiff, while acknowledging that it asserts only direct claims,[24] attempts to avoid a dismissal of those claims for lack of standing by contending that "[e]ven if [its] direct claims were deemed derivative, [it] still may assert them, under circuit precedent, because the [FHFA-C] as conservator has a manifest conflict of interest." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 39. The precedent upon which plaintiff relies is the Federal Circuit's decision in First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279 (Fed. Cir. 1999).

Once defendant challenged the standing of plaintiffs in these related cases to bring direct claims, the opposition brief filed in this case raised a novel standing argument. Although plaintiff continues to argue that its claims are direct, and that it has standing to bring direct claims, it posits that "[e]ven if plaintiffs' direct claims [in these five cases] were deemed derivative, they still may assert them, under circuit precedent, because the [FHFA-C] as conservator has a manifest conflict of interest." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 39. The precedent upon which plaintiff relies is the Federal Circuit's decision in First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279 (Fed. Cir. 1999).

In First Hartford, the Federal Circuit held that a shareholder of a company could bring a derivative claim, notwithstanding a succession clause, if the company was controlled by an entity with a conflict of interest. Id. at 1283; accord id. at 1295 (remarking that the purpose of derivative suits was to "permit shareholders to file suit on behalf of a corporation when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation"). The court in

[24] Indeed, there is no dispute that the four claims plaintiff asserts in its amended complaint are direct claims. In each count plaintiff emphasizes that the harm to plaintiff is direct. 1st Am. Compl. ¶¶ 108, 112, 118, 134. In addition, the relief requested by plaintiff is for monetary relief payable to it, not to the Enterprises. Id. at 46; see also Pls.' Suppl. Br. on Outstanding Mot. to Dismiss 3-4 (arguing that payments to the Enterprises would be of no use to plaintiff). Finally, the amended complaint contains a statement that plaintiff's claims are direct in nature. See 1st Am. Compl. ¶ 102 ("[A]ny claim raised by CSS that might be considered derivative on behalf of the Company is in fact direct, on behalf of CSS itself.").

Fairholme II concluded that pursuant to First Hartford, the plaintiff who asserted derivative claims in Fairholme had standing to litigate those claims due to the FHFA-C's conflict of interest. 147 Fed. Cl. at 49-51.

If plaintiff had asserted derivative claims in its amended complaint, the "conflict of interest" holding in First Hartford would have aided plaintiff in its quest to establish standing. But it did not do so. Thus, its reliance on this holding in First Hartford is misplaced.

As for plaintiff's suggestion that its direct claims could be deemed derivative, it identifies no authority for that recharacterization of its claims, even though it had the opportunity to do so in its opposition brief and its supplemental brief. The court finds plaintiff's "direct claims deemed derivative" argument, Pls.' Suppl. Br. on Outstanding Mot. to Dismiss 5 (emphasis removed), to be unsupported by authority and unpersuasive for the purpose of establishing plaintiff's standing to bring the claims in its amended complaint.[25]

D. Plaintiff's standing to bring direct claims is not established by another holding in First Hartford.

Finally, the court addresses an assertion in plaintiff's opposition brief that was not explicitly addressed in Fairholme II. Only one sentence of that sixty-page brief was devoted to the following contention included among plaintiff's standing arguments: "[T]he Federal Circuit has repeatedly recognized a direct claim where a shareholder alleged deprivation of a contingent property interest in a bank." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 38 (citing First Hartford, 194 F.3d at 1296; Cal. Hous. Sec., Inc. v. United States, 959 F.2d 955, 957 n.2 (Fed. Cir. 1992)). Defendant, in support of its challenge to plaintiff's standing to bring its claims, relied on more recent precedent, the Federal Circuit's decision in Starr, to argue that plaintiff's claims were derivative claims, not direct claims. Plaintiff, notwithstanding its citation to First Hartford and a footnote in a case discussed in First Hartford, did not attempt, in any meaningful way, to explain why Starr should not be applied and followed in this case. Because plaintiff's reliance on First Hartford as support for a shareholder's standing to bring direct claims is cursory and undeveloped, the court is within its discretion to deem this argument waived. See SmithKline Beecham Corp. v. Apotex Corp., 439 F.3d 1312, 1320 (Fed. Cir. 2006) (noting that the court has discretion on whether to consider undeveloped arguments).

Even if this argument were not waived, the Federal Circuit's Starr decision remains the binding precedent most on point. In Starr, the distinction between direct and derivative claims brought by shareholders is the focus of the Federal Circuit's standing analysis. 856 F.3d at 963-73. Just as here, the plaintiffs brought takings and illegal-exaction claims related to a government intervention, during a financial crisis, affecting the future of a corporation in which they owned shares. Id. at 958-61. Starr provides the test for determining whether such claims are direct or derivative in nature and requires that nominally direct claims—that are actually derivative claims—be dismissed for lack of standing. Id. at 973.

[25] As defendant notes, claims brought on behalf of the Enterprises are asserted in numerous shareholder derivative claims in these related cases.

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In the face of this binding precedent, the court cannot conclude that the holding in First Hartford, which concerns direct Fifth Amendment takings claims, is more relevant. It is true that in First Hartford shareholders of a bank in receivership could pursue their takings claims as direct claims against the United States. 194 F.3d at 1287. However, First Hartford does not address the distinction between direct and derivative claims. When faced with binding precedent that addresses a crucial distinction, such as Starr, and one that does not, such as First Hartford, the court follows the precedent most on point. Cf. Union Elec. Co. v. United States, 363 F.3d 1292, 1297 (Fed. Cir. 2004) ("[W]e have repeatedly held that the disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue." (citing Boeing N. Am., Inc. v. Roche, 298 F.3d 1274, 1282 (Fed. Cir. 2002))).

In sum, plaintiff has not established that it has standing to litigate its claims because it does not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court dismisses plaintiff's claims on standing grounds to the extent that it has subject-matter jurisdiction over those claims.[26]

VI. CONCLUSION

For the reasons stated above, the court **GRANTS** defendant's motion to dismiss and **DISMISSES** plaintiff's complaint because the court lacks jurisdiction to entertain its fiduciary duty and implied-in-fact-contract claims, and plaintiff lacks standing to pursue any of its claims. The clerk shall enter judgment accordingly. No costs.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

[26] As explained above, the court lacks jurisdiction over plaintiff's claims for breach of fiduciary duty and breach of implied contract. See supra Sections IV.B.1 (fiduciary duty), IV.C (contract). In addition, because all of plaintiff's claims must be dismissed for lack of standing, the court need not reach defendant's remaining arguments that these claims should be dismissed for failure to state a claim upon which relief can be granted.

In the United States Court of Federal Claims

No. 13-698C
(Filed: May 15, 2020)

****
ARROWOOD INDEMNITY COMPANY et al.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.
****

Motion to Dismiss; RCFC 12(b)(1); RCFC 12(b)(6); Jurisdiction; Standing; Direct Claims; Instrumentalities; Coercion; Agent; Collateral Estoppel; Issue Preclusion; Conservators; Conflict of Interest; Third-Party Beneficiaries; Stock; Shareholders; Fannie; Freddie; FHFA

Richard M. Zuckerman, New York, NY, for plaintiffs.

Kenneth M. Dintzer, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiffs in this case challenge the actions of the United States during the conservatorships of the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie"). Specifically, plaintiffs take issue with the conservator for Fannie and Freddie (collectively, the "Enterprises") amending a funding agreement between the Enterprises and the United States Department of the Treasury ("Treasury"). Based on the revisions to that agreement, plaintiffs seek the return of money illegally exacted, damages for breach of contract and breach of fiduciary duty, and compensation for a taking pursuant to the Fifth Amendment to the United States Constitution ("Constitution"). Defendant moves to dismiss plaintiffs' complaint, arguing that the court lacks subject-matter jurisdiction over plaintiffs' claims, plaintiffs lack standing to pursue certain claims, and plaintiffs fail to state a claim upon which relief may be granted. For the reasons stated below, the court grants defendant's motion to dismiss.

I. BACKGROUND

A. The Enterprises are private companies that are under the control of a conservator.

1. The Enterprises operated independently before the financial crisis.

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities that are sold to investors.[1] 2d Am. Compl. ¶ 28. Congress chartered Fannie in 1938 and established Freddie in 1970. Id. ¶ 29. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. Id. Freddie is organized under Virginia law, and Fannie is organized under Delaware law. Fairholme II, 147 Fed. Cl. at 15. The Enterprises, consistent with the applicable state laws, issued their own common and preferred stock. 2d Am. Compl. ¶ 30. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. Id.; Fairholme II, 147 Fed. Cl. at 15. Those owning preferred stock, including plaintiffs in this suit, acquired the right to receive dividends and a liquidation preference. 2d Am. Compl. ¶¶ 30-31.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. Id. ¶ 32. Although the Enterprises recorded losses in 2007 and the first two quarters of 2008, the Enterprises continued to generate sufficient cash to pay their debts and retained sufficient capital to operate. Id. ¶ 33. Otherwise stated, the Enterprises were not in financial distress or otherwise at risk of insolvency. Id. ¶ 34.

2. Congress created the Federal Housing Finance Agency to regulate the Enterprises and authorized the agency to serve as a conservator for each Enterprise.

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency ("FHFA") and provided it with supervisory and regulatory authority over the Enterprises. See 12 U.S.C. § 4511(a)-(b) (2018).[2] Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator

[1] This background section is a less comprehensive version of the court's recitation of facts in a related case, Fairholme Funds, Inc. v. United States, 147 Fed. Cl. 1 (2019) ("Fairholme II"), motion to certify interlocutory appeal granted, 147 Fed. Cl. 126 (2020).

[2] Congress has not amended the relevant portions of HERA since enacting the law in 2008. The court, therefore, refers to the most recent version of the United States Code.

("FHFA-C") for each Enterprise to reorganize, rehabilitate, or wind up its affairs.[3] Id. § 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its obligations. Id. § 4617(a)(3).[4] The conservator, once appointed, functions independently; it is not "subject to the direction or supervision of any other agency of the United States or any State in the exercise of [its] rights, powers, and privileges . . . ." Id. § 4617(a)(7).

Congress also delineated the scope of the FHFA-C's powers in HERA. See generally id. § 4617. As soon as it is appointed, the FHFA-C "immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . . ." Id. § 4617(b)(2)(A). Congress also conferred on the conservator the power to "[o]perate the [Enterprise]." Id. § 4617(b)(2)(B). Pursuant to that power, the conservator "may," among other things, "perform all functions of the [Enterprise]," "preserve and conserve the assets and property of the [Enterprise]," and "provide by contract for assistance in fulfilling any function . . . of the [conservator]." Id. The conservator "may" also "take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise]." Id. § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator "may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]" and "take any action authorized by [12 U.S.C. § 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA]." Id. § 4617(b)(2)(J). By describing the FHFA-C's role primarily in terms of what powers it "may" exercise, see generally id. § 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its powers, see United States v. Rodgers, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."). Simply stated, the FHFA has "extraordinarily broad flexibility to carry out its role as conservator." Perry Capital LLC v. Mnuchin, 864 F.3d 591, 606 (D.C. Cir. 2017) ("Perry II"), cert. denied, 138 S. Ct. 978 (2018).

3. Congress authorized Treasury to purchase securities issued by the Enterprises.

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(g) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. Id. §§ 1455(*l*)(4), 1719(g)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the

[3] To avoid any ambiguity, the court reiterates that it is using "FHFA" to refer to the agency acting in its regulatory role and "FHFA-C" when discussing the agency acting as a conservator.

[4] Congress enticed the Enterprises to consent to a conservatorship by insulating their board members from any liability to shareholders or creditors for agreeing in good faith to the FHFA's appointment of a conservator. 12 U.S.C. § 4617(a)(6).

availability of mortgage finance, and protect taxpayers. Id. §§ 1455(*l*)(1)(B), 1719(g)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

> (i) The need for preferences or priorities regarding payments to the Government.
>
> (ii) Limits on maturity or disposition of obligations or securities to be purchased.
>
> (iii) The [Enterprise's] plan for the orderly resumption of private market funding or capital market access.
>
> (iv) The probability of the [Enterprise] fulfilling the terms of any such obligation or other security, including repayment.
>
> (v) The need to maintain the [Enterprise's] status as a private shareholder-owned company.
>
> (vi) Restrictions on the use of [Enterprise] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

Id. §§ 1455(*l*)(1)(C), 1719(g)(1)(C).

4. The FHFA became the conservator for each Enterprise.

After Congress enacted HERA, Treasury "urg[ed]" the FHFA to place each Enterprise into conservatorship. 2d Am. Compl. ¶ 4. The FHFA and Treasury subsequently sought to persuade each Enterprise's board of directors to consent to conservatorship. Id. ¶ 45. The FHFA and Treasury told each Enterprise's board that the FHFA would seize the Enterprises if the board did not consent to the conservatorship. Id. Around the same time, the FHFA made an offer to each board: consent to a conservatorship in exchange for the FHFA-C aiming to preserve and conserve the Enterprises' assets, attempting to restore the Enterprises to sound and solvent condition, and terminating the conservatorships when those goals were achieved. Id. ¶¶ 45-48. Each Enterprise's board accepted that offer and consented to a conservatorship on September 6, 2008, with an understanding that the FHFA-C would operate in the aforementioned limited ways. Id. ¶ 45. The FHFA, soon thereafter, issued statements echoing each board's understanding. Id. ¶¶ 46-47.

The conservatorships became effective on September 6, 2008, upon each Enterprise's board's consent. Id. ¶ 45; see also 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when "[t]he [Enterprise], by resolution of its board of directors or its shareholders or members, consents to the appointment").

5. The FHFA-C contracted with Treasury to obtain funding for the Enterprises.

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement ("PSPA") with Treasury for each Enterprise. 2d Am. Compl. ¶ 49. Treasury entered into the agreements pursuant to its authority under HERA to buy the Enterprises' securities. Id. ¶ 50. The PSPA for each Enterprise is materially identical. Id. ¶ 53. Under the PSPAs, Treasury committed to provide up to $100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. Id. If an Enterprise's liabilities exceeded its assets, then the Enterprise could draw on Treasury's funding commitment in an amount equal to the difference between the Enterprise's liabilities and assets. Id.

In return for Treasury's funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their respective common stock at a nominal price. Id. ¶ 54. Treasury's preferred stock had an initial liquidation preference of $1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury's funding commitment. Id. ¶ 55. In the event of a liquidation, Treasury was entitled to recover the full liquidation value of its shares before any other shareholder would receive compensation. Id. Second, Treasury bargained for the right to a quarterly cash dividend equal to 10% of its liquidation preference. Id. ¶¶ 57, 60. An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. Id. ¶ 57. Those in-kind payments, however, did not count as a draw from Treasury's funding commitment. Id. ¶ 61. Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. Id. ¶ 62. If Treasury did not waive the fee, the Enterprise could elect to pay the amount in cash or make an in-kind payment by increasing the liquidation preference. Id. Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. Id. ¶ 63.

The FHFA-C and Treasury amended each Enterprise's PSPA on May 6, 2009, to increase Treasury's funding commitment to each Enterprise from $100 billion to $200 billion. Id. ¶ 65. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed $200 billion. Id.

6. The Enterprises' finances improved during their conservatorships.

In the early stages of the conservatorships, each Enterprise's net worth decreased as it reported losses. The bulk of the losses resulted from the FHFA-C writing down the value of deferred tax assets and designating large loan loss reserves.[5] Id. ¶ 66. Notwithstanding those

[5] A loan loss reserve is an entry on a company's balance sheet that reduces its net worth to reflect anticipated losses on mortgages that it owns. 2d Am. Compl. ¶ 68. A deferred tax asset is an asset that may be used to offset future tax liability. Id. ¶ 67. A company must write

on-paper losses, the Enterprises' cash receipts consistently exceeded their expenses; they maintained net operating revenue in excess of their net operating expenses from the onset of the conservatorships under the PSPAs and through the first two amendments to the agreements. Id. ¶ 72.

By 2012, the Enterprises' financial outlooks were promising. In addition to an improvement in the housing market, the Enterprises began generating consistent profits and anticipated losing less money on their newer mortgages. Id. ¶¶ 73-76. They were positioned to further improve their financial condition by settling lawsuits brought by each Enterprise, id. ¶ 89, and revising their valuations of (1) deferred tax assets because of growing profits and (2) loan loss reserves because losses were less than expected, id. ¶¶ 79-80. The FHFA-C and Treasury were aware of those forthcoming changes and the Enterprises' improving outlooks. Id. ¶¶ 75-80. In August 2012, Treasury and FHFA-C knew that the Enterprises would soon experience improved profitability and received projections reflecting that the Enterprises would have positive comprehensive income between 2012 and 2022. Id. ¶¶ 81-84. Otherwise stated, the FHFA-C and Treasury knew, by early August 2012, that the Enterprises were poised to generate profits in excess of their respective dividend obligations to Treasury. Id. ¶ 88.

7. Treasury and the FHFA-C agreed to a third amendment to the PSPAs.

At an unspecified time prior to August 2012, the Treasury and the FHFA-C began considering a third amendment to each PSPA. Treasury was the driving force behind the initiative to amend the PSPAs' terms. Id. ¶ 127. Indeed, an FHFA official reported in early August 2012 that Treasury was making a "renewed push" to implement a new amendment. Id. ¶ 126 (quoting the FHFA official). The FHFA-C learned of the proposed changes before the Enterprises; Treasury informed the Enterprises that the new terms were forthcoming and announced the changes to the Enterprises at a subsequent meeting. Id. ¶ 127. Treasury officials who were involved with the process do not recall Treasury making any backup or contingency plans in the event that the FHFA-C rejected the proposed terms. Id. The FHFA-C accepted the changes without advocating for different terms. Fairholme II, 147 Fed. Cl. at 19.

Treasury and the FHFA-C decided to announce the changed terms in mid-August 2012 because, according to Treasury, the Enterprises would be reporting earnings exceeding their dividend obligation at the beginning of that month. 2d Am. Compl. ¶ 110. On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA ("PSPA Amendment"). Id. ¶ 92. A key component of the amended PSPAs is the requirement—referred to as the "Net Worth Sweep"—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise's net worth (except for a small capital reserve amount) rather than a dividend based

down the value of that deferred asset if it is unlikely to be used to offset future taxable profits. Id. This write down occurs, for example, if a company predicts it will not be profitable in the future. Id.

on a set percentage of the liquidation preference.[6] Id. ¶ 93. Additionally, under the amended PSPAs, the Enterprises are not obligated to pay a periodic commitment fee. Id. ¶ 95.

a. Treasury wanted to ensure that it benefited from the new terms.

With the PSPAs, Treasury sought to secure a more beneficial arrangement for itself, as a representative for taxpayers. During the lead-up to the PSPA Amendments, a Treasury official acknowledged in an internal communication that the government had resolved "to ensure existing common equity holders will not have access to any positive earnings from the [Enterprises] in the future." Id. ¶ 9 (quoting the document). In another Treasury document, an official noted that the amended PSPAs would put the taxpayer "in a better position" because, rather than having "Treasury's upside . . . capped at the 10% dividend, now the taxpayer will be the beneficiary of any future earnings produced by the [Enterprises]." Id. ¶ 110 (quoting the document). Treasury recognized its goal of obtaining all of the Enterprises' profits by executing the PSPA Amendments; when the changes were announced, it noted that "every dollar of earnings that [the Enterprises] generate will be used to benefit taxpayers." Id. ¶ 98 (quoting a Treasury press release).

b. The FHFA-C agreed to changes that benefit Treasury.

For its part, the FHFA-C was operating under the belief that Treasury would benefit from the PSPA Amendments. An internal Treasury communication indicates that Treasury anticipated that its receipts under the PSPA Amendments would "'exceed the amount that would have been paid if the 10% [dividend] was still in effect' and that the changes would lead to 'a better outcome' for Treasury." Id. ¶ 110 (quoting the communication). Moreover, Mel Watt—a former FHFA Director—confirmed that he was concerned with how decisions affect the taxpayers. Id. ¶ 99. During an interview conducted while he was Director, he stated that he does not "'lay awake at night worrying what's fair to the shareholders' but rather focuses on 'what is responsible for the taxpayers.'" Id. (quoting the interview).

c. Treasury and the FHFA understood that the PSPA Amendments would not facilitate the Enterprises exiting conservatorship.

Treasury was aware that the new terms of the PSPAs were not conducive to the Enterprises exiting conservatorship. When announcing the PSPA Amendments, Treasury openly acknowledged that the new terms would "expedite the wind down of [the Enterprises]." Id. ¶ 114 (quoting a Treasury press release). Treasury further explained that the new deal would ensure that the Enterprises "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." Id.; accord id. ¶ 14 (explaining that "[b]y taking all of their profits going forward, [Treasury is] making clear that [the Enterprises] will not ever be allowed to return to profitable entities") (quoting internal Treasury document). Indeed, a White House official sent a message to a Treasury official on the day the deal was announced

[6] The capital reserve for each Enterprise started at $3 billion and was set to decrease to $0 by January 2018, but the Enterprises and Treasury agreed in December 2017 to reset the capital reserve amount to $3 billion in the first quarter of 2018. 2d Am. Compl. ¶ 104.

noting that "we've closed off [the] possibility that [the Enterprises] ever[] go (pretend) private again." Id. ¶ 118 (alterations in original) (quoting the message); accord id. (noting in a separate message that a quotation "in Bloomberg" was "exactly right on substance and intent" when describing the deal as depriving the Enterprises of the capital they needed to go private).

The FHFA shared a similar sentiment. The FHFA's former Acting Director, Edward DeMarco, testified before the United States Senate that the PSPA Amendments "reinforce the notion that the [Enterprises] will not be building capital as a potential step to regaining their former corporate status." Id. ¶ 115 (quoting the testimony). He also stated that he had no intention of returning the Enterprises to private control under their existing charters, while another FHFA official testified that the agency's objective "was not for Fannie and Freddie . . . to emerge from conservatorship." Id. ¶ 116 (quoting the testimony). Indeed, the FHFA explained in its 2012 report to Congress that the agency had begun "prioritizing [its] actions to move the housing industry to a new state, one without Fannie . . . and Freddie . . . ." Id. ¶ 115 (quoting the report). Consistent with those actions, the FHFA acknowledged that it would continue to serve as conservator until "Congress determines the future of [the Enterprises] and the housing finance market." Id. ¶ 116 (quoting an FHFA statement).

d. Treasury has benefited from the PSPA Amendments at the expense of the Enterprises and other shareholders.

There are four significant effects that flowed from the PSPA Amendments. First, plaintiffs lost their economic interests in the Enterprises because, under the new terms, private shareholders can never receive dividends or liquidation distributions. Id. ¶ 97; see also id. (alleging that, in the event of liquidation, private shareholders will receive nothing because an Enterprise will never have enough money to pay Treasury's dividend and liquidation preferences). Second, Treasury acquired plaintiffs' economic interests in the Enterprises because Treasury now "has the right to all residual profits, and it hence owns all the equity." Id. ¶ 100. Third, Treasury reaped a windfall of $124 billion in comparison to what it would have received absent changes to the PSPAs. Id. ¶ 15; see id. ¶¶ 102-03 (alleging that the Enterprises paid Treasury $223.7 billion under the PSPA Amendments but would have only paid Treasury $99.5 billion under the previous terms). Fourth, the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink of insolvency. Id. ¶¶ 111-12.

8. Treasury and the FHFA are committed to ending the conservatorships.

On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the Treasury Secretary to develop, "as soon as practicable," a plan for "[e]nding the conservatorships of the [Enterprises] upon the completion of specified reforms . . . ."[7]

[7] The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source, the Federal Register. See Murakami v. United States, 46 Fed. Cl. 731, 739 (2000) (noting that the court may take judicial notice of government documents), aff'd, 398 F.3d 1342, 1354-55 (Fed. Cir. 2005); see also Democracy Forward Found. v. White House Office of Am. Innovation, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019)

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Memorandum on Federal Housing Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must include proposals for "[s]etting the conditions necessary for the termination of the conservatorships" and outlined some of those conditions. Id. at 12,480. Subsequently, Treasury issued a plan in which it advocated for "begin[ning] the process of ending the [Enterprises'] conservatorships."[8] U.S. Dep't of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf [https://perma.cc/RGH8-N385]; accord id. at 26 ("It is, after 11 years, time to bring the conservatorships to an end."). As part of the plan to end the conservatorships, Treasury proposed that it and the FHFA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. Id. at 26-27.

The FHFA shares Treasury's goals with respect to the conservatorships. Mark Calabria, the current FHFA Director, testified during his confirmation hearing that he wanted to end the conservatorships.[9] 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony). See generally Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs, 116th Cong. 10-40, 74-75, 148-85 (2019) [hereinafter Calabria Testimony] (documenting Mr. Calabria's testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that each Enterprise retains. Calabria Testimony, supra, at 150; see also id. at 25 ("I support the idea of having significantly more capital at the [Enterprises].").

B. Plaintiffs own Fannie and Freddie stock.

There are three plaintiffs in this case; each plaintiff is an insurance company related to the others through subsidiary relationships. The first is Arrowood Indemnity Company ("Arrowood Indemnity"), a Delaware corporation. 2d Am. Compl. ¶ 19. Arrowood Indemnity owns Fannie preferred stock and Freddie preferred stock. Id. ¶¶ 19-20. The second company is Arrowood Surplus Lines Insurance Company ("Arrowood Surplus Lines"), also a Delaware corporation. Id. ¶ 21. Arrowood Surplus Lines owns Fannie preferred stock and Freddie preferred stock. Id. ¶¶ 21-22. The third company is Financial Structures Limited, a Bermuda

("[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum."); see generally Fed. R. Evid. 201 (discussing judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the court may consider facts derived from sources subject to judicial notice without converting the motion into one for summary judgment. Sebastian v. United States, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

[8] The court takes judicial notice of Treasury's reform plan because it is a government record available from a reliable source, Treasury's website. See supra note 7.

[9] The court takes judicial notice of the relevant testimony because the statements are recorded in government documents. See supra note 7.

company that owns Freddie preferred stock. Id. ¶ 23. Each plaintiff has owned shares in the Enterprises since before September 6, 2008. Id. ¶¶ 19-23.

II. PROCEDURAL HISTORY

Plaintiffs filed their complaint on September 18, 2013.[10] After jurisdictional discovery proceeded in Fairholme, a related case, see supra note 1, plaintiffs filed their second amended complaint in this case on September 17, 2018. In their second amended complaint, plaintiffs present four claims. Plaintiffs first assert that the Net Worth Sweep constitutes a Fifth Amendment taking (count I) of their economic interests in their stock. Plaintiffs next assert that the Net Worth Sweep constitutes an illegal exaction (count II) of those same economic interests because the (1) FHFA was operating unconstitutionally and (2) FHFA-C and Treasury exceeded their statutory authority when they approved the PSPA Amendments. Plaintiffs also plead a breach-of-fiduciary-duty claim ("fiduciary duty claim") (count III) premised on the Net Worth Sweep being unfair; constituting waste, self dealing, gross overreach, and gross abuse of discretion; and failing to further a valid business purpose or reflect a good faith business judgment. Additionally, plaintiffs assert a breach-of-implied-contract claim (count IV) based on a purported agreement by which the Enterprises consented to the conservatorship in exchange for the FHFA agreeing to preserve the Enterprises' assets with the goal of making them safe and solvent. Specifically, plaintiffs assert that each dividend payment under the Net Worth Sweep constitutes a breach because it depletes the Enterprises' assets in a manner that undermines the goals of conservatorship.

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case and eleven related cases before the undersigned.[11] The plaintiffs in each of the twelve cases filed a response brief on their respective dockets; some of the plaintiffs relied on a joint brief, while others, as is the case here, filed a joint brief and a supplemental response brief. Defendant filed its omnibus reply brief in each of the cases on May 6, 2019. The parties have fully briefed defendant's motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiffs in this case have adopted the favorable arguments

[10] A fuller recitation of the procedural history of this case and related cases is provided in Fairholme II, 147 Fed. Cl. at 21-23.

[11] The eleven related cases are Fairholme Funds, Inc. v. United States, No. 13-465C; Washington Federal v. United States, No. 13-385C; Cacciapalle v. United States, No. 13-466C; Fisher v. United States, No. 13-608C; Reid v. United States, No. 14-152C; Rafter v. United States, No. 14-740C; Owl Creek Asia I, L.P. v. United States, No. 18-281C; Akanthos Opportunity Master Fund, L.P. v. United States, No. 18-369C; Appaloosa Investment Limited Partnership I v. United States, No. 18-370C; CSS, LLC v. United States, No. 18-371C; and Mason Capital L.P. v. United States, No. 18-529C.

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made by the plaintiffs in the related cases to the extent that such arguments are relevant.[12] Defendant's motion to dismiss is now ripe for adjudication.

III. STANDARD OF REVIEW

In ruling on a motion to dismiss a complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), the court generally assumes that the allegations in the complaint are true and construes those allegations in the plaintiff's favor. Trusted Integration, Inc. v. United States, 659 F.3d 1159, 1163 (Fed. Cir. 2011). With respect to RCFC 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of the evidence, that the court possesses subject-matter jurisdiction. Id. The allegations in the complaint must include "the facts essential to show jurisdiction." McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936). And, if such jurisdictional facts are challenged in a motion to dismiss, the plaintiff "must support them by competent proof." Id.; accord Land v. Dollar, 330 U.S. 731, 735 & n.4 (1947) ("[W]hen a question of the District Court's jurisdiction is raised, . . . the court may inquire by affidavits or otherwise, into the facts as they exist." (citations omitted)). If the court finds that it lacks subject-matter jurisdiction, it must, pursuant to RCFC 12(h)(3), dismiss the complaint.

A claim that survives a jurisdictional challenge remains subject to dismissal under RCFC 12(b)(6) if it does not provide a basis for the court to grant relief. Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002) ("A motion to dismiss . . . for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy."). To survive a motion to dismiss under RCFC 12(b)(6), a plaintiff must include in the complaint "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Indeed, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 814-19 (1982).

IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a "threshold matter." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998). Subject-matter jurisdiction cannot be waived or forfeited because it "involves a court's power to hear a case." Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)). "Without

[12] Plaintiffs have specifically adopted certain arguments that support their breach-of-implied-contract claim that were made in a brief filed by the plaintiffs in Owl Creek. Pls.' Supp'l Br. in Opp'n to Def.'s Omnibus Mot. to Dismiss 12-13. More generally, they adopt any arguments presented in the supplemental briefing in other cases that support their claims. Id. at 13. However, given that the plaintiffs in this case allege direct claims, the court does not infer that they adopted the Reid and Fisher plaintiffs' argument that "the shareholder claims asserted in connection with the [PSPA Amendments] are properly asserted as derivative claims." Reid Supp'l Mem. in Opp'n to Def.'s Omnibus Mot. to Dismiss 2; accord Fisher Supp'l Mem. in Opp'n to Def.'s Omnibus Mot. to Dismiss 2.

jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it is "an inflexible matter that must be considered before proceeding to evaluate the merits of a case." Matthews v. United States, 72 Fed. Cl. 274, 278 (2006); accord K-Con Bldg. Sys., Inc. v. United States, 778 F.3d 1000, 1004-05 (Fed. Cir. 2015). Either party, or the court sua sponte, may challenge the court's subject-matter jurisdiction at any time. Arbaugh, 546 U.S. at 506; see also Jeun v. United States, 128 Fed. Cl. 203, 209-10 (2016) (collecting cases).

The ability of the United States Court of Federal Claims ("Court of Federal Claims") to entertain suits against the United States is limited. "The United States, as sovereign, is immune from suit save as it consents to be sued." United States v. Sherwood, 312 U.S. 584, 586 (1941). The waiver of immunity "may not be inferred, but must be unequivocally expressed." United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003). Any such waiver must be narrowly construed. Smith v. Orr, 855 F.2d 1544, 1552 (Fed. Cir. 1988). The Tucker Act, the principal statute governing the jurisdiction of this court, waives sovereign immunity for claims against the United States, not sounding in tort, that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (2018); White Mountain, 537 U.S. at 472. However, the Tucker Act is merely a jurisdictional statute and "does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 298 (1976). Instead, the substantive right must appear in another source of law, such as a "money-mandating constitutional provision, statute or regulation that has been violated, or an express or implied contract with the United States." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc).

Defendant challenges the court's jurisdiction to entertain plaintiffs' claims on a number of bases. Specifically, defendant argues that 28 U.S.C. § 1500 bars plaintiffs' claims, that plaintiffs have not asserted claims against the United States, and that the court lacks jurisdiction over the subject matter of certain claims. The court addresses each of these contentions in turn.[13]

A. Plaintiffs are not barred by 28 U.S.C. § 1500 from litigating their claims in this court.

The court first addresses defendant's argument that the court lacks jurisdiction to consider plaintiffs' claims because plaintiffs initiated lawsuits in other courts after filing their complaint in this court. Specifically, defendant asserts that the claims are barred by 28 U.S.C. § 1500, which provides:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time

[13] In Fairholme II, the court addressed an additional jurisdictional concern that was not raised in this case. See generally 147 Fed. Cl. at 34-37 (rejecting the contention of a putative intervenor that the Court of Federal Claims lacks jurisdiction to entertain Fifth Amendment takings claims).

> when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Defendant acknowledges that, under binding precedent, § 1500 is not a bar in this case because the limitation only applies "when the suit shall have been commenced in the other court before the claim was filed in [the Court of Federal Claims]." Tecon Eng'rs, Inc. v. United States, 343 F.2d 943, 949 (Ct. Cl. 1965). Nonetheless, defendant asserts that the court should reinterpret § 1500 as creating a jurisdictional bar regardless of the timing of the filings. Plaintiffs counter that the court cannot disregard the binding precedent.

As defendant acknowledges, its argument is foreclosed by binding precedent: The jurisdictional limitation in § 1500 does not apply in this case because plaintiffs filed their complaint in this court before seeking redress in other jurisdictions. See Tecon, 343 F.2d at 949; see also Res. Invs., Inc. v. United States, 785 F.3d 660, 670 (Fed. Cir. 2015) (noting that Tecon remains good law in this circuit). Compare Compl. (filed Sept. 18, 2013), with Compl., Arrowood Indemnity Co. v. Fed. Nat'l Mortg. Ass'n, No. 13-1439 (D.D.C. Sept. 20, 2013). Although defendant urges the court to reconsider the rule set forth in Tecon, the court cannot do so because it is bound by that precedent. See Coltec Indus., Inc. v. United States, 454 F.3d 1340, 1353 (Fed. Cir. 2006) ("There can be no question that the Court of Federal Claims is required to follow the precedent of . . . our court, and our predecessor court, the Court of Claims."). Plaintiffs' claims, therefore, are not barred by § 1500.

B. Plaintiffs have asserted claims against the United States.

The court next considers whether plaintiffs have asserted claims against the United States, a necessary element of jurisdiction in the Court of Federal Claims. As set forth in their second amended complaint, plaintiffs' Fifth Amendment takings, illegal exaction, and breach-of-implied-contract claims are premised on actions taken by the FHFA-C and Treasury, while plaintiffs' fiduciary duty claim is premised on the FHFA-C's actions. Defendant argues that the court lacks jurisdiction to consider any claims premised on the FHFA-C's or Treasury's conduct. In response, plaintiffs contend that they have asserted claims against the government because (1) Treasury was involved in the challenged conduct, (2) the FHFA-C exercised nontraditional conservator powers such that its actions must be deemed those of the government, (3) the FHFA-C was coerced by the government, (4) the FHFA-C was the government's agent, and (5) the FHFA-C is a government actor. The court addresses each contention in turn.

1. The court cannot exercise jurisdiction based on allegations of Treasury's involvement.

Plaintiffs initially argue that the court has jurisdiction over their Fifth Amendment takings and illegal-exaction claims because they have alleged the involvement of Treasury—indisputably a part of the federal government—in the action underlying these claims, i.e., the Net Worth Sweep. Defendant counters that Treasury alone could not have implemented the PSPA Amendments, and Treasury's role as a counterparty to the voluntary agreement with the Enterprises is not sufficient to establish jurisdiction over plaintiffs' takings claim. Defendant further asserts that the court's order allowing jurisdictional discovery reflects that plaintiffs' allegations concerning Treasury alone are insufficient to confer jurisdiction.

The parties' dispute on the import of allegations concerning Treasury is ultimately immaterial in light of the court's determination, explained below, that the FHFA-C—the other party involved in the PSPA Amendments—is the United States. Nonetheless, the court notes, as defendant asserts, that it implicitly acknowledged in its February 26, 2014 discovery order that the allegations concerning Treasury alone were insufficient to support jurisdiction. In that order, the court permitted plaintiffs to conduct fact discovery on whether the FHFA-C was "the 'United States' for purposes of the Tucker Act." Fairholme Funds, Inc. v. United States, 114 Fed. Cl. 718, 721 (2014). The aforementioned discovery would have been unnecessary (and unwarranted) if, as plaintiffs assert, the court has jurisdiction over plaintiffs' claims based on their allegations concerning Treasury.

2. The FHFA-C exercised its statutory conservatorship powers when it approved the PSPA Amendments for each Enterprise.

Plaintiffs next argue that the FHFA-C must be considered the United States because the FHFA-C acted beyond its authority when it expropriated the Enterprises' assets for the government's benefit. Defendant counters that, irrespective of the "expropriation" label assigned by plaintiffs, the FHFA-C's execution of the PSPA Amendments was consistent with its statutory authority and purpose.

The FHFA-C is the United States for any claims challenging the conservator's conduct that exceeded the applicable statutory authority. Cf. Slattery v. United States, 583 F.3d 800, 827-28 (Fed. Cir. 2009) (noting that the Federal Deposit Insurance Company ("FDIC") as receiver is the United States for claims premised on allegations that the receiver failed to distribute funds as required by statute). Thus, resolving the parties' dispute requires determining whether the FHFA-C had statutory authority to enter into the PSPA Amendments. The answer depends on HERA. Under HERA, the FHFA-C has exceptionally broad powers. See Jacobs v. Fed. Hous. Fin. Agency, 908 F.3d 884, 889 (3d Cir. 2018) (noting that the FHFA-C's "powers are many and mostly discretionary"); see also Saxton v. Fed. Hous. Fin. Agency, 901 F.3d 954, 960 (8th Cir. 2018) (Stras, J., concurring) ("Congress came close to handing a blank check to the FHFA."). The FHFA-C wields complete control over the Enterprises; it succeeds to the rights and powers of the Enterprises as well as their shareholders, directors, and officers. 12 U.S.C. § 4617(b)(2)(A)(i). The FHFA-C may (but is not required to) use that power to, among other things, further the FHFA's interests, carry on the Enterprises' business, preserve and conserve the Enterprises' assets, and place the Enterprises in sound and solvent condition.[14] Id.

[14] The conclusion that the FHFA-C has some discretionary powers is buttressed by the fact that Congress stated the conservator "may" do certain things but "shall" do others. See Huston v. United States, 956 F.2d 259, 262 (Fed. Cir. 1992) ("When, within the same statute, Congress uses both 'shall' and 'may,' it is differentiating between mandatory and discretionary tasks."). Compare 12 U.S.C. § 4617(b)(2)(D) ("The [FHFA] may, as conservator, take such action as may be . . . necessary to put the regulated entity in sound and solvent condition . . . ." (emphasis added)), with id. § 4617(b)(14)(A) ("The [FHFA] as conservator or receiver shall

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§ 4617(b)(2)(B), (D), (J) (noting actions that the FHFA-C "may" undertake); see also Roberts v. Fed. Hous. Fin. Agency, 889 F.3d 397, 403 (7th Cir. 2018) (explaining that Congress's use of "may" reflects that the FHFA-C has discretionary authority).

Congress's broad grant of power to the FHFA-C colors the analysis of whether the FHFA-C became the United States by approving the PSPA Amendments. As an initial matter, plaintiffs' contention that the FHFA-C exceeded its statutory authority by expropriating the Enterprises' assets for the government is unavailing because the FHFA-C is authorized to act in its own interest without regard for the effects on the Enterprises. Moreover, the FHFA-C's approval of the PSPA Amendments is in accordance with its authority to operate the Enterprises and preserve their assets. As operating businesses, the Enterprises needed to "secure ongoing access to capital, manage debt loads, control cash flow, and decide whether and how to pay dividends." Jacobs, 908 F.3d at 890. The FHFA-C achieved those goals with the PSPA Amendments, which are, "in essence[,] a renegotiation of an existing lending agreement." Id. By agreeing to the PSPA Amendments, the FHFA-C eliminated the risk of the Enterprises consuming all of their financial lifeline (Treasury's funding commitment) through cash-dividend payments or entering a cycle of an ever-increasing liquidation preference.[15] Roberts, 889 F.3d at 404-05; see also Jacobs, 908 F.3d at 890 (noting that the Enterprises increased their future obligations and reduced their available funds by drawing funds from Treasury to pay the dividend); Saxton, 901 F.3d at 962 (Callas, J., concurring) ("Crushing dividend payments could have led the entities toward insolvency."). The FHFA-C, with the amendments, also protected the Enterprises against future financial downturns.[16] See Jacobs, 908 F.3d at 890 ("The [PSPA Amendments] insured the [Enterprises] against downturns and 'death spirals,' preventing unpayable dividends from ratcheting up their debt loads to unsustainable levels."); see also Roberts, 889 F.3d at 405 (noting that the Enterprises fared better in some years and worse in other years under the terms of the PSPA Amendments as compared to the previous agreements).

In light of the above, the FHFA-C's execution of the PSPA Amendment for each Enterprise was a "quintessential conservatorship task[]" that is appropriate under HERA. Perry II, 864 F.3d at 607. Although "stockholders no doubt disagree about the necessity and fiscal

. . . maintain a full accounting of each conservatorship and receivership or other disposition of a[n Enterprise] in default." (emphasis added)).

[15] If, under the terms of the PSPAs before the PSPA Amendments, the Enterprises chose to make their dividend payment by increasing Treasury's liquidation preference, the future dividends would be more expensive because the dividends were a set percentage of the liquidation preference. Making future dividends more expensive would, in turn, increase the likelihood that the Enterprises would again need to rely on increasing Treasury's liquidation preference rather than making a cash payment. The end result is a cycle in which the Enterprises continue to increase Treasury's liquidation preference.

[16] Although the FHFA-C anticipated continued profitability for the Enterprises in the near term, this fact does not undermine the propriety of the PSPA Amendments because ensuring the continued functioning of a company includes guarding against long-term risks. These long-term outlooks are especially important given the indefinite nature of the FHFA-C's role.

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wisdom of the [PSPA Amendments] . . . , Congress could not have been clearer about leaving those hard operational calls to the FHFA's managerial judgment." Id. In sum, the court joins the growing consensus that the FHFA-C acted within its statutory authority when it entered into the PSPA Amendments. See Jacobs, 908 F.3d at 894; Saxton, 901 F.3d at 963; Roberts, 889 F.3d at 403; Robinson v. Fed. Hous. Fin. Agency, 876 F.3d 220, 231 (6th Cir. 2017); Perry II, 864 F.3d at 606. But see Collins v. Mnuchin, 938 F.3d 553, 582 (5th Cir. 2019) (en banc) (holding, over the dissent of seven judges, that the plaintiffs stated a plausible claim that the FHFA-C exceeded its statutory authority), petitions for cert. filed, 88 U.S.L.W. 3114 (U.S. Sept. 25, 2019) (No. 19-422), 88 U.S.L.W. 3146 (U.S. Oct. 25, 2019) (No. 19-563). Thus, plaintiffs' theory that the FHFA-C is the United States because the FHFA-C exceeded its statutory authority is not persuasive.

3. The FHFA-C was not coerced into approving the PSPA Amendments.

Plaintiffs also argue that the FHFA-C is the United States because the FHFA-C was coerced into approving the PSPA Amendments by Treasury. Plaintiffs assert that Treasury coerced the FHFA-C into approving the PSPA Amendments because (1) Treasury drove the amendment process, (2) Treasury did not plan for the possibility that the FHFA-C would reject the amendments, and (3) the FHFA-C did not propose any alternatives to the amendments. In the alternative, plaintiffs contend that the FHFA, in its role as regulator, coerced the FHFA-C to approve the amendments because the two entities were not acting independently. Specifically, plaintiffs aver that the lines between the FHFA and the FHFA-C were blurred because (1) the FHFA's consent was required for any dividend payment and (2) the FHFA-C approved the amendments to achieve governmental objectives.

Defendant counters that the FHFA-C was not coerced by Treasury because the FHFA-C had a choice of whether to accept or reject the PSPA Amendments. Defendant asserts that there is no coercion if a party has a choice, regardless of however difficult refusal of a particular option may be. With respect to Treasury's involvement, defendant contends that plaintiffs fail to proffer any allegations that Treasury required the FHFA-C to enter into the agreements against its will. Defendant further asserts that other courts have declined to conclude that the FHFA-C felt compelled to follow Treasury based on allegations that Treasury invented the amendment concept or led the process. Defendant also argues that the FHFA-C was not coerced by the FHFA in the latter's role as regulator because there were clear statutory lines delineating the FHFA's authority in each role.[17]

a. The court has jurisdiction over claims based on actions that resulted from government coercion.

The court has jurisdiction over claims premised on the FHFA-C's actions if Treasury's "influence over the" FHFA-C "was coercive rather than merely persuasive." A & D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1154 (Fed. Cir. 2014). The line between coercion and

[17] Defendant frames its argument as addressing whether the FHFA-C acted as an agent for the FHFA in its role as regulator, but defendant is responding to plaintiffs' coercion argument.

persuasion "is highly fact-specific." Id. Precedent from the United States Court of Appeals for the Federal Circuit ("Federal Circuit") frames the contours of the inquiry. In Langenegger v. United States, the plaintiffs pleaded that the United States coerced El Salvador by threatening to withhold financial and military assistance unless El Salvador passed legislation expropriating private property. 756 F.2d 1565, 1567 (Fed. Cir. 1985). The Federal Circuit disagreed with the plaintiffs' characterization of the threats because "[d]iplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of [coercion], however difficult refusal may be as a practical matter." Id. at 1572. Similarly, the Federal Circuit concluded in B & G Enterprises, Ltd. v. United States that California was not coerced into enacting restrictions on smoking, notwithstanding the federal government conditioning grants on states enacting such limits. 220 F.3d 1318, 1321, 1325 (Fed. Cir. 2000); see also A & D Auto, 748 F.3d at 1155 (explaining that "coercion was not established" in B & G). The court explained that "it was California's decision to create [the] restrictions[;] . . . Congress may have provided the bait, but California decided to bite." B & G, 220 F.3d at 1325. In A & D Auto, the Federal Circuit addressed coercion in the context of the government allegedly conditioning vital financial assistance to bankrupt automobile companies on those companies terminating some of their franchise agreements. 748 F.3d at 1145. Unable to resolve the issue due to gaps in the record, the court noted in dicta that a relevant consideration was "whether the government financing was essential to the companies." Id.

A common thread runs through the Federal Circuit's decisions: the importance of choice. A nonfederal actor is not coerced when it can choose to go against the wishes of the United States, even if doing so will cause significant hardships, Langenegger, 756 F.2d at 1567, or result in a loss of prospective benefits, id.; B & G, 220 F.3d at 1325. But there is no choice, in any meaningful sense, when there is only one realistic option. A & D Auto, 748 F.3d at 1145 (noting the importance of considering whether the companies could survive without accepting the government's offer); cf. Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) (noting that, with respect to Congress's spending powers, "the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions"). Put differently, the nonfederal actor must make a voluntary decision, which it cannot do if there is only one realistic option. See BMR Gold Corp. v. United States, 41 Fed. Cl. 277, 282 (1998) (finding that the "the necessary element of coerciveness" for a taking was missing because the plaintiff granted the military permission to cross his land); accord Henn v. Nat'l Geographic Soc., 819 F.2d 824, 826 (7th Cir. 1987) (noting that hard choices remain voluntary when they are not akin to "Don Corelone's 'make him an offer he can't refuse'"). In sum, the FHFA-C was not coerced if it voluntarily chose to enter into the PSPA Amendments.

b. Plaintiffs have not established that Treasury coerced the FHFA-C into approving the PSPA Amendments.

In support of their contention that Treasury coerced the FHFA-C into approving the PSPA Amendments, plaintiffs allege that Treasury proposed the terms of the amendments, and the FHFA-C did not make a counteroffer. Those allegations are not enough to establish coercion. First, given the Enterprises' improving financial condition and Treasury's existing funding commitment, the FHFA-C's decision to execute the PSPA Amendments was voluntary

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because it could reject the deals without imperiling the Enterprises. The facts here, therefore, are diametrically opposed to the circumstances in A & D Auto that the Federal Circuit suggested may support coercion because the automobile dealers faced insolvency if they did not accede to the financing terms. See 748 F.3d at 1145. Second, the FHFA-C's lack of protestation is informative. "[T]he very fact that FHFA[-C] itself [did] not br[ing] suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA[-C] was an independent, willing participant in its negotiations with the Treasury." Robinson v. Fed. Hous. Fin. Agency, 223 F. Supp. 3d 659, 668 (E.D. Ky. 2016), aff'd, 876 F.3d at 220. The court's conclusion is bolstered by the fact that another court has held that materially similar allegations to those at issue here did not "come close to a reasonable inference that [the] FHFA[-C] considered itself bound to do whatever Treasury ordered." Perry Capital LLC v. Lew, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) ("Perry I"), aff'd in part, rev'd in part sub nom. Perry II, 864 F.3d at 591. This court agrees with the reasoning in Perry I: The PSPA Amendments were executed by sophisticated parties, and many agreements arise from a party's proposal being accepted by the other party. Id.

c. Plaintiffs have not established that the FHFA coerced the FHFA-C into approving the PSPA Amendments.

Plaintiffs also have not alleged facts reflecting that the FHFA coerced the FHFA-C into agreeing to the PSPA Amendments. As an initial matter, plaintiffs have not alleged that the FHFA unduly influenced the FHFA-C's decision-making process with respect to the proposed agreements. They merely allege that the FHFA did not silo its regulatory and conservator roles. The lack of a firewall (without more), however, does not indicate that the FHFA deprived the FHFA-C of meaningful choice. Moreover, plaintiffs' focus on the FHFA-C allegedly pursuing government objectives when it approved the PSPA Amendments is a red herring. The purported pursuit of government objectives is not germane to the coercion inquiry because it does not suggest that the FHFA-C lacked any choice in the matter. Even if it was relevant to coercion (or to some other theory for jurisdiction), plaintiffs would not prevail because Congress permitted the FHFA-C to act in the interests of the government. See 12 U.S.C. § 4617(b)(2)(J) (allowing the FHFA-C to "take any action" that "is in the interests of the [Enterprises] or the [FHFA]"). The mere pursuit of government objectives, therefore, would not reflect a blending of any roles but rather the FHFA-C using powers afforded to it by Congress.

In conclusion, plaintiffs have not established that the FHFA-C was coerced into approving the PSPA Amendments by Treasury or the FHFA.

4. The FHFA-C is not Treasury's agent.

Plaintiffs further argue that that the FHFA-C's actions are attributable to the United States because the FHFA-C is Treasury's agent. Plaintiffs assert that the FHFA-C is a government agent because (1) Treasury, by virtue of the PSPAs, had a major role in conservator decisions; (2) the FHFA-C approved the PSPA Amendments for the taxpayers' benefit; and (3) the FHFA-C could not have approved the amendments absent statutory authority. Defendant

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counters that plaintiffs have not pleaded an agency relationship because Treasury does not control the FHFA-C's operations and is statutorily barred from exercising such control.

The United States is subject to claims in this court for the actions of a third party "if [that] party is acting as the government's agent . . . ." A & D Auto, 748 F.3d at 1154. "An essential element of agency is the principal's right to control the agent's actions." Hollingsworth v. Perry, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01 cmt. f (Am. Law. Inst. 2005)); accord O'Neill v. Dep't of Hous. & Urban Dev., 220 F.3d 1354, 1360 (Fed. Cir. 2000) (acknowledging that the common-law meaning of agency requires, among other things, that the principal has the right to control the agent's conduct); see also Preseault v. United States, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (concluding that a state's actions were attributable to the United States when the state acted pursuant to the Interstate Commerce Commission's order); Hendler v. United States, 952 F.2d 1364, 1378-79 (Fed. Cir. 1991) (attributing a state's actions to the United States when the state acted under authority flowing from an Environmental Protection Agency order). The facts, as alleged, do not reflect that Treasury controlled the FHFA-C's actions because Congress explicitly precluded the FHFA-C from being subservient to another agency, 12 U.S.C. § 4617(a)(7) (providing that the FHFA-C cannot be subject to the "direction or supervision" of any other agency), and plaintiffs have not alleged facts indicating that Treasury exercised such control notwithstanding the statutory bar. Although the FHFA-C was required by the PSPAs to obtain Treasury's approval for certain actions (e.g., issuing dividends), the PSPAs did not provide Treasury with the right to unilaterally order amendments. Moreover, plaintiffs describe an FHFA-C that made decisions independently; Treasury "urg[ed]" the FHFA to pursue conservatorship and "push[ed]" for the PSPA Amendments. 2d Am. Compl. ¶¶ 4, 126. Simply stated, plaintiffs have not alleged facts establishing that Treasury exercised the control over the FHFA-C that is necessary for an agency relationship.

5. The FHFA-C is the United States because the FHFA-C retains the FHFA's governmental character.

Finally, plaintiffs contend that the FHFA-C is itself a government actor. Defendant disagrees. First, relying on O'Melveny & Myers v. FDIC, 412 U.S. 79 (1994), defendant argues that the FHFA-C is not the United States because the FHFA-C stands in the Enterprises' shoes. Specifically, defendant asserts that Congress's decision to have the FHFA-C succeed to the Enterprises' rights reflects that Congress intended that the FHFA-C step into the Enterprises' private shoes and shed its government character. Second, defendant argues that the FHFA-C's exercise of nontraditional conservatorship powers is immaterial because Congress can expand the conservator's role without transforming it into it into a government actor. Third, defendant argues that the Enterprises are not government instrumentalities—which means that the FHFA did not step into the shoes of a government actor when it became the Enterprises' conservator—because the government does not retain permanent authority to appoint the Enterprises' directors. Defendant contends that the government only has temporary, albeit indefinite, control over the Enterprises because conservatorships are not permanent.

In response, plaintiffs dispute the premise of defendant's argument that, pursuant to O'Melveny, the FHFA becomes the Enterprises when acting as conservator. Plaintiffs assert that O'Melveny does not concern whether an entity is the United States or, if the decision can be read

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as addressing that issue, is distinguishable because it concerns receivers or is limited to conservators exercising traditional conservator powers. Second, plaintiffs argue that the FHFA has not shed its government status, even if it has stepped into the Enterprises' shoes, when it acts as conservator. Specifically, plaintiffs assert that the FHFA-C retains the FHFA's government status because (1) the FHFA-C has acted beyond the traditional conservator powers and (2) Congress expressed its intention for that result by precluding the conservator from being subject to the supervision of "any other agency." 12 U.S.C. § 4617 (emphasis added). Third, plaintiffs argue that their claims are against the United States, even if the FHFA-C steps into the shoes of the Enterprises, because the Enterprises are government instrumentalities.

In short, the parties disagree over the government status of the FHFA-C. The FHFA is indisputably the United States, see 12 U.S.C. § 4511(a) (establishing the FHFA as an "independent agency of the Federal Government"), and so the only question is whether the FHFA sheds that status when it acts as conservator. In other jurisdictions, courts have held (with near unanimity) that the FHFA loses its government status pursuant to O'Melveny. In O'Melveny, the United States Supreme Court ("Supreme Court") explained that the FDIC "steps into [the] shoes" of a private company when acting as receiver and sheds its government character because the FDIC "succeed[s] to . . . all rights, titles, powers, and privileges of the [entity in receivership] . . . ." 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); see also AG Route Seven P'ship v. United States, 57 Fed. Cl. 521, 534 (2003) (citing O'Melveny for the proposition that the FDIC as receiver is a "private party, and not the government per se" because it "is merely standing in the shoes . . . of the defunct thrift"). The courts drawing from O'Melveny have concluded that the FHFA steps into the shoes of the Enterprises and sheds its government character when acting as conservator because Congress provided that the FHFA-C exercises the same rights with respect to the Enterprises as Congress granted to the FDIC as receiver. See, e.g., Herron v. Fannie Mae, 861 F.3d 160, 169 (D.C. Cir. 2017); cf. Ameristar Fin. Servicing Co. v. United States, 75 Fed. Cl. 807, 811 (2007) (concluding, with respect to the FDIC, that the step-into-the-shoes principle set forth in O'Melveny also applies in the conservator context).

a. The FHFA-C is not the United States if the FHFA steps into the Enterprises' shoes when acting as conservator.

Plaintiffs initially contend that defendant's reliance on O'Melveny is a red herring because, assuming that O'Melveny applies, the FHFA-C is the United States even though it steps into the Enterprises' shoes. Specifically, plaintiffs assert that the FHFA-C is the United States under the facts alleged because (1) the FHFA-C exercises nontraditional conservator powers, (2) Congress intended that the FHFA-C retain the FHFA's government status, and (3) the FHFA-C steps into the shoes of a government instrumentality. The court addresses each assertion in turn.

First, the FHFA-C did not become a government actor by exercising powers beyond those traditionally afforded to a conservator. As a threshold matter, plaintiffs have not alleged facts reflecting that the FHFA-C used such powers; the execution of the PSPA Amendments was a "quintessential conservatorship" function. Perry II, 864 F.3d at 607; see also supra Section IV.B.2 (discussing the FHFA-C's exercise of its powers). More importantly, however, plaintiffs would not prevail even if the FHFA-C exercised nontraditional conservatorship powers in agreeing to the PSPA Amendments. When this argument was pressed in other jurisdictions, it was rejected:

> It may well be true that FHFA's actions would not be allowed under traditional principles of corporate or conservatorship law, but it does not follow that those actions are therefore governmental. Legislatures can expand conservatorship and similar powers without transforming conservators into agents of the government. Cf. Pegram v. Herdrich, 530 U.S. 211, 225-26 (2000) (explaining that the Employee Retirement Income Security Act altered the common law of trusts to permit certain actions that would otherwise violate the trustee's fiduciary duties).

Bhatti v. Fed. Hous. Fin. Agency, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (footnote omitted). The court agrees with that reasoning, and plaintiffs provide no authority that supports a contrary result. Although plaintiffs state that the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") decision in Waterview Management Co. v. FDIC, 105 F.3d 696 (D.C. Cir. 1997), supports their position, they are mistaken. Waterview is not on point because the D.C. Circuit did not hold that a conservator is per se the United States when acting pursuant to a congressional grant of broad powers. Rather, it held that, as a matter of statutory interpretation, the existence of a receivership did not preempt a prereceivership contract. Id. at 699-702.

Second, Congress's instruction that the FHFA-C is not subject to the supervision of any other agency does not reflect congressional intent for the FHFA to retain its government status when acting as conservator even if it steps into the shoes of the Enterprises. Because the court only reaches this issue by assuming that O'Melveny is instructive, the statutory language concerning supervision of the FHFA-C does not support a finding of jurisdiction because the same language is present in the statute that the Supreme Court addressed in O'Melveny. See 512 U.S. at 85-86 (discussing 12 U.S.C. § 1821). Compare 12 U.S.C. § 1821(c)(3)(C) ("When acting as conservator or receiver . . . , [the FDIC] shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC's] rights, powers, and privileges."), with id. § 4617(a)(7) ("When acting as conservator or receiver, the [FHFA] shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the [FHFA].").

The third argument advanced by plaintiffs—that the FHFA-C is the United States because it steps into the shoes of a government instrumentality—also is not meritorious. A government instrumentality's actions are attributable to the United States for purposes of the Tucker Act. See Corr v. Metro. Wash. Airports Auth., 702 F.3d 1334, 1336 (Fed. Cir. 2012) (noting that a claim against a government instrumentality is a claim against the United States for purposes of the Little Tucker Act, 28 U.S.C. § 1346(a)(2)). The Supreme Court established in Lebron v. National Railroad Passenger Corp. that a company is a government instrumentality when (1) it is created by "special law," (2) it is established "for the furtherance of governmental objectives," and (3) the federal government "retains for itself permanent authority to appoint a majority of the [company's] directors . . . ." 513 U.S. 374, 400 (1995). After Lebron, the

Supreme Court clarified that, for purposes of the instrumentality test, "the practical reality of federal control and supervision prevails over Congress' disclaimer of the [the entity's] governmental status." Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1233 (2015).

There is no dispute that the Enterprises satisfy the first two prongs of the Lebron test; Congress created the Enterprises by special law to achieve governmental objectives related to the housing market. See 12 U.S.C. § 4501; see also Herron, 861 F.3d at 167 (addressing claims involving Fannie and noting that "[t]his case satisfies the first two Lebron criteria"); Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 75 F.3d 1401, 1406-07 (9th Cir. 1996) (reaching same conclusion for Freddie). The status of the Enterprises, therefore, turns on the third prong: whether the government retains permanent authority to appoint a majority of the Enterprises' directors.

The Federal Circuit has not addressed the government-control prong with respect to the Enterprises, but courts in other jurisdictions have done so. Those decisions provide a starting point for the court. It appears that every court to consider the issue, with the exception of one district court, has held that the government does not exercise permanent control over the Enterprises. Sisti v. Fed. Hous. Fin. Agency, 324 F. Supp. 3d 273, 279 (D.R.I. 2018) (concluding that the government retains permanent authority to control the Enterprises after noting that "[t]he non-controlling precedent to date" has reached the opposite conclusion). Most of the courts that concluded that the government lacks permanent control over the Enterprises issued their decisions before the Supreme Court in Association of American Railroads emphasized the importance of evaluating the practical reality over nomenclature, and the other courts focused on the statutory purpose for the conservatorships rather than the Enterprises' actual situation. E.g., Herron, 861 F.3d at 169 (relying on the notion that a conservatorship is fundamentally temporary). In other words, the courts adopting the prevailing view considered the issue of control without regard for the Supreme Court's instruction to focus on the practical reality. The court, therefore, does not find those decisions persuasive.

The crux of the inquiry, as the Supreme Court mandates, is on the practical reality of the government's control over the Enterprises. Ass'n of Am. R.Rs., 135 S. Ct. at 1233. It is of no import that Congress nominally authorized a facially temporary conservatorship, see 12 U.S.C. § 4617(a) (permitting the FHFA to act as conservator to "reorganiz[e]" or "rehabilitat[e]" the Enterprises), because Congress's disclaimers are no substitute for the court's obligation to assess the government's actual control, Ass'n of Am. R.Rs., 135 S. Ct. at 1233. The court focuses on the length of the conservatorship because the FHFA-C wields complete control over the Enterprises so long as they are in conservatorship. See generally 12 U.S.C. § 4617.

Plaintiffs allege that the Enterprises will remain undercapitalized—and thus subject to conservatorship pursuant to 12 U.S.C. § 4617(a)(3)(J)—until the PSPAs, in their current form, are changed because the Enterprises cannot accumulate any capital under the existing terms of the PSPAs. Although the PSPAs could be further amended, plaintiffs' allegations reflect that Treasury and the FHFA-C will not do so because the purpose of the PSPA Amendments is to prevent the Enterprises from accumulating the necessary capital to become independent companies. Plaintiffs, in short, have alleged that the government intended, and has taken steps to ensure, that the conservatorships never end. Those facts, viewed in isolation, would support a

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conclusion that the practical reality is that the Enterprises are under permanent government control. The court's inquiry, however, is not limited to plaintiffs' allegations because it has taken judicial notice of relevant facts reflecting that the status quo has changed: The Treasury Secretary and the FHFA Director are now both committed to ending the conservatorships. Moreover, the idea that the Enterprises are permanently subject to government control because they can never accumulate the capital needed to exit the conservatorships is undermined by recent developments. Indeed, Treasury proposed amending the Net Worth Sweep to allow the Enterprises to retain more capital, and the FHFA Director testified during his confirmation hearing that, if confirmed, he would seek to increase the amount of capital that the Enterprises retain. Simply stated, the practical reality is that the Enterprises are not subject to permanent government control because the relevant parties are working to terminate the conservatorships.[18]

In sum, the FHFA-C does not become the United States if the FHFA steps into the Enterprises' shoes when serving as conservator.

b. The FHFA-C retains the FHFA's government character because the FHFA-C does not step into the Enterprises' shoes.

The key inquiry, therefore, is whether the FHFA steps into the shoes of the Enterprises when acting as conservator. Defendant argues that the FHFA-C sheds its government character and assumes the identity of the Enterprises based on the reasoning in O'Melveny. Defendant's reliance on O'Melveny is misplaced. O'Melveny concerns a receiver stepping into the shoes of a failed bank. 512 U.S. at 86. The roles of a conservator and receiver are meaningfully different. In a recent decision, the United States District Court for the District of Rhode Island artfully explained the differences and their import for assessing whether the FHFA-C is the government:

> The O'Melveny Court held that FDIC, when acting as a receiver for a private entity, steps into the shoes of that private entity for state law claims. This holding makes sense given the purpose of receivership: "to preserve a company's assets, for the benefit of creditors, in the face of bankruptcy." When FDIC is appointed receiver, it must dispose of the received entity's assets, resolving obligations and claims made against the entity. Notably, "[i]n receivership, the receiver owes fiduciary duties to the creditors, which the corporation would otherwise owe to

[18] Plaintiffs may disagree with the court's conclusion that events occurring after the PSPA Amendments are relevant to determining whether the Enterprises were under permanent government control during the events discussed in plaintiffs' complaint. Even if the court agreed that events occurring after the PSPA Amendments are not germane, plaintiffs still would not prevail because they allege that the conservatorships began as temporary measures. See 2d Am. Compl. ¶¶ 47 ("FHFA also emphasized that the conservatorship was temporary: 'Upon the [FHFA] Director's determination that the [FHFA-C's] plan to restore the [Enterprises] to a safe and solvent condition has been completed successfully, the Director will issue an order terminating the conservatorships'" (quoting FHFA publication)), 90 (noting that, when the conservatorships were imposed, the FHFA Director "vowed" that the Enterprises would "exit conservatorship" and return to "normal business operations"). Thus, the Enterprises were not under permanent government control before the PSPA Amendments.

> creditors during a period of insolvency." It logically follows, then, that the receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity.
>
> Conservatorship, in contrast, serves a different function. FHFA has described the purpose of conservatorship is "to establish control and oversight of a company to put it in a sound and solvent condition." Conservators, unlike receivers, have a fiduciary duty running to the corporation itself.
>
> This is "critically distinct" from the fiduciary duties owed as a receiver—the receiver does indeed "step into the shoes" of the entity by assuming the fiduciary duties of the entity, but the conservator does not: it remains distinct, and rather owes a duty to the entity. Given the difference in fiduciary duties, O'Melveny's "steps into the shoes" holding makes sense in the context of receivership, but not in the context of conservatorship.

Sisti, 324 F. Supp. 3d at 282-83 (citations and footnotes omitted). See generally Brian Taylor Goldman, The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State-Action, 17 J. Bus. & Sec. L. 11, 23-30 (2016). The district court, relying on the above analysis, declined to treat the FHFA-C as a private actor. Sisti, 324 F. Supp. 3d at 284. This court agrees with the reasoning and conclusion in Sisti: The FHFA does not shed its government character when acting as conservator because it does not step into the shoes of the Enterprises. Otherwise stated, the FHFA-C is the United States because it retains the FHFA's government character. Plaintiffs' claims, therefore, are against the United States for purposes of the Tucker Act.

C. The court lacks jurisdiction over plaintiffs' claim that sounds in tort.

1. Plaintiffs' fiduciary duty claim sounds in tort.

Defendant next argues that the court lacks jurisdiction over plaintiffs' fiduciary duty claim because the United States does not owe to each Enterprise's shareholders a fiduciary duty that is grounded in a statute or contract. Defendant asserts that such a fiduciary duty cannot be based on (1) HERA because, pursuant to the statute, the FHFA-C is only required to act in the government's and the Enterprises' best interests; or (2) the PSPAs because plaintiffs are not parties to those contracts. Plaintiffs counter that their claim is based on a fiduciary duty rooted in both HERA and the PSPAs. As to HERA, plaintiffs assert that Congress made the FHFA-C a fiduciary by authorizing it to control the Enterprises, entrusting it with duties that are at the core of what it means to be a fiduciary, and using terminology—"conservator"—associated with a fiduciary. Additionally, plaintiffs contend that recognizing that Treasury owes a fiduciary duty to shareholders is the only way to give meaning to Congress's mandate in HERA that Treasury protect taxpayers by considering, before purchasing securities, the need to maintain the Enterprises as privately owned entities. With respect to the PSPAs, plaintiffs argue that Treasury owes a fiduciary duty to the shareholders because it acquired control rights under the contract.

The court, pursuant to the Tucker Act, lacks jurisdiction over tort claims. 28 U.S.C. § 1491(a)(1). A breach of fiduciary duty is generally classified as a tort. Newby v. United

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States, 57 Fed. Cl. 382, 294 (2003). A fiduciary duty claim, however, does not sound in tort for purposes of the Tucker Act when the fiduciary relationship is founded on a money-mandating statute or a contractual provision between the claimant and United States. See Hopi Tribe v. United States, 782 F.3d 662, 667 (Fed. Cir. 2015) (statute); Cleveland Chair Co. v. United States, 557 F.2d 244, 246 (Ct. Cl. 1977) (contract); see also 28 U.S.C. § 1491(a)(1) (providing jurisdiction over claims "founded upon . . . any Act of Congress . . . or contract with the United States").

The initial issue is whether HERA establishes a fiduciary relationship between the FHFA-C and the Enterprises' shareholders. The court begins with the language of the statute. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). "If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect." Rosete v. Office of Pers. Mgmt., 48 F.3d 514, 517 (Fed. Cir. 1995); accord Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Congress provided in HERA that the FHFA-C is only required to act in the interests of itself or the Enterprises. 12 U.S.C. § 4617(b)(2)(J). That statement reflects a clear intent: The FHFA-C does not owe a fiduciary duty to shareholders because the conservator is not required to consider shareholders' interests.[19] See id.; see also Collins, 938 F.3d at 580 (noting that HERA "may permit" the FHFA-C to pursue actions that are "inconsistent with fiduciary duties"). The plain language controls, and therefore the court does not consider the peripheral considerations urged by plaintiffs such as the implications of the word "conservator," the FHFA-C's control over the Enterprises, or the FHFA-C's other powers. In sum, plaintiffs cannot establish jurisdiction for their direct fiduciary duty claim by relying on HERA.

The next issue is whether Treasury owes a fiduciary duty to shareholders because it purchased securities pursuant to HERA.[20] Plaintiffs contend that Treasury assumed such a duty

[19] The court's interpretation of HERA's plain language is buttressed by the fact that Congress seemingly made a deliberate decision to exclude shareholder interests from the FHFA-C's considerations. Congress modeled HERA on the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Jacobs, 908 F.3d at 893. Under FIRREA, Congress permitted the FDIC as conservator to consider the best interests of a bank, its depositors, or the FDIC. 12 U.S.C. § 1821(d)(2)(J)(ii). Although Congress permitted the FDIC to take into consideration the interests of its depositors, Congress omitted the analogue of depositors—shareholders—from the list of germane interests that the conservator can consider when acting pursuant to HERA. Compare id. (FIRREA), with 12 U.S.C. 4617(b)(2)(J) (HERA). The omission is telling.

[20] The gravamen of plaintiffs' fiduciary duty claim is that the FHFA-C owed a fiduciary duty to plaintiffs. See 2d Am. Compl. ¶¶ 151-60. Indeed, plaintiffs state in their complaint that the "FHFA violated its fiduciary duty," id. ¶ 160, and make no similar allegation with regard to Treasury. Although plaintiffs have not alleged that their fiduciary duty claim is premised on Treasury's actions, the court nonetheless considers the parties' arguments on whether such a claim would be within the court's jurisdiction for two reasons. First, the parties have fully briefed the issue without noting the discrepancy between plaintiffs' arguments and the allegations in their second amended complaint. Second, the court's resolution of the issue is

when it agreed to the PSPAs because of the determinations that Congress required the Treasury Secretary to make prior to buying the securities. Before purchasing securities pursuant to HERA, the Secretary is required to determine that the purchase is necessary to protect taxpayers and evaluate various considerations in connection with protecting the taxpayers. 12 U.S.C. §§ 1455(*l*)(1)(B)-(C), 1719(g)(1)(B)-(C). One of those considerations is the need to maintain the Enterprises as privately owned companies. Id. §§ 1455(*l*)(1)(C), 1719(g)(1)(C). At no point, however, did Congress direct (or even suggest) that the Secretary must protect the shareholders. The court declines to stretch the statutory language to support a fiduciary relationship based on any incidental benefit shareholders may derive from the Secretary considering the need to keep the Enterprises privately owned in the context of protecting taxpayers. Simply stated, Treasury did not assume any fiduciary obligations to the Enterprises' shareholders by virtue of HERA.

Finally, the court turns to whether Treasury owed a fiduciary duty to the Enterprises' other shareholders because it acquired control rights by agreeing to the PSPAs. Plaintiffs' argument is premised on the state-law principle (which they term "general corporate law") that a controlling shareholder owes a fiduciary duty to the minority shareholders. The court is not convinced. First, plaintiffs' allegation of a fiduciary relationship is not founded on a contract within the meaning of the Tucker Act. Plaintiffs are not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs. They invoke the contracts solely to establish that Treasury is a controlling shareholder and rely on that conclusion to argue that it has a fiduciary duty based on state law. The contract, otherwise stated, is one step removed from the purported genesis of the fiduciary duty—the application of state-law principles. That gap is too much in light of the court's obligation to narrowly construe the Tucker Act's waiver of sovereign immunity. See Smith, 855 F.2d at 1552 (noting that the Tucker Act is narrowly construed); see also Perry II, 864 F.3d at 619-20 (rejecting the legal theory that the Enterprises' shareholders' need to reference the PSPAs for their fiduciary duty claim was enough to conclude that the claim was rooted in a contract for purposes of the Tucker Act).

Second, plaintiffs fail to demonstrate the applicability of the state-law principles underlying their theory for why Treasury assumed fiduciary duties. Federal law governs the obligations Treasury incurred by entering into the PSPAs. See Boyle v. United Techs. Corp., 487 U.S. 500, 519 (1988) ("The proposition that federal common law continues to govern the 'obligations to and rights of the United States under its contracts' is nearly as old as Erie [v. Tompkins, 304 U.S. 64 (1938),] itself."). Although courts may shape federal law by drawing from state-law principles, plaintiffs do not explain why doing so is appropriate in this instance.

Third, plaintiffs do not prevail even if their fiduciary duty claim could be founded on a contract and federal common law incorporates the state-law principles regarding controlling shareholders' fiduciary obligations. Under Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders. See Ivanhoe Partners v. Newmont Min. Corp., 535 A.2d 1334, 1344 (Del. 1987); Parsch v. Massey, 79 Va. Cir. 446 (2009); see also Quadrant Structured Prod. Co. v. Vertin, 102 A.3d 155, 183 (Del. Ch. 2014) (acknowledging that

immaterial to the ultimate outcome because, as discussed below, plaintiffs lack standing to pursue their claims.

those "who effectively control a corporation" owe a fiduciary duty to others).[21] To have the requisite level of control, the controlling shareholder must (1) be able to exercise a majority of the corporation's voting power or (2) direct the corporation without owning a majority of stock. Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1113 (Del. 1994). The latter, effective exercise of control, "is not an easy test to satisfy"; the individual or group must be, "as a practical matter, . . . no differently situated than if they had majority voting control." In re PNB Holding Co. S'holders Litig., No. CIV.A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006). Plaintiffs have not established that Treasury meets either control test. First, plaintiffs do not allege that Treasury owns any of the Enterprises' voting stock. Treasury purchased preferred stock and acquired the right to buy common (i.e., voting) stock, but there is no indication that Treasury exercised its warrants or otherwise acquired common stock.[22] Second, plaintiffs do not demonstrate that Treasury exercised effective control over the Enterprises. Although Treasury acquired the right to preclude the Enterprises from taking certain actions, Treasury did not control the Enterprises because it could not direct any action—it could only respond to certain requests made by the Enterprises. As a practical matter, therefore, Treasury is situated differently than if it had majority voting power.

In sum, plaintiffs' fiduciary duty claim is a tort claim because plaintiffs have not established that the FHFA-C or Treasury owed shareholders a fiduciary duty based on a statute or contract. The court, therefore, dismisses count III—breach of fiduciary duty—because it lacks jurisdiction over tort claims.

2. Plaintiffs' takings and illegal-exaction claims do not sound in tort.

Defendant also argues that plaintiffs' Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the FHFA-C. Plaintiffs counter that they have pleaded the predicates for takings and illegal-exaction claims, which means that it is irrelevant whether they also alleged facts that are germane to tortious actions.

When a party pleads the predicates for a takings claim or illegal-exaction claim, the court possesses jurisdiction to entertain such claims. See Hansen v. United States, 65 Fed. Cl. 76, 80-81 (2005) ("[S]o long as there is some material evidence in the record that establishes the predicates for a [claim covered by the Tucker Act,] . . . a plaintiff succeeds in demonstrating

[21] The court refers to Delaware and Virginia law because Fannie is a Delaware corporation, and Freddie is a Virginia corporation. When evaluating Virginia law, the court also looks to Delaware state court decisions because Virginia courts do so to resolve unsettled issues in the Commonwealth. E.g., U.S. Inspect Inc. v. McGreevy, No. 160966, 2000 WL 33232337, at *4 (Va. Cir. Ct. Nov. 27, 2000).

[22] Even if Treasury had exercised its option to buy a majority of the voting stock, it would not be a controlling shareholder because the FHFA-C succeeded to all of the shareholders' rights. See 12 U.S.C. § 4617(b)(2)(A) (noting that the FHFA-C, by operation of law, succeeds to all rights and powers of any Enterprise shareholder). Treasury, therefore, would have no voting power.

subject matter jurisdiction in this court . . . ."). Those claims, at a basic level, are contentions that the government expropriated private property lawfully (takings) or unlawfully (illegal exaction). See Orient Overseas Container Line (UK) Ltd. v. United States, 48 Fed. Cl. 284, 289 (2000) ("Takings claims arise because of a deprivation of property that is authorized by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation." (citing Dureiko v. United States, 209 F.3d 1345, 1359 (Fed. Cir. 2000); Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-08 (Ct. Cl. 1967))). If a party alleges the necessary predicates for these claims, the court is not deprived of jurisdiction even if the complaint contains allegations that could support a tort claim. See El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1353 (Fed. Cir. 2004) ("That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims."); Rith Energy, Inc. v. United States, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that this court has jurisdiction over a takings claim "even if the government's action was subject to legal challenge on some other ground"). Here, plaintiffs plead the predicates for takings and illegal-exaction claims by alleging, in essence, that they were forced to give their property to the government because of lawful or unlawful government conduct. Therefore, it is of no import to the court's jurisdiction whether plaintiffs have alleged facts that would also support a tort claim.

D. The court lacks jurisdiction over plaintiffs' implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract.

Defendant argues next that the court lacks jurisdiction to entertain plaintiffs' implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract. Specifically, defendant asserts that plaintiffs have not established that they are intended beneficiaries independent of their status as shareholders and that any benefit that is related to their status as shareholders is insufficient for jurisdiction. Plaintiffs counter that they are intended third-party beneficiaries of implied contracts, between the FHFA and each Enterprise's board, in which the boards consented to the conservatorships in exchange for the FHFA-C operating the Enterprises as a fiduciary and returning them to sound condition. Specifically, plaintiffs assert that the intent to benefit the shareholders is evident from (1) the boards' consent to the conservatorships because shareholders would benefit from a conservator focused on returning the Enterprises to a better condition, and (2) the government acknowledging that the Enterprises' stock would remain outstanding while the Enterprises were in conservatorship.

The court's jurisdiction over contract claims is limited by the Tucker Act. Ransom v. United States, 900 F.2d 242, 244 (Fed. Cir. 1990). Of particular import here, ordinarily, a plaintiff must be in privity of contract with the United States to invoke this court's jurisdiction over a contract claim against the government. Fid. & Guar. Ins. Underwriters, Inc. v. United States, 805 F.3d 1082, 1087 (Fed. Cir. 2015). But privity is not required if "the plaintiff can demonstrate that it was an intended third-party beneficiary under the contract." Pac. Gas & Elec. Co. v. United States, 838 F.3d 1341, 1361 (Fed. Cir. 2016).

"Third party beneficiary status is an 'exceptional privilege.'" Glass v. United States, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (quoting German All. Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 230 (1912)). The conditions for attaining such status are "stringent." Anderson v.

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United States, 344 F.3d 1343, 1352 (Fed. Cir. 2003). "[S]hareholders seeking status to sue as third-party beneficiaries of an allegedly breached contract must 'demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.'" Castle v. United States, 301 F.3d 1328, 1338 (Fed. Cir. 2002) (quoting Glass, 258 F.3d at 1354). Specifically, "the contract must express the intent of the promissor to benefit the shareholder personally, independently of his or her status as shareholder." Glass, 258 F.3d at 1353-54. As a practical matter, the shareholder does not personally benefit independent of its status as a shareholder when the contractual promises pertain only to the treatment of the company. See FDIC v. United States, 342 F.3d 1313, 1320 (Fed. Cir. 2003) (noting that the broken promises concerned the treatment of the company such that the plaintiffs did not benefit independent of their status as shareholders); accord Maher v. United States, 314 F.3d 600, 605 (Fed. Cir. 2002) (concluding that the plaintiffs were not third-party beneficiaries when they failed to "establish[] that the government took on any obligations in the merger agreement for [the plaintiffs'] personal benefit, or even that the merger agreement contains any provisions pertaining to [the plaintiffs] personally").

As plaintiffs are not parties to the alleged implied contracts between the FHFA and the Enterprises, the relevant issue is whether plaintiffs are third-party beneficiaries of those agreements. They are not. First, it is of no import that the Enterprises, as plaintiffs argue, purportedly agreed to the conservatorships because that would serve the interests of shareholders. Indeed, "every action of a corporation is supposed to benefit its shareholders," but the "law has not viewed this general benefit as making every shareholder a third-party beneficiary." Suess v. United States, 33 Fed. Cl. 89, 94 (1995). Second, plaintiffs' allegations reflect that they only benefit from the alleged implied contracts by virtue of their shareholder status. The relevant promises concerned how the FHFA-C would operate the Enterprises; the crux of the purported agreements was the FHFA-C promising to operate the Enterprises as a fiduciary to preserve their assets and return them to sound condition. Because the promises in the alleged implied contracts were directed at the Enterprises, plaintiffs cannot be third-party beneficiaries of the alleged contract. See FDIC, 342 F.3d at 1320. Third, plaintiffs have not demonstrated that the FHFA intended that plaintiffs benefit independently of their status as shareholders even if they did so benefit. Plaintiffs rely on the FHFA's statements that private stock would remain outstanding and shareholders would continue to hold an economic interest in their stock. Those factual statements, however, do not reflect that the FHFA intended to confer any specific benefit on plaintiffs independent of their role as shareholders. Because plaintiffs have not alleged facts reflecting that the FHFA intended to confer a personal benefit on them, they are not third-party beneficiaries. See Glass, 258 F.3d at 1353-54. In sum, the court lacks jurisdiction to entertain plaintiffs' implied-in-fact-contract claim because plaintiffs are neither parties to a contact with the government nor third-party beneficiaries of any such agreement. Therefore, the court dismisses count IV.

V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiffs' claims, defendant challenges plaintiffs' standing to pursue their claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. Starr Int'l Co. v. United States, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is

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"assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties." Kowalski v. Tesmer, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that control. See Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted."), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014). Thus, in a suit brought by shareholders, it is the substance of the allegations and not the label assigned to the allegations—i.e., direct or derivative—that matters. See Starr, 856 F.3d at 966-67; see also In re Sunrise Sec. Litig., 916 F.2d 874, 882 (3d Cir. 1990) ("Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties."). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based on the rights of the company. See Starr, 856 F.3d at 966-67; see also Weir v. Stagg, No. 09-21745-CIV, 2011 WL 13174531, at *9 (S.D. Fla. Feb. 7, 2011) ("Shareholders do not have standing to bring a direct action for injuries suffered by a corporation, but rather, must bring a derivative action."). A shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the corporation's injuries—to have standing to litigate those claims. See Starr, 856 F.3d at 966-67.

The parties disagree on whether plaintiffs have standing to litigate any of their claims. Defendant argues that plaintiffs lack standing to litigate their claims because the claims belong to the Enterprises and are therefore derivative in nature. Defendant contends that plaintiffs' claims are actually derivative because, to prevail, plaintiffs would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises.

Plaintiffs counter that they assert direct claims because the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises' capital structure to plaintiffs' detriment, which renders the claims for such conduct both direct and derivative under the dual-nature exception.[23] Defendant replies that the Federal Circuit rejected the notion that a plaintiff states a direct claim by alleging it was targeted by the challenged action. Defendant also contends that the dual-nature exception is not applicable because Treasury was not a controlling shareholder, the Enterprises did not issue new shares, and the PSPA Amendments did not involve the reallocation of power.

Plaintiffs do not satisfy their burden of establishing standing. Neither theory they advance for why those claims are substantively direct, rather than derivative, is persuasive. First, it is of no import whether the government targeted shareholders with the PSPA Amendments. See Starr, 856 F.3d at 973 (noting that plaintiffs did not "sufficiently explain why the

[23] Plaintiffs also assert that their claims must be construed as direct claims to vindicate important federal policies if shareholders cannot assert derivative claims because of HERA. But as this court held in Fairholme II, the shareholders of the Enterprises, notwithstanding HERA, have standing to assert derivative claims because of the FHFA-C's conflict of interest. 147 Fed. Cl. at 49-51.

Government's subjective motivations are relevant to the inquiry into direct standing"). The direct-versus-derivative inquiry "turns on the plaintiff's injury, not the defendant's motive." Pagan v. Calderon, 448 F.3d 16, 30 (1st Cir. 2006). Second, plaintiffs have not asserted claims that qualify as both direct and derivative based on the dual-nature exception. The Federal Circuit explained that, pursuant to this exception, shareholder claims may be both direct and derivative "when a 'reduction in [the] economic value and voting power affected the minority stockholders uniquely . . . .'" Starr, 856 F.3d at 968 (quoting Gentile v. Rossette, 906 A.2d 91, 99 (Del. 2006)). Specifically, shareholder claims are both direct and derivative if

> "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value," and "(2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders."

Id. (quoting Gentile, 906 A.2d at 100). The exception does not apply here because Treasury was not a controlling shareholder at the time the PSPA Amendments were executed,[24] the PSPA Amendments did not involve the issuance of new shares, and shareholder voting power was not reallocated under the PSPA Amendments. It is not enough, contrary to plaintiffs' contention, that the government allegedly exacted economic value from the other shareholders by rearranging the corporate structure. See El Paso Pipeline GP Co. v. Brinckerhoff, 152 A.3d 1248, 1264 (Del. 2016) (applying Gentile and holding a plaintiff does not state a direct claim under the dual-nature exception by pleading the "extraction of solely economic value from the minority by a controlling stockholder"). Because plaintiffs have not established that their claims are substantively direct in nature, they cannot demonstrate that they have standing to litigate those claims.

Plaintiffs fare no better if the court moves beyond their arguments for why their claims are substantively direct in nature. Federal law governs whether plaintiffs' claims are direct or derivative. See Starr, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. Id.; see also Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 97 (1991) (noting the "presumption that state law should be incorporated into federal common law"). Under Delaware law, the test for whether a shareholder's claim is derivative or direct depends on the answers to two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004) (en banc). "Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow." Gentile, 906 A.2d at 99, discussed in Starr, 856 F.3d at 965. Such claims are derivative even "though the overpayment may diminish the value of the corporation's stock or deplete corporate assets that might

[24] Treasury is not a controlling shareholder for the reasons set forth in Section IV.C.1, supra.

otherwise be used to benefit the stockholders, such as through a dividend." Protas v. Cavanagh, No. CIV.A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012); see also Hometown Fin. Inc. v. United States, 56 Fed. Cl. 477, 486 (2003) ("[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to nothing more than a diminution in stock value or a loss of dividends.").

In their complaint, plaintiffs focus on the expropriation of the Enterprises' assets via compulsory payments of all profits. The gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury. Regardless of plaintiffs' label (direct or derivative) or theory (taking, illegal exaction, breach of fiduciary duty, or breach of implied contract) for their claims, the claims are substantively derivative in nature because they are premised on allegations of overpayment.[25] See Gentile, 906 A.2d at 99; see also Roberts, 889 F.3d at 409 (explaining that the plaintiffs asserted "classic derivative claims" when they alleged that "the [PSPA Amendments] illegally dissipated corporate assets by transferring them to Treasury"). Plaintiffs cannot transform their substantively derivative claims into direct claims by merely alleging that, as a result of overpayments, they were deprived of their stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiffs' purported "harms are 'merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.'" Protas, 2012 WL 1580969, at *6 (quoting Gentile, 906 A.2d at 99); see also Agostino v. Hicks, 845 A.2d 1110, 1122 (Del. Ch. 2004) ("[T]he inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation."). Because plaintiffs' claims are derivative in nature, plaintiffs lack standing to pursue those claims on their own behalf.

After the initial round of briefing on defendant's omnibus motion to dismiss was complete, and after Fairholme II was decided and the court held a status conference regarding further proceedings in the related cases, plaintiffs raised a new argument—that the Federal Circuit's decision in First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279 (Fed. Cir. 1999), compels a finding that they have standing to assert their takings and illegal-exaction claims.[26] This particular argument was not timely raised and is waived. See United

[25] Plaintiffs would remain unsuccessful if their allegations of waste and mismanagement (styled as self dealing, overreach, or abuse of discretion) were construed to be indicative of some action other than overpayment. Any claims premised on waste and mismanagement are derivative in nature. Kramer v. W. Pac. Indus., Inc., 546 A.2d 348, 353 (Del. 1988) (noting that "mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature"). Plaintiffs' claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. See Hometown, 56 Fed. Cl. at 486 (stock prices); In re Straight Path Commc'ns Inc. Consol. S'holder Litig., No. CV 2017-0486-SG, 2017 WL 5565264, at *4 (Del. Ch. Nov. 20, 2017) ("Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . . .").

[26] As defendant notes, the court did not invite plaintiffs, after the status conference held March 5, 2020, to relitigate issues already decided in Fairholme II.

States v. Ford Motor Co., 463 F.3d 1267, 1277 (Fed. Cir. 2006) (explaining that "[a]rguments raised for the first time in a reply brief are not properly before this court"); Ironclad/EEI v. United States, 78 Fed. Cl. 351, 358 (2007) (noting that "under the law of this circuit, arguments not presented in a party's principal brief to the court are typically deemed to have been waived").

Even if this argument were not waived, the Federal Circuit's Starr decision remains the binding precedent most on point. The distinction between direct and derivative claims brought by shareholders is the focus of the Federal Circuit's standing analysis. Starr, 856 F.3d at 963-73. Just as here, the plaintiffs brought takings and illegal-exaction claims related to a government intervention, during a financial crisis, affecting the future of a corporation in which they owned shares. Id. at 958-61. Starr provides the test for determining whether such claims are direct or derivative in nature and requires that nominally direct claims—that are actually derivative claims—be dismissed for lack of standing. Id. at 973.

In face of this binding precedent, the court cannot conclude that the holding in First Hartford regarding direct Fifth Amendment takings claims is more relevant. It is true that in First Hartford shareholders of a bank in receivership could pursue their takings claims as direct claims against the United States. 194 F.3d at 1287. However, First Hartford does not address the distinction between direct and derivative claims. When faced with binding precedent that addresses a crucial distinction, such as Starr, and one that does not, such as First Hartford, the court follows the precedent most on point. Cf. Union Elec. Co. v. United States, 363 F.3d 1292, 1297 (Fed. Cir. 2004) ("[W]e have repeatedly held that the disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue." (citing Boeing N. Am., Inc. v. Roche, 298 F.3d 1274, 1282 (Fed. Cir. 2002))).

In sum, plaintiffs have not established that they have standing to litigate their claims because they do not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court dismisses plaintiffs' claims on standing grounds to the extent that it has subject-matter jurisdiction over those claims.[27]

[27] As explained above, the court lacks jurisdiction over plaintiffs' claims for breach of fiduciary duty and breach of implied contract. See supra Sections IV.C.1 (fiduciary duty), IV.D (contract). In addition, because all of plaintiffs' claims must be dismissed for lack of standing, the court need not reach defendant's remaining arguments that these claims should be dismissed for failure to state a claim upon which relief can be granted.

VI. CONCLUSION

For the reasons stated above, the court dismisses plaintiffs' claims because it lacks jurisdiction to entertain their fiduciary duty and implied-in-fact-contract claims, and plaintiffs lack standing to pursue any of their claims. The court therefore **GRANTS** defendant's motion to dismiss. The clerk shall enter judgment accordingly.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

In the United States Court of Federal Claims

No. 13-466C
(Filed: June 26, 2020)

JOSEPH CACCIAPALLE et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Motion to Dismiss; RCFC 12(b)(1); RCFC 12(b)(6); Jurisdiction; Standing; Direct Claims; Instrumentalities; Coercion; Agent; Conservators; Conflict of Interest; Stock; Shareholders; Judicial Taking; Privity of Contract; Fannie; Freddie; FHFA

Hamish P.M. Hume, Washington, DC, and Eric L. Zagar, Radnor, PA, for plaintiffs.

Kenneth M. Dintzer, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiffs in this case challenge the actions of the United States during the conservatorships of the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie"). Specifically, plaintiffs take issue with the conservator for Fannie and Freddie (collectively, the "Enterprises") amending a funding agreement between the Enterprises and the United States Department of the Treasury ("Treasury"). Based on the revisions to that agreement, plaintiffs seek the return of money illegally exacted; damages for breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty; and compensation for two types of takings claims pursuant to the Fifth Amendment to the United States Constitution ("Constitution"). Defendant moves to dismiss plaintiffs' complaint, arguing that the court lacks subject-matter jurisdiction over plaintiffs' claims, plaintiffs lack standing to pursue their claims, and plaintiffs fail to state a claim upon which relief may be granted. For the reasons stated below, the court grants defendant's motion to dismiss.

I. BACKGROUND

A. The Enterprises are private companies that are under the control of a conservator.

1. The Enterprises operated independently before the financial crisis.

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities

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that are sold to investors.[1] 1st Am. Consol. Class Action Compl. ("1st Am. Compl.") ¶ 19. Congress chartered Fannie in 1938 and established Freddie in 1970. Id. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. Id. Freddie is organized under Virginia law, and Fannie is organized under Delaware law. Id. ¶ 106. The Enterprises, consistent with the applicable state laws, issued their own common and preferred stock. Id. ¶¶ 102-106; Fairholme II, 147 Fed. Cl. at 15. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. Fairholme II, 147 Fed. Cl. at 15. Those owning preferred stock acquired the right to receive dividends and a liquidation preference. 1st Am. Compl. ¶¶ 104-105.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. Id. ¶ 22. Although the Enterprises recorded losses in 2007 and the first two quarters of 2008, the Enterprises continued to generate sufficient cash to pay their debts and retained sufficient capital to operate. Fairholme II, 147 Fed. Cl. at 15. Otherwise stated, the Enterprises were not in any apparent financial distress or otherwise at risk of insolvency. 1st Am. Compl. ¶¶ 24, 26.

2. Congress created the Federal Housing Finance Agency to regulate the Enterprises and authorized the agency to serve as a conservator for each Enterprise.

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency ("FHFA") and provided it with supervisory and regulatory authority over the Enterprises. See 12 U.S.C. § 4511(a)-(b) (2018).[2] Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator ("FHFA-C") for each Enterprise to reorganize, rehabilitate, or wind up its affairs.[3] Id. § 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its

[1] This background section is a less comprehensive version of the court's recitation of facts in a related case, Fairholme Funds, Inc. v. United States, 147 Fed. Cl. 1 (2019) ("Fairholme II"), interlocutory appeals docketed, Nos. 20-121, 20-122 (Fed. Cir. June 18, 2020).

[2] Congress has not amended the relevant portions of HERA since enacting the law in 2008. The court, therefore, refers to the most recent version of the United States Code.

[3] To avoid any ambiguity, the court reiterates that it is using "FHFA" to refer to the agency acting in its regulatory role and "FHFA-C" when discussing the agency acting as a conservator.

obligations. Id. § 4617(a)(3).[4] The conservator, once appointed, functions independently; it is not "subject to the direction or supervision of any other agency of the United States or any State in the exercise of [its] rights, powers, and privileges . . . ." Id. § 4617(a)(7).

Congress also delineated the scope of the FHFA-C's powers in HERA. See generally id. § 4617. As soon as it is appointed, the FHFA-C "immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . . ." Id. § 4617(b)(2)(A). Congress also conferred the conservator with the power to "[o]perate the [Enterprise]." Id. § 4617(b)(2)(B). Pursuant to that power, the conservator "may," among other things, "perform all functions of the [Enterprise]," "preserve and conserve the assets and property of the [Enterprise]," and "provide by contract for assistance in fulfilling any function . . . of the [conservator]." Id. The conservator "may" also "take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise]." Id. § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator "may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]" and "take any action authorized by [12 U.S.C. § 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA]." Id. § 4617(b)(2)(J). By describing the FHFA-C's role primarily in terms of what powers it "may" exercise, see generally id. § 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its powers, see United States v. Rodgers, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."). Simply stated, the FHFA has "extraordinarily broad flexibility to carry out its role as conservator." Perry Capital LLC v. Mnuchin, 864 F.3d 591, 606 (D.C. Cir. 2017) ("Perry II"), cert. denied, 138 S. Ct. 978 (2018).

3. Congress authorized Treasury to purchase securities issued by the Enterprises.

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(g) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. Id. §§ 1455(*l*)(4), 1719(g)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the availability of mortgage finance, and protect taxpayers. Id. §§ 1455(*l*)(1)(B), 1719(g)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

(i) The need for preferences or priorities regarding payments to the Government.

(ii) Limits on maturity or disposition of obligations or securities to be purchased.

[4] Congress enticed the Enterprises to consent to a conservatorship by insulating their board members from any liability to shareholders or creditors for agreeing in good faith to the FHFA's appointment of a conservator. 12 U.S.C. § 4617(a)(6).

> (iii) The [Enterprise's] plan for the orderly resumption of private market funding or capital market access.
>
> (iv) The probability of the [Enterprise] fulfilling the terms of any such obligation or other security, including repayment.
>
> (v) The need to maintain the [Enterprise's] status as a private shareholder-owned company.
>
> (vi) Restrictions on the use of [Enterprise] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

Id. §§ 1455(*l*)(1)(C), 1719(g)(1)(C).

4. The FHFA became the conservator for each Enterprise.

After Congress enacted HERA, Treasury decided that the FHFA should place each Enterprise into conservatorship. 1st Am. Compl. ¶ 30. The conservatorships became effective on September 6, 2008. Id. ¶ 27. The conservatorships were permissible under HERA once consent had been obtained from the boards of directors of the Enterprises. See 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when "[t]he [Enterprise], by resolution of its board of directors or its shareholders or members, consents to the appointment").

5. The FHFA-C contracted with Treasury to obtain funding for the Enterprises.

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement ("PSPA") with Treasury for each Enterprise. 1st Am. Compl. ¶¶ 5, 38; Fairholme II, 147 Fed. Cl. at 17. Treasury entered into the agreements pursuant to its authority under HERA to buy the Enterprises' securities. 1st Am. Compl. ¶ 40. The PSPA for each Enterprise is materially identical. Id. ¶ 38. Under the PSPAs, Treasury committed to provide up to $100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. Fairholme II, 147 Fed. Cl. at 17. If an Enterprise's liabilities exceeded its assets, then the Enterprise could draw on Treasury's funding commitment in an amount equal to the difference between the Enterprise's liabilities and assets. Id.

In return for Treasury's funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their respective common stock at a nominal price. Id.; 1st Am. Compl. ¶ 38. Treasury's preferred stock had an initial liquidation preference of $1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury's funding commitment. 1st Am. Compl. ¶ 38; Fairholme II, 147 Fed. Cl. at 17. In the event of a liquidation, Treasury was entitled to recover the full liquidation value of its shares before any other shareholder would receive compensation.

1st Am. Compl. ¶ 38. Second, Treasury bargained for the right to a quarterly cash dividend equal to 10% of its liquidation preference. Id. An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. Id. Those in-kind payments, however, did not count as a draw from Treasury's funding commitment. Fairholme II, 147 Fed. Cl. at 18. Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. 1st Am. Compl. ¶ 38. If Treasury did not waive the fee, the Enterprise could elect to pay the amount in cash or make an in-kind payment by increasing the liquidation preference. Fairholme II, 147 Fed. Cl. at 18. Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. Id.

The FHFA-C and Treasury amended each Enterprise's PSPA in May 2009, to increase Treasury's funding commitment to each Enterprise from $100 billion to $200 billion. 1st Am. Compl. ¶ 45. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed $200 billion. Id.; Fairholme II, 147 Fed. Cl. at 18.

6. The Enterprises' finances improved during their conservatorships.

In the early stages of the conservatorships, each Enterprise's net worth decreased as it reported losses. Fairholme II, 147 Fed. Cl. at 18. The bulk of the losses resulted from the FHFA-C writing down the value of deferred tax assets and designating large loan loss reserves.[5] 1st Am. Compl. ¶ 42. Notwithstanding those on-paper losses, the Enterprises' cash receipts consistently exceeded their expenses; they maintained net operating revenue in excess of their net operating expenses from the onset of the conservatorships under the PSPAs and through the first two amendments to the agreements. Fairholme II, 147 Fed. Cl. at 18.

By 2012, the Enterprises' financial outlooks were promising. In addition to an improvement in the housing market, the Enterprises began generating consistent profits and anticipated losing less money on their newer mortgages. Id. They were positioned to further improve their financial condition by settling lawsuits brought by each Enterprise and revising their valuations of (1) deferred tax assets because of growing profits and (2) loan loss reserves because losses were less than expected. Id. The FHFA-C and Treasury were aware of those forthcoming changes and the Enterprises' improving outlooks. 1st Am. Compl. ¶ 54. By August 2012, the Enterprises were expected to experience record profitability. Id. ¶ 55. The Enterprises received projections reflecting that they would have positive comprehensive income between

[5] A loan loss reserve is an entry on a company's balance sheet that reduces its net worth to reflect anticipated losses on mortgages that it owns. 1st Am. Compl. ¶ 42. A deferred tax asset is an asset that may be used to offset future tax liability. Id. A company must write down the value of that deferred asset if it is unlikely to be used to offset future taxable profits. Id. This write down occurs, for example, if a company predicts it will not be profitable in the future. Id.

2012 and 2022. Id. ¶ 52. The FHFA-C had similar information; in July 2012, it circulated, within the FHFA, comparable projections and a prediction that the next eight years were likely to be the "golden years of [the Enterprises'] earnings." Id. (quoting the document) (emphasis omitted). Otherwise stated, the FHFA-C and Treasury knew, by the summer of 2012, that the Enterprises were poised to generate profits in excess of their respective dividend obligations to Treasury. Id. ¶ 54.

7. Treasury and the FHFA-C agreed to a third amendment to the PSPAs.

At an unspecified time prior to August 2012, the Treasury and the FHFA-C began considering a third amendment to each PSPA. Treasury wanted to reap all of the benefits of the Enterprises' return to profitability; Treasury's goal was the driving force behind the third amendment. Id. ¶ 12. Treasury and the FHFA-C decided to announce the changed terms in mid-August 2012 because, according to Treasury, the Enterprises would be reporting earnings exceeding their dividend obligation at the beginning of that month. Fairholme II, 147 Fed. Cl. at 19.

On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA ("PSPA Amendment"). 1st Am. Compl. ¶ 56. A key component of the amended PSPAs is the requirement—referred to as the "Net Worth Sweep"—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise's net worth (except for a small capital reserve amount) rather than a dividend based on a set percentage of the liquidation preference.[6] Id. ¶¶ 56, 59. Additionally, under the amended PSPAs, the Enterprises are not obligated to pay a periodic commitment fee. Fairholme II, 147 Fed. Cl. at 19.

a. Treasury wanted to ensure that it benefited from the new terms.

With the PSPAs, Treasury sought to secure a more beneficial arrangement for itself, as a representative for taxpayers. During the lead-up to the PSPA Amendments, a Treasury official acknowledged in a December 2010 memorandum to the Treasury Secretary that the government was "committ[ed] to ensur[ing] existing common equity holders will not have access to any positive earnings from the [Enterprises] in the future." 1st Am. Compl. ¶ 61 (quoting the memorandum). Treasury recognized its goal of obtaining all of the Enterprises' profits by executing the PSPA Amendments; when the changes were announced, it noted that the Net Worth Sweep would "make sure that every dollar of earnings [each Enterprise] generates is used to benefit taxpayers." Id. ¶ 65 (quoting a Treasury press release).

b. The FHFA-C agreed to changes that benefit Treasury.

For its part, the FHFA-C was operating under the belief that Treasury would benefit from the PSPA Amendments. Treasury anticipated that its receipts under the PSPA Amendments

[6] The capital reserve for each Enterprise started at $3 billion and was set to decrease to $0 by January 2018, but the Enterprises and Treasury agreed in December 2017 to reset the capital reserve amount to $3 billion in the first quarter of 2018. Fairholme II, 147 Fed. Cl. at 19 n.5.

would exceed those under the prior scheme and would lead to a better outcome for taxpayers. Fairholme II, 147 Fed. Cl. at 19. Moreover, Mel Watt—a former FHFA Director—confirmed that he was concerned with how decisions affect the taxpayers. Id.

c. Treasury and the FHFA understood that the PSPA Amendments would not facilitate the Enterprises exiting conservatorship.

Treasury was aware that the new terms of the PSPAs were not conducive to the Enterprises exiting conservatorship. When announcing the PSPA Amendments, Treasury openly acknowledged that the new terms would expedite the winding down of Fannie and Freddie. 1st Am. Compl. ¶ 65. Treasury further explained that the new deal would ensure that the Enterprises "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." Id. (quoting a press release). Indeed, a White House official sent a message to a Treasury official when the deal was announced noting that Treasury was "clos[ing] off [the] possibility that [Fannie and Freddie] ever[] go (pretend) private again." Id. ¶ 69 (alterations in original) (quoting the message).

The FHFA shared the goal of winding down the Enterprises. Id. ¶ 63. Numerous statements of FHFA officials confirm that Fannie and Freddie were not intended to return to private corporate status. Fairholme II, 147 Fed. Cl. at 20. Indeed, the FHFA did not expect the Enterprises to exit conservatorship, or that they would survive to continue to play a role in the housing finance market. Id.

d. Treasury has benefited from the PSPA Amendments at the expense of the Enterprises and other shareholders.

There are four significant effects that flowed from the PSPA Amendments. First, plaintiffs lost their economic interests in the Enterprises because, under the new terms, private shareholders can never receive dividends or liquidation distributions. 1st Am. Compl. ¶¶ 56, 58, 73. Second, Treasury acquired plaintiffs' economic interests in the Enterprises because Treasury has now transferred all of those economic interests to itself. Id. ¶¶ 82-87. Third, Treasury reaped a windfall of $125.5 billion in comparison to what it would have received absent changes to the PSPAs. Id. ¶ 70. Fourth, the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink of insolvency. Id. ¶ 97.

8. Treasury and the FHFA are committed to ending the conservatorships.

On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the Treasury Secretary to develop, "as soon as practicable," a plan for "[e]nding the conservatorships of the [Enterprises] upon the completion of specified reforms . . . ."[7]

[7] The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source, the Federal Register. See Murakami v. United States, 46 Fed. Cl. 731, 739 (2000) (noting that the court may take judicial notice of government documents), aff'd, 398 F.3d 1342, 1354-55 (Fed. Cir. 2005); see also Democracy Forward

Memorandum on Federal Housing Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must include proposals for "[s]etting the conditions necessary for the termination of the conservatorships" and outlined some of those conditions. Id. at 12,480. Subsequently, Treasury issued a plan in which it advocated for "begin[ning] the process of ending the [Enterprises'] conservatorships."[8] U.S. Dep't of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf [https://perma.cc/RGH8-N385]; accord id. at 26 ("It is, after 11 years, time to bring the conservatorships to an end."). As part of the plan to end the conservatorships, Treasury proposed that it and the FHFA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. Id. at 26-27.

The FHFA shares Treasury's goals with respect to the conservatorships. Mark Calabria, the current FHFA Director, testified during his confirmation hearing that he wanted to end the conservatorships.[9] 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony). See generally Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs, 116th Cong. 10-40, 74-75, 148-85 (2019) [hereinafter Calabria Testimony] (documenting Mr. Calabria's testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that each Enterprise retains. Calabria Testimony, supra, at 150; see also id. at 25 ("I support the idea of having significantly more capital at the [Enterprises].").

B. Plaintiffs own Fannie and/or Freddie stock.

There are two categories of plaintiffs in this litigation brought as a class action. One putative class of plaintiffs consists of holders of Fannie preferred stock, except the United States, and the other putative class is composed of holders of Freddie preferred stock, except the United States. 1st Am. Compl. ¶¶ 15-16, 115. The class members purchased their stock before the Net Worth Sweep. Id. Class members may hold stock in just one of the Enterprises, or both. Id.

Found. v. White House Office of Am. Innovation, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) ("[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum."). See generally Fed. R. Evid. 201 (discussing judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the court may consider facts derived from sources subject to judicial notice without converting the motion into one for summary judgment. Sebastian v. United States, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

[8] The court takes judicial notice of Treasury's reform plan because it is a government record available from a reliable source, Treasury's website. See supra note 7.

[9] The court takes judicial notice of the relevant testimony because the statements are recorded in government documents. See supra note 7.

II. PROCEDURAL HISTORY

Plaintiffs filed their complaint on July 10, 2013.[10] After jurisdictional discovery proceeded in Fairholme, a related case, see supra note 1, plaintiffs filed their first amended consolidated class action complaint in this case on March 8, 2018.[11] In their amended complaint, plaintiffs plead six direct claims brought in their individual capacities as shareholders.

Plaintiffs first assert that the Net Worth Sweep constitutes a Fifth Amendment taking of their economic interests in their stock (count I). Next, plaintiffs assert a different takings claim based on any judicial interpretation of HERA that precludes them from recovering just compensation for their property interest in certain causes of action, inluding derivative claims on behalf of the Enterprises (count II). Plaintiffs further assert that the Net Worth Sweep constitutes an illegal exaction (count III) of their economic interests in their stock because (1) the FHFA-C was operating against its statutory mandate to preserve the Enterprises' assets; (2) the FHFA-C repudiated the Enterprises' contractual obligations to their shareholders outside of the permissible statutory time-frame; and (3) Treasury entered into the PSPA Amendments after the statutory time frame for entering into such contracts had expired.

Plaintiffs also plead two breach-of-contract claims. In the first, they allege that their stock certificates bind the Enterprises in contract, and that these contracts were breached by the FHFA-C when it entered into the PSPA Amendments, depriving plaintiffs of the benefits of those contracts (count IV). In the second breach-of-contract claim, founded again on plaintiffs' stock certificates, they allege that the FHFA-C breached the Enterprises' implied covenant of good faith and fair dealing vis-à-vis plaintiffs (count V). Lastly, plaintiffs allege that the FHFA-C, as a conservator pursuant to HERA, owes a fiduciary duty to plaintiffs. The breach-of-fiduciary-duty claim ("fiduciary duty claim") is premised on the Net Worth Sweep being unfair; constituting waste, self-dealing, gross overreach, and gross abuse of discretion; and failing to further a valid business purpose or reflect a good faith business judgment (count VI).

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case and eleven related cases before the undersigned.[12] The plaintiffs in each of

[10] This is a consolidated case composed of three putative class actions (Cacciapalle v. United States, No. 13-466C; American European Insurance Co. v. United States, No. 13-496C; and Dennis v. United States, No. 13-542C) with two designated class representative plaintiffs (Joseph Cacciapalle and the American European Insurance Company). Cacciapalle is the lead case and the original Cacciapalle complaint was designated as the operative complaint for the consolidated case.

[11] A fuller recitation of the procedural history of this case and related cases is provided in Fairholme II, 147 Fed. Cl. at 21-23.

[12] The eleven related cases are Washington Federal v. United States, No. 13-385C; Fairholme Funds, Inc. v. United States, No. 13-465C; Fisher v. United States, No. 13-608C; Arrowood Indemnity Company v. United States, No. 13-698C; Reid v. United States, No. 14-152C; Rafter v. United States, No. 14-740C; Owl Creek Asia I, L.P. v. United States, No. 18-281C; Akanthos Opportunity Master Fund, L.P. v. United States, No. 18-369C; Appaloosa

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the twelve cases filed a response brief on their respective dockets; some of the plaintiffs relied on a joint brief, while others, as is the case here, filed a joint brief and a supplemental response brief.[13] Defendant filed its omnibus reply brief in each of the cases on May 6, 2019. The parties have fully briefed defendant's motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiffs in this case have adopted the favorable arguments made by the plaintiffs in the related cases to the extent that such arguments are relevant.[14] Defendant's motion to dismiss is now ripe for adjudication.

III. STANDARD OF REVIEW

In ruling on a motion to dismiss a complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), the court generally assumes that the allegations in the complaint are true and construes those allegations in the plaintiff's favor. Trusted Integration, Inc. v. United States, 659 F.3d 1159, 1163 (Fed. Cir. 2011). With respect to RCFC 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of the evidence, that the court possesses subject-matter jurisdiction. Id. The allegations in the complaint must include "the facts essential to show jurisdiction." McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936). And, if such jurisdictional facts are challenged in a motion to dismiss, the plaintiff "must support them by competent proof." Id.; accord Land v. Dollar, 330 U.S. 731, 735 & n.4 (1947) ("[W]hen a question of the District Court's jurisdiction is raised, . . . the court may inquire by affidavits or otherwise, into the facts as they exist." (citations omitted)). If the court finds that it lacks subject-matter jurisdiction, it must, pursuant to RCFC 12(h)(3), dismiss the complaint.

A claim that survives a jurisdictional challenge remains subject to dismissal under RCFC 12(b)(6) if it does not provide a basis for the court to grant relief. Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002) ("A motion to dismiss . . . for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy."). To survive a motion to dismiss under RCFC 12(b)(6), a plaintiff must include in the complaint "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Indeed, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the

Investment Limited Partnership I v. United States, No. 18-370C; CSS, LLC v. United States, No. 18-371C; and Mason Capital L.P. v. United States, No. 18-529C.

[13] The court addresses in this opinion some arguments that were made primarily by the plaintiffs in the related cases to provide context for the resolution of defendant's motion to dismiss. In addition, to the extent that any of plaintiffs' less-developed arguments are not discussed in this opinion, the court found such arguments to be unpersuasive.

[14] Given that plaintiffs here allege six direct claims, the court does not infer that they adopted the Reid and Fisher plaintiffs' argument that shareholder claims regarding the PSPA Amendments are derivative claims brought on behalf of the Enterprises.

claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 814-19 (1982).

IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a "threshold matter." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998). Subject-matter jurisdiction cannot be waived or forfeited because it "involves a court's power to hear a case." Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it is "an inflexible matter that must be considered before proceeding to evaluate the merits of a case." Matthews v. United States, 72 Fed. Cl. 274, 278 (2006); accord K-Con Bldg. Sys., Inc. v. United States, 778 F.3d 1000, 1004-05 (Fed. Cir. 2015). Either party, or the court sua sponte, may challenge the court's subject-matter jurisdiction at any time. Arbaugh, 546 U.S. at 506; see also Jeun v. United States, 128 Fed. Cl. 203, 209-10 (2016) (collecting cases).

The ability of the United States Court of Federal Claims ("Court of Federal Claims") to entertain suits against the United States is limited. "The United States, as sovereign, is immune from suit save as it consents to be sued." United States v. Sherwood, 312 U.S. 584, 586 (1941). The waiver of immunity "may not be inferred, but must be unequivocally expressed." United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003). Any such waiver must be narrowly construed. Smith v. Orr, 855 F.2d 1544, 1552 (Fed. Cir. 1988). The Tucker Act, the principal statute governing the jurisdiction of this court, waives sovereign immunity for claims against the United States, not sounding in tort, that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (2018); White Mountain, 537 U.S. at 472. However, the Tucker Act is merely a jurisdictional statute and "does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 298 (1976). Instead, the substantive right must appear in another source of law, such as a "money-mandating constitutional provision, statute or regulation that has been violated, or an express or implied contract with the United States." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc).

Defendant challenges the court's jurisdiction to entertain plaintiffs' claims on a number of bases. Specifically, defendant argues that 28 U.S.C. § 1500 bars plaintiffs' claims, that plaintiffs have not asserted claims against the United States, and that the court lacks jurisdiction over the subject matter of certain claims. The court addresses each of these bases in turn.[15]

[15] In Fairholme II, the court addressed an additional jurisdictional concern that was not raised in this case. See generally 147 Fed. Cl. at 34-37 (rejecting the contention of a putative intervenor that the Court of Federal Claims lacks jurisdiction to entertain Fifth Amendment takings claims).

A. Plaintiffs are not barred by 28 U.S.C. § 1500 from litigating their claims in this court.

The court first addresses defendant's argument that the court lacks jurisdiction to consider plaintiffs' claims because plaintiffs initiated lawsuits in other courts after filing their complaint in this court. Specifically, defendant asserts that the claims are barred by 28 U.S.C. § 1500, which provides:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Defendant acknowledges that, under binding precedent, § 1500 is not a bar in this case because the limitation only applies "when the suit shall have been commenced in the other court before the claim was filed in [the Court of Federal Claims]." Tecon Eng'rs, Inc. v. United States, 343 F.2d 943, 949 (Ct. Cl. 1965). Nonetheless, defendant asserts that the court should reinterpret § 1500 as creating a jurisdictional bar regardless of the timing of the filings. Plaintiffs counter that the court cannot disregard the binding precedent.

As defendant acknowledges, its argument is foreclosed by binding precedent: The jurisdictional limitation in § 1500 does not apply in this case because plaintiffs filed their complaint in this court before seeking redress in other jurisdictions. See Tecon, 343 F.2d at 949; see also Res. Invs., Inc. v. United States, 785 F.3d 660, 670 (Fed. Cir. 2015) (noting that Tecon remains good law in this circuit). Compare Class Action Compl. (filed July 10, 2013), with Class Action Compl., Cacciapelle v. Fed. Nat'l Mortg. Ass'n, No. 13-1149 (D.D.C. July 29, 2013). Although defendant urges the court to reconsider the rule set forth in Tecon, the court cannot do so because it is bound by that precedent. See Coltec Indus., Inc. v. United States, 454 F.3d 1340, 1353 (Fed. Cir. 2006) ("There can be no question that the Court of Federal Claims is required to follow the precedent of . . . our court, and our predecessor court, the Court of Claims."). Plaintiffs' claims, therefore, are not barred by § 1500.

B. Plaintiffs have asserted claims against the United States.

The court next considers whether plaintiffs have asserted claims against the United States, a necessary element of jurisdiction in the Court of Federal Claims. As set forth in their amended complaint, plaintiffs premise two of their claims on actions taken by the FHFA-C and Treasury. Specifically, the Fifth Amendment takings claim in count I and the illegal-exaction claim in count III both reference the FHFA-C and Treasury.[16] 1st Am. Compl. ¶¶ 129, 145.

[16] Although plaintiffs use "FHFA" in counts I and III of their amended complaint, 1st Am. Compl. ¶¶ 129, 145, the basis of those counts—the Net Worth Sweep—was executed by the FHFA in its role as conservator, see supra Section I.A.7 (describing the genesis and execution of the Net Worth Sweep); see also Pls.' Omnibus Resp. to Def.'s Mot. to Dismiss 10-13, 19-21

Plaintiffs' breach-of-contract and fiduciary duty claims (counts IV, V, and VI) rely on the duties and responsibilities allegedly assumed by the FHFA-C. Id. ¶¶ 153, 161, 167. Finally, the judicial takings claim in count II is premised on actions taken by any court, and in particular the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), which would impede plaintiffs from pursuing derivative claims on behalf of the Enterprises, or from pursuing injunctive or declaratory relief, in response to the Net Worth Sweep. Id. ¶¶ 136-137. Because the judicial takings claim does not concern the actions of Treasury or the FHFA-C, it will be addressed separately in Section IV.C, infra.

Defendant argues that the court lacks jurisdiction to consider any claims premised on the FHFA-C's or Treasury's conduct. In response, plaintiffs contend that they have asserted claims against the government because (1) Treasury was involved in the challenged conduct, (2) the FHFA-C exercised nontraditional conservator powers such that its actions must be deemed those of the government, (3) the FHFA-C was coerced by the government, (4) the FHFA-C was the government's agent, and (5) the FHFA-C is a government actor. The court addresses each contention in turn.[17]

1. The court cannot exercise jurisdiction based on allegations of Treasury's involvement.

Plaintiffs initially argue that the court has jurisdiction over their Fifth Amendment takings and illegal-exaction claims because they have alleged the involvement of Treasury—indisputably a part of the federal government—in the action underlying these claims, i.e., the Net Worth Sweep. Defendant counters that Treasury alone could not have implemented the PSPA Amendments, and Treasury's role as a counterparty to the voluntary agreement with the Enterprises is not sufficient to establish jurisdiction over plaintiffs' takings claims. Defendant further asserts that the court's order allowing jurisdictional discovery reflects that plaintiffs' allegations concerning Treasury alone are insufficient to confer jurisdiction.

The parties' dispute on the import of allegations concerning Treasury is ultimately immaterial in light of the court's determination, explained below, that the FHFA-C—the other party involved in the PSPA Amendments—is the United States. Nonetheless, the court notes, as defendant asserts, that it implicitly acknowledged in its February 26, 2014 discovery order, issued in Fairholme and related cases, that the allegations concerning Treasury alone were insufficient to support jurisdiction. In that order, the court permitted the plaintiffs in those related cases to conduct fact discovery on whether the FHFA-C was "the 'United States' for purposes of the Tucker Act." Fairholme Funds, Inc. v. United States, 114 Fed. Cl. 718, 721 (2014). The aforementioned discovery would have been unnecessary (and unwarranted) if, as plaintiffs assert, the court has jurisdiction over plaintiffs' claims based on their allegations concerning Treasury.

(arguing that actions taken by Treasury and the FHFA-C were actions taken by the United States).

[17] The remainder of this section, Section IV.B, is almost identical to the corresponding jurisdictional analysis section of Fairholme II. 147 Fed. Cl. at 25-34.

2. The FHFA-C exercised its statutory conservatorship powers when it approved the PSPA Amendments for each Enterprise.

Plaintiffs next argue that the FHFA-C must be considered the United States because the FHFA-C acted beyond its authority when it expropriated the Enterprises' assets for the government's benefit. Defendant counters that, irrespective of the "expropriation" label assigned by plaintiffs, the FHFA-C's execution of the PSPA Amendments was consistent with its statutory authority and purpose.

The FHFA-C is the United States for any claims challenging the conservator's conduct that exceeded the applicable statutory authority. Cf. Slattery v. United States, 583 F.3d 800, 827-28 (Fed. Cir. 2009) (noting that the Federal Deposit Insurance Corporation ("FDIC") as receiver is the United States for claims premised on allegations that the receiver failed to distribute funds as required by statute), modified, 635 F.3d 1298 (Fed. Cir. 2011) (en banc). Thus, resolving the parties' dispute requires determining whether the FHFA-C had statutory authority to enter into the PSPA Amendments. The answer depends on HERA. Under HERA, the FHFA-C has exceptionally broad powers. See Jacobs v. Fed. Hous. Fin. Agency, 908 F.3d 884, 889 (3d Cir. 2018) (noting that the FHFA-C's "powers are many and mostly discretionary"); see also Saxton v. Fed. Hous. Fin. Agency, 901 F.3d 954, 960 (8th Cir. 2018) (Stras, J., concurring) ("Congress came close to handing a blank check to the FHFA."). The FHFA-C wields complete control over the Enterprises; it succeeds to the rights and powers of the Enterprises as well as their shareholders, directors, and officers. 12 U.S.C. § 4617(b)(2)(A)(i). The FHFA-C may (but is not required to) use that power to, among other things, further the FHFA's interests, carry on the Enterprises' business, preserve and conserve the Enterprises' assets, and place the Enterprises in sound and solvent condition.[18] Id. § 4617(b)(2)(B), (D), (J) (noting actions that the FHFA-C "may" undertake); see also Roberts v. Fed. Hous. Fin. Agency, 889 F.3d 397, 403 (7th Cir. 2018) (explaining that Congress's use of "may" reflects that the FHFA-C has discretionary authority).

Congress's broad grant of power to the FHFA-C colors the analysis of whether the FHFA-C became the United States by approving the PSPA Amendments. As an initial matter, plaintiffs' contention that the FHFA-C exceeded its statutory authority by expropriating the Enterprises' assets for the government is unavailing because the FHFA-C is authorized to act in its own interest without regard for the effects on the Enterprises. Moreover, the FHFA-C's approval of the PSPA Amendments is in accordance with its authority to operate the Enterprises and preserve their assets. As operating businesses, the Enterprises needed to "secure ongoing

[18] The conclusion that the FHFA-C has some discretionary powers is buttressed by the fact that Congress stated the conservator "may" do certain things but "shall" do others. See Huston v. United States, 956 F.2d 259, 262 (Fed. Cir. 1992) ("When, within the same statute, Congress uses both 'shall' and 'may,' it is differentiating between mandatory and discretionary tasks."). Compare 12 U.S.C. § 4617(b)(2)(D) ("The [FHFA] may, as conservator, take such action as may be . . . necessary to put the regulated entity in sound and solvent condition . . . ." (emphasis added)), with id. § 4617(b)(14)(A) ("The [FHFA] as conservator or receiver shall . . . maintain a full accounting of each conservatorship and receivership or other disposition of a[n Enterprise] in default." (emphasis added)).

access to capital, manage debt loads, control cash flow, and decide whether and how to pay dividends." Jacobs, 908 F.3d at 890. The FHFA-C achieved those goals with the PSPA Amendments, which are, "in essence[,] a renegotiation of an existing lending agreement." Id. By agreeing to the PSPA Amendments, the FHFA-C eliminated the risk of the Enterprises consuming all of their financial lifeline (Treasury's funding commitment) through cash-dividend payments or entering a cycle of an ever-increasing liquidation preference.[19] Roberts, 889 F.3d at 404-05; see also Jacobs, 908 F.3d at 890 (noting that the Enterprises increased their future obligations and reduced their available funds by drawing funds from Treasury to pay the dividend); Saxton, 901 F.3d at 962 (Callas, J., concurring) ("Crushing dividend payments could have led the entities toward insolvency."). The FHFA-C, with the amendments, also protected the Enterprises against future financial downturns.[20] See Jacobs, 908 F.3d at 890 ("The [PSPA Amendments] insured the [Enterprises] against downturns and 'death spirals,' preventing unpayable dividends from ratcheting up their debt loads to unsustainable levels."); see also Roberts, 889 F.3d at 405 (noting that the Enterprises fared better in some years and worse in other years under the terms of the PSPA Amendments as compared to the previous agreements).

In light of the above, the FHFA-C's execution of the PSPA Amendment for each Enterprise was a "quintessential conservatorship task[]" that is appropriate under HERA. Perry II, 864 F.3d at 607. Although "stockholders no doubt disagree about the necessity and fiscal wisdom of the [PSPA Amendments] . . . , Congress could not have been clearer about leaving those hard operational calls to the FHFA's managerial judgment." Id. In sum, the court joins the growing consensus that the FHFA-C acted within its statutory authority when it entered into the PSPA Amendments. See Jacobs, 908 F.3d at 894; Saxton, 901 F.3d at 963; Roberts, 889 F.3d at 403; Robinson v. Fed. Hous. Fin. Agency, 876 F.3d 220, 231 (6th Cir. 2017); Perry II, 864 F.3d at 606. But see Collins v. Mnuchin, 938 F.3d 553, 582 (5th Cir. 2019) (en banc) (holding, over the dissent of seven judges, that the plaintiffs stated a plausible claim that the FHFA-C exceeded its statutory authority), petitions for cert. filed, 88 U.S.L.W. 3114 (U.S. Sept. 25, 2019) (No. 19-422), 88 U.S.L.W. 3146 (U.S. Oct. 25, 2019) (No. 19-563). Thus, plaintiffs' theory that the FHFA-C is the United States because the FHFA-C exceeded its statutory authority is not persuasive.

3. The FHFA-C was not coerced into approving the PSPA Amendments.

[19] If, under the terms of the PSPAs before the PSPA Amendments, the Enterprises chose to make their dividend payment by increasing Treasury's liquidation preference, the future dividends would be more expensive because the dividends were a set percentage of the liquidation preference. Making future dividends more expensive would, in turn, increase the likelihood that the Enterprises would again need to rely on increasing Treasury's liquidation preference rather than making a cash payment. The end result is a cycle in which the Enterprises continue to increase Treasury's liquidation preference.

[20] Although the FHFA-C anticipated continued profitability for the Enterprises in the near term, this fact does not undermine the propriety of the PSPA Amendments because ensuring the continued functioning of a company includes guarding against long-term risks. These long-term outlooks are especially important given the indefinite nature of the FHFA-C's role.

Plaintiffs also argue that the FHFA-C is the United States because the FHFA-C was coerced into approving the PSPA Amendments by Treasury. Plaintiffs assert that Treasury coerced the FHFA-C into approving the PSPA Amendments because (1) Treasury drove the amendment process, (2) Treasury did not plan for the possibility that the FHFA-C would reject the amendments, and (3) the FHFA-C did not propose any alternatives to the amendments. In the alternative, plaintiffs contend that the FHFA, in its role as regulator, coerced the FHFA-C to approve the amendments because the two entities were not acting independently. Specifically, plaintiffs aver that the lines between the FHFA and the FHFA-C were blurred because (1) the FHFA's consent was required for any dividend payment and (2) the FHFA-C approved the amendments to achieve governmental objectives.

Defendant counters that the FHFA-C was not coerced by Treasury because the FHFA-C had a choice of whether to accept or reject the PSPA Amendments. Defendant asserts that there is no coercion if a party has a choice, regardless of however difficult refusal of a particular option may be. With respect to Treasury's involvement, defendant contends that plaintiffs fail to proffer any allegations that Treasury required the FHFA-C to enter into the agreements against its will. Defendant further asserts that other courts have declined to conclude that the FHFA-C felt compelled to follow Treasury based on allegations that Treasury invented the amendment concept or led the process. Defendant also argues that the FHFA-C was not coerced by the FHFA in the latter's role as regulator because there were clear statutory lines delineating the FHFA's authority in each role.[21]

a. The court has jurisdiction over claims based on actions that resulted from government coercion.

The court has jurisdiction over claims premised on the FHFA-C's actions if Treasury's "influence over the" FHFA-C "was coercive rather than merely persuasive." A & D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1154 (Fed. Cir. 2014). The line between coercion and persuasion "is highly fact-specific." Id. Precedent from the United States Court of Appeals for the Federal Circuit ("Federal Circuit") frames the contours of the inquiry. In Langenegger v. United States, the plaintiffs pleaded that the United States coerced El Salvador by threatening to withhold financial and military assistance unless El Salvador passed legislation expropriating private property. 756 F.2d 1565, 1567 (Fed. Cir. 1985). The Federal Circuit disagreed with the plaintiffs' characterization of the threats because "[d]iplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of [coercion], however difficult refusal may be as a practical matter." Id. at 1572. Similarly, the Federal Circuit concluded in B & G Enterprises, Ltd. v. United States that California was not coerced into enacting restrictions on smoking, notwithstanding the federal government conditioning grants on states enacting such limits. 220 F.3d 1318, 1321, 1325 (Fed. Cir. 2000); see also A & D Auto, 748 F.3d at 1155 (explaining that "coercion was not established" in B & G). The court explained that "it was California's decision to create [the] restrictions[;] . . . Congress may have provided the bait, but California decided to bite." B & G,

[21] Defendant frames its argument as addressing whether the FHFA-C acted as an agent for the FHFA in its role as regulator, but defendant is responding to plaintiffs' coercion argument.

220 F.3d at 1325. In A & D Auto, the Federal Circuit addressed coercion in the context of the government allegedly conditioning vital financial assistance to bankrupt automobile companies on those companies terminating some of their franchise agreements. 748 F.3d at 1145. Unable to resolve the issue due to gaps in the record, the court noted in dicta that a relevant consideration was "whether the government financing was essential to the companies." Id.

A common thread runs through the Federal Circuit's decisions: the importance of choice. A nonfederal actor is not coerced when it can choose to go against the wishes of the United States, even if doing so will cause significant hardships, Langenegger, 756 F.2d at 1567, or result in a loss of prospective benefits, id.; B & G, 220 F.3d at 1325. But there is no choice, in any meaningful sense, when there is only one realistic option. A & D Auto, 748 F.3d at 1145 (noting the importance of considering whether the companies could survive without accepting the government's offer); cf. Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) (noting that, with respect to Congress's spending powers, "the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions"). Put differently, the nonfederal actor must make a voluntary decision, which it cannot do if there is only one realistic option. See BMR Gold Corp. v. United States, 41 Fed. Cl. 277, 282 (1998) (finding that the "the necessary element of coerciveness" for a taking was missing because the plaintiff granted the military permission to cross his land); accord Henn v. Nat'l Geographic Soc., 819 F.2d 824, 826 (7th Cir. 1987) (noting that hard choices remain voluntary when they are not akin to "Don Corleone's '[m]ake him an offer he can't refuse'"). In sum, the FHFA-C was not coerced if it voluntarily chose to enter into the PSPA Amendments.

b. Plaintiffs have not established that Treasury coerced the FHFA-C into approving the PSPA Amendments.

In support of their contention that Treasury coerced the FHFA-C into approving the PSPA Amendments, plaintiffs allege that Treasury proposed the terms of the amendments, and the FHFA-C did not make a counteroffer. Those allegations are not enough to establish coercion. First, given the Enterprises' improving financial condition and Treasury's existing funding commitment, the FHFA-C's decision to execute the PSPA Amendments was voluntary because it could reject the deals without imperiling the Enterprises. The facts here, therefore, are diametrically opposed to the circumstances in A & D Auto that the Federal Circuit suggested may support coercion because the automobile dealers faced insolvency if they did not accede to the financing terms. See 748 F.3d at 1145. Second, the FHFA-C's lack of protestation is informative. "[T]he very fact that FHFA[-C] itself [did] not br[ing] suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA[-C] was an independent, willing participant in its negotiations with the Treasury." Robinson v. Fed. Hous. Fin. Agency, 223 F. Supp. 3d 659, 668 (E.D. Ky. 2016), aff'd, 876 F.3d at 220. The court's conclusion is bolstered by the fact that another court has held that materially similar allegations to those at issue here did not "come close to a reasonable inference that [the] FHFA[-C] considered itself bound to do whatever Treasury ordered." Perry Capital LLC v. Lew, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) ("Perry I"), aff'd in part, rev'd in part sub nom. Perry II, 864 F.3d at 591. This court agrees with the reasoning in Perry I: the PSPA Amendments were executed by sophisticated parties, and many agreements arise from a party's proposal being accepted by the other party. Id.

c. Plaintiffs have not established that the FHFA coerced the FHFA-C into approving the PSPA Amendments.

Plaintiffs also have not alleged facts reflecting that the FHFA coerced the FHFA-C into agreeing to the PSPA Amendments. As an initial matter, plaintiffs have not alleged that the FHFA unduly influenced the FHFA-C's decision-making process with respect to the proposed agreements. They merely allege that the FHFA did not silo its regulatory and conservator roles. The lack of a firewall (without more), however, does not indicate that the FHFA deprived the FHFA-C of meaningful choice. Moreover, plaintiffs' focus on the FHFA-C allegedly pursuing government objectives when it approved the PSPA Amendments is a red herring. The purported pursuit of government objectives is not germane to the coercion inquiry because it does not suggest that the FHFA-C lacked any choice in the matter. Even if it was relevant to coercion (or to some other theory for jurisdiction), plaintiffs would not prevail because Congress permitted the FHFA-C to act in the interests of the government. See 12 U.S.C. § 4617(b)(2)(J) (allowing the FHFA-C to "take any action" that "is in the interests of the [Enterprises] or the [FHFA]"). The mere pursuit of government objectives, therefore, would not reflect a blending of any roles but rather the FHFA-C using powers afforded to it by Congress.

In conclusion, plaintiffs have not established that the FHFA-C was coerced into approving the PSPA Amendments by Treasury or the FHFA.

4. The FHFA-C is not Treasury's agent.

Plaintiffs further argue that the FHFA-C's actions are attributable to the United States because the FHFA-C is Treasury's agent. Plaintiffs assert that the FHFA-C is a government agent because (1) Treasury, by virtue of the PSPAs, had a major role in conservator decisions; (2) the FHFA-C approved the PSPA Amendments for the taxpayers' benefit; and (3) the FHFA-C could not have approved the amendments absent statutory authority. Defendant counters that plaintiffs have not pleaded an agency relationship because Treasury does not control the FHFA-C's operations and is statutorily barred from exercising such control.

The United States is subject to claims in this court for the actions of a third party "if [that] party is acting as the government's agent . . . ." A & D Auto, 748 F.3d at 1154. "An essential element of agency is the principal's right to control the agent's actions." Hollingsworth v. Perry, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01 cmt. f (Am. Law. Inst. 2005)); accord O'Neill v. Dep't of Hous. & Urban Dev., 220 F.3d 1354, 1360 (Fed. Cir. 2000) (acknowledging that the common-law meaning of agency requires, among other things, that the principal has the right to control the agent's conduct); see also Preseault v. United States, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (concluding that a state's actions were attributable to the United States when the state acted pursuant to the Interstate Commerce Commission's order); Hendler v. United States, 952 F.2d 1364, 1378-79 (Fed. Cir. 1991) (attributing a state's actions to the United States when the state acted under authority flowing from an Environmental Protection Agency order). The facts, as alleged, do not reflect that Treasury controlled the

FHFA-C's actions because Congress explicitly precluded the FHFA-C from being subservient to another agency, 12 U.S.C. § 4617(a)(7) (providing that the FHFA-C cannot be subject to the "direction or supervision" of any other agency), and plaintiffs have not alleged facts indicating that Treasury exercised such control notwithstanding the statutory bar. Although the FHFA-C was required by the PSPAs to obtain Treasury's approval for certain actions (e.g., issuing dividends), the PSPAs did not provide Treasury with the right to unilaterally order amendments. Moreover, plaintiffs describe an FHFA-C that made decisions independently, even though it shared Treasury's goals: Treasury and the FHFA-C "act[ed] in concert"; the FHFA-C, like Treasury, "also determined to 'wind down'" the Enterprises; and Treasury and the FHFA-C agreed on specific terms of the PSPS Amendments. 1st Am. Compl. ¶¶ 56, 62, 76. Simply stated, plaintiffs have not alleged facts establishing that Treasury exercised the control over the FHFA-C that is necessary for an agency relationship.

5. The FHFA-C is the United States because the FHFA-C retains the FHFA's governmental character.

Finally, plaintiffs contend that the FHFA-C is itself a government actor. Defendant disagrees. First, relying on O'Melveny & Myers v. FDIC, 412 U.S. 79 (1994), defendant argues that the FHFA-C is not the United States because the FHFA-C stands in the Enterprises' shoes. Specifically, defendant asserts that Congress's decision to have the FHFA-C succeed to the Enterprises' rights reflects that Congress intended that the FHFA-C step into the Enterprises' private shoes and shed its government character. Second, defendant argues that the FHFA-C's exercise of nontraditional conservatorship powers is immaterial because Congress can expand the conservator's role without transforming it into a government actor. Third, defendant argues that the Enterprises are not government instrumentalities—which means that the FHFA did not step into the shoes of a government actor when it became the Enterprises' conservator—because the government does not retain permanent authority to appoint the Enterprises' directors. Defendant contends that the government only has temporary, albeit indefinite, control over the Enterprises because the conservatorships are not permanent.

In response, plaintiffs dispute the premise of defendant's argument that, pursuant to O'Melveny, the FHFA becomes the Enterprises when acting as conservator. Plaintiffs assert that O'Melveny does not concern whether an entity is the United States or, if the decision can be read as addressing that issue, is distinguishable because it concerns receivers or is limited to conservators exercising traditional conservator powers. Second, plaintiffs argue that the FHFA has not shed its government status, even if it has stepped into the Enterprises' shoes, when it acts as conservator. Specifically, plaintiffs assert that the FHFA-C retains the FHFA's government status because (1) the FHFA-C has acted beyond the traditional conservator powers and (2) Congress expressed its intention for that result by precluding the conservator from being subject to the supervision of "any other agency." 12 U.S.C. § 4617 (emphasis added). Third, plaintiffs argue that their claims are against the United States, even if the FHFA-C steps into the shoes of the Enterprises, because the Enterprises are government instrumentalities.

In short, the parties disagree over the government status of the FHFA-C. The FHFA is indisputably the United States, see id. § 4511(a) (establishing the FHFA as an "independent agency of the Federal Government"), and so the only question is whether the FHFA sheds that status when it acts as conservator. In other jurisdictions, courts have held (with near unanimity) that the FHFA loses its government status pursuant to O'Melveny. In O'Melveny, the United States Supreme Court ("Supreme Court") explained that the FDIC "steps into [the] shoes" of a private company when acting as receiver and sheds its government character because the FDIC "succeed[s] to . . . all rights, titles, powers, and privileges of the [entity in receivership] . . . ." 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); see also AG Route Seven P'ship v. United States, 57 Fed. Cl. 521, 534 (2003) (citing O'Melveny for the proposition that the FDIC as receiver is a "private party, and not the government per se" because it "is merely standing in the shoes . . . of the defunct thrift"). The courts drawing from O'Melveny have concluded that the FHFA steps into the shoes of the Enterprises and sheds its government character when acting as conservator because Congress provided that the FHFA-C exercises the same rights with respect to the Enterprises as Congress granted to the FDIC as receiver. See, e.g., Herron v. Fannie Mae, 861 F.3d 160, 169 (D.C. Cir. 2017); cf. Ameristar Fin. Servicing Co. v. United States, 75 Fed. Cl. 807, 811 (2007) (concluding, with respect to the FDIC, that the step-into-the-shoes principle set forth in O'Melveny also applies in the conservator context).

a. The FHFA-C is not the United States if the FHFA steps into the Enterprises' shoes when acting as conservator.

Plaintiffs initially contend that defendant's reliance on O'Melveny is a red herring because, assuming that O'Melveny applies, the FHFA-C is the United States even though it steps into the Enterprises' shoes. Specifically, plaintiffs assert that the FHFA-C is the United States under the facts alleged because (1) the FHFA-C exercises nontraditional conservator powers, (2) Congress intended that the FHFA-C retain the FHFA's government status, and (3) the FHFA-C steps into the shoes of a government instrumentality. The court addresses each assertion in turn.

First, the FHFA-C did not become a government actor by exercising powers beyond those traditionally afforded to a conservator. As a threshold matter, plaintiffs have not alleged facts reflecting that the FHFA-C used such powers; the execution of the PSPA Amendments was a "quintessential conservatorship" function. Perry II, 864 F.3d at 607; see also supra Section IV.B.2 (discussing the FHFA-C's exercise of its powers). More importantly, however, plaintiffs would not prevail even if the FHFA-C exercised nontraditional conservatorship powers in agreeing to the PSPA Amendments. When this argument was pressed in other jurisdictions, it was rejected:

> It may well be true that FHFA's actions would not be allowed under traditional principles of corporate or conservatorship law, but it does not follow that those actions are therefore governmental. Legislatures can expand conservatorship and similar powers without transforming conservators into agents of the government. Cf. Pegram v. Herdrich, 530 U.S. 211, 225-26 (2000) (explaining that the Employee Retirement Income Security Act altered the common law of trusts to permit certain actions that would otherwise violate the trustee's fiduciary duties).

Bhatti v. Fed. Hous. Fin. Agency, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (footnote omitted). The court agrees with that reasoning, and plaintiffs provide no authority that supports a contrary result. Although plaintiffs state that the D.C. Circuit's decision in Waterview Management Co. v. FDIC, 105 F.3d 696 (D.C. Cir. 1997), supports their position, they are mistaken. Waterview is not on point because the D.C. Circuit did not hold that a conservator is per se the United States when acting pursuant to a congressional grant of broad powers. Rather, it held that, as a matter of statutory interpretation, the existence of a receivership did not preempt a prereceivership contract. Id. at 699-702.

Second, Congress's instruction that the FHFA-C is not subject to the supervision of any other agency does not reflect congressional intent for the FHFA to retain its government status when acting as conservator even if it steps into the shoes of the Enterprises. Because the court only reaches this issue by assuming that O'Melveny is instructive, the statutory language concerning supervision of the FHFA-C does not support a finding of jurisdiction because the same language is present in the statute that the Supreme Court addressed in O'Melveny. See 512 U.S. at 85-86 (discussing 12 U.S.C. § 1821). Compare 12 U.S.C. § 1821(c)(3)(C) ("When acting as conservator or receiver . . . , [the FDIC] shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC's] rights, powers, and privileges."), with id. § 4617(a)(7) ("When acting as conservator or receiver, the [FHFA] shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the [FHFA].").

The third argument advanced by plaintiffs—that the FHFA-C is the United States because it steps into the shoes of a government instrumentality—also is not meritorious. A government instrumentality's actions are attributable to the United States for purposes of the Tucker Act. See Corr v. Metro. Wash. Airports Auth., 702 F.3d 1334, 1336 (Fed. Cir. 2012) (noting that a claim against a government instrumentality is a claim against the United States for purposes of the Little Tucker Act, 28 U.S.C. § 1346(a)(2)). The Supreme Court established in Lebron v. National Railroad Passenger Corp. that a company is a government instrumentality when (1) it is created by "special law," (2) it is established "for the furtherance of governmental objectives," and (3) the federal government "retains for itself permanent authority to appoint a majority of the [company's] directors . . . ." 513 U.S. 374, 400 (1995). After Lebron, the Supreme Court clarified that, for purposes of the instrumentality test, "the practical reality of federal control and supervision prevails over Congress' disclaimer of [the entity's] governmental status." Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 55 (2015).

There is no dispute that the Enterprises satisfy the first two prongs of the Lebron test; Congress created the Enterprises by special law to achieve governmental objectives related to the housing market. See 12 U.S.C. § 4501; see also Herron, 861 F.3d at 167 (addressing claims involving Fannie and noting that "[t]his case satisfies the first two Lebron criteria"); Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 75 F.3d 1401, 1406-07 (9th Cir. 1996) (reaching same conclusion for Freddie). The status of the Enterprises, therefore, turns on the third prong: whether the government retains permanent authority to appoint a majority of the Enterprises' directors.

The Federal Circuit has not addressed the government-control prong with respect to the Enterprises, but courts in other jurisdictions have done so. Those decisions provide a starting point for the court. It appears that every court to consider the issue, with the exception of one district court, has held that the government does not exercise permanent control over the Enterprises. Sisti v. Fed. Hous. Fin. Agency, 324 F. Supp. 3d 273, 279 (D.R.I. 2018) (concluding that the government retains permanent authority to control the Enterprises after noting that "[t]he non-controlling precedent to date" has reached the opposite conclusion). Most of the courts that concluded that the government lacks permanent control over the Enterprises issued their decisions before the Supreme Court in Association of American Railroads emphasized the importance of evaluating the practical reality over nomenclature, and the other courts focused on the statutory purpose for the conservatorships rather than the Enterprises' actual situation. E.g., Herron, 861 F.3d at 169 (relying on the notion that a conservatorship is fundamentally temporary). In other words, the courts adopting the prevailing view considered the issue of control without regard for the Supreme Court's instruction to focus on the practical reality. The court, therefore, does not find those decisions persuasive.

The crux of the inquiry, as the Supreme Court mandates, is on the practical reality of the government's control over the Enterprises. Ass'n of Am. R.Rs., 575 U.S. at 55. It is of no import that Congress nominally authorized a facially temporary conservatorship, see 12 U.S.C. § 4617(a) (permitting the FHFA to act as conservator to "reorganiz[e]" or "rehabilitat[e]" the Enterprises), because Congress's disclaimers are no substitute for the court's obligation to assess the government's actual control, Ass'n of Am. R.Rs., 575 U.S. at 55. The court focuses on the length of the conservatorship because the FHFA-C wields complete control over the Enterprises so long as they are in conservatorship. See generally 12 U.S.C. § 4617.

Plaintiffs allege that the Enterprises will remain undercapitalized—and thus subject to conservatorship pursuant to 12 U.S.C. § 4617(a)(3)(J)—until the PSPAs, in their current form, are changed because the Enterprises cannot accumulate any capital under the existing terms of the PSPAs. Although the PSPAs could be further amended, plaintiffs' allegations reflect that Treasury and the FHFA-C will not do so because the purpose of the PSPA Amendments is to prevent the Enterprises from accumulating the necessary capital to become independent companies. Plaintiffs, in short, have alleged that the government intended, and has taken steps to ensure, that the conservatorships never end. Those facts, viewed in isolation, would support a conclusion that the practical reality is that the Enterprises are under permanent government control. The court's inquiry, however, is not limited to plaintiffs' allegations because it has taken judicial notice of relevant facts reflecting that the status quo has changed: The Treasury Secretary and the FHFA Director are now both committed to ending the conservatorships. Moreover, the idea that the Enterprises are permanently subject to government control because they can never accumulate the capital needed to exit the conservatorships is undermined by recent developments. Indeed, Treasury proposed amending the Net Worth Sweep to allow the Enterprises to retain more capital, and the FHFA Director testified during his confirmation hearing that, if confirmed, he would seek to increase the amount of capital that the Enterprises retain. Simply stated, the practical reality is that the Enterprises are not subject to permanent government control because the relevant parties are working to terminate the conservatorships.[22]

In sum, the FHFA-C does not become the United States if the FHFA steps into the Enterprises' shoes when serving as conservator.

b. The FHFA-C retains the FHFA's government character because the FHFA-C does not step into the Enterprises' shoes.

The key inquiry, therefore, is whether the FHFA steps into the shoes of the Enterprises when acting as conservator. Defendant argues that the FHFA-C sheds its government character and assumes the identity of the Enterprises based on the reasoning in O'Melveny. Defendant's reliance on O'Melveny is misplaced. O'Melveny concerns a receiver stepping into the shoes of a failed bank. 512 U.S. at 86. The roles of a conservator and receiver are meaningfully different. In a recent decision, the United States District Court for the District of Rhode Island artfully explained the differences and their import for assessing whether the FHFA-C is the government:

> The O'Melveny Court held that FDIC, when acting as a receiver for a private entity, steps into the shoes of that private entity for state law claims. This holding makes sense given the purpose of receivership: "to preserve a company's assets, for the benefit of creditors, in the face of bankruptcy." When FDIC is appointed receiver, it must dispose of the received entity's assets, resolving obligations and claims made against the entity. Notably, "[i]n receivership, the receiver owes fiduciary duties to the creditors, which the corporation would otherwise owe to creditors during a period of insolvency." It logically follows, then, that the receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity.
>
> Conservatorship, in contrast, serves a different function. FHFA has described the purpose of conservatorship is "to establish control and oversight of a company to put it in a sound and solvent condition." Conservators, unlike receivers, have a fiduciary duty running to the corporation itself.

[22] Plaintiffs may disagree with the court's conclusion that events occurring after the PSPA Amendments are relevant to determining whether the Enterprises were under permanent government control during the events discussed in plaintiffs' complaint. Even if the court agreed that events occurring after the PSPA Amendments are not germane, plaintiffs still would not prevail because they allege that the conservatorships began as temporary measures. See 1st Am. Compl. ¶¶ 28 (noting that FHFA publicly announced that the conservatorships would be terminated once the Enterprises were stabilized), 29 (noting that, when the conservatorships were imposed, the FHFA announced that the Enterprises would be returned to their shareholders, once stabilized), 55 (noting that FHFA's director had "vowed" in 2008 that the Enterprises would exit conservatorship and return to normal operations). Thus, the Enterprises were not under permanent government control before the PSPA Amendments.

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> This is "critically distinct" from the fiduciary duties owed as a receiver—the receiver does indeed "step into the shoes" of the entity by assuming the fiduciary duties of the entity, but the conservator does not: it remains distinct, and rather owes a duty to the entity. Given the difference in fiduciary duties, O'Melveny's "steps into the shoes" holding makes sense in the context of receivership, but not in the context of conservatorship.

Sisti, 324 F. Supp. 3d at 282-83 (citations and footnotes omitted). See generally Brian Taylor Goldman, The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State-Action, 17 J. Bus. & Sec. L. 11, 23-30 (2016). The district court, relying on the above analysis, declined to treat the FHFA-C as a private actor. Sisti, 324 F. Supp. 3d at 284. This court agrees with the reasoning and conclusion in Sisti: The FHFA does not shed its government character when acting as conservator because it does not step into the shoes of the Enterprises. Otherwise stated, the FHFA-C is the United States because it retains the FHFA's government character. Plaintiffs' claims, therefore, are against the United States for purposes of the Tucker Act.

C. The court lacks jurisdiction over plaintiffs' judicial takings claim.

The court now turns to defendant's challenge to the plausibility of plaintiffs' judicial takings claim, which, in the court's view, raises a jurisdictional question. Plaintiffs allege in count II of their amended complaint that they possess a property interest in certain causes of action which were foreclosed by the D.C. Circuit's interpretation of HERA. As explained below, however, there is no jurisdiction in this court over plaintiffs' takings claim that collaterally attacks the rulings of another federal court.

In their amended complaint, plaintiffs allege that they possess a property interest in shareholder derivative claims, as well as claims presenting requests for declaratory or injunctive relief, regarding the Net Worth Sweep: "As holders of Preferred Stock, Plaintiffs had the right to protect their investment by filing certain causes of action, including derivative lawsuits and claims seeking injunctive and declaratory relief." 1st Am. Compl. ¶ 134. According to plaintiffs, this property right is "protected by the Fifth Amendment." Id. ¶ 135. Plaintiffs further argue that in Perry II the D.C. Circuit's interpretation of HERA—so as to block such relief—took their property right in these causes of action. Id. ¶¶ 91, 136. Plaintiffs also argue that any other court ruling that has a similar effect on their causes of action would constitute a taking. Id. ¶ 137.

Plaintiffs acknowledge that their petition for certiorari challenging Perry II was denied by the Supreme Court. Id. ¶ 91. Nonetheless, plaintiffs ask this court to entertain their challenge to Perry II, and to any similar court rulings, because

> to the extent that any courts continue to hold that such derivative claims are not possible and thereby block the shareholders in Fannie and Freddie from obtaining a full and just recovery for the loss of their shareholder rights, we assert that such an interpretation of HERA, as applied to the facts of these cases and the [PSPA] Amendment[s], is itself a Taking without just compensation.

Id. ¶ 92. Unfortunately for plaintiffs, the Federal Circuit does not consider collateral attacks on the judgments of other federal courts to be cognizable under this court's jurisdiction over takings claims.

As the Federal Circuit noted recently: "It is well established that the Claims Court 'cannot entertain a taking[s] claim that requires the court to scrutinize the actions of another tribunal.'" Campbell v. United States, 932 F.3d 1331, 1340 (Fed. Cir. 2019) (alteration in original) (citing Petro-Hunt, L.L.C. v. United States, 862 F.3d 1370, 1386 (Fed. Cir. 2017); Allustiarte v. United States, 256 F.3d 1349, 1351-52 (Fed. Cir. 2001)). In Campbell, the appellants attempted to challenge the bases of rulings by a bankruptcy court and a federal district court. Id. Their takings claim could not proceed, however, because it was a "collateral attack on the decisions of the bankruptcy court and district court on a takings theory." Id. The Federal Circuit held that "[t]he proper forum for such a challenge is the judicial appellate process." Id.

Following Campbell and the precedent cited in Campbell, the court concludes that there is no jurisdiction in this court for plaintiffs' takings claim attacking the holdings of Perry II that were adverse to plaintiffs, and attacking similar court rulings, if any.[23] The court, therefore, dismisses count II—plaintiffs' judicial takings claim—because it lacks jurisdiction over that claim. The court now turns to the remaining jurisdictional issues raised by defendant's motion to dismiss.

D. The court lacks jurisdiction over plaintiffs' claim that sounds in tort.

1. Plaintiffs' fiduciary duty claim sounds in tort.

Defendant argues that the court lacks jurisdiction over plaintiffs' fiduciary duty claim because the United States does not owe to each Enterprise's shareholders a fiduciary duty that is grounded in a statute or contract. Defendant asserts that such a fiduciary duty cannot be based on (1) HERA because, pursuant to the statute, the FHFA-C is only required to act in the government's and the Enterprises' best interests; or (2) the PSPAs because plaintiffs are not parties to those contracts. Plaintiffs counter that their claim is based on a fiduciary duty rooted in both HERA and the PSPAs. As to HERA, plaintiffs assert that Congress made the FHFA-C a fiduciary by authorizing it to control the Enterprises, entrusting it with duties that are at the core of what it means to be a fiduciary, and using terminology—"conservator"—associated with a fiduciary. Additionally, plaintiffs contend that recognizing that Treasury owes a fiduciary duty to shareholders is the only way to give meaning to Congress's mandate in HERA that Treasury protect taxpayers by considering, before purchasing securities, the need to maintain the Enterprises as privately owned entities. With respect to the PSPAs, plaintiffs argue that Treasury owes a fiduciary duty to the shareholders because it acquired control rights under the contract.

The court, pursuant to the Tucker Act, lacks jurisdiction over tort claims. 28 U.S.C. § 1491(a)(1). A breach of fiduciary duty is generally classified as a tort. Newby v. United States, 57 Fed. Cl. 382, 294 (2003). A fiduciary duty claim, however, does not sound in tort for

[23] The court notes that in Fairholme II it interpreted HERA to permit derivative claims related to the Net Worth Sweep. 147 Fed. Cl. at 49-51.

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purposes of the Tucker Act when the fiduciary relationship is founded on a money-mandating statute or a contractual provision between the claimant and United States. See Hopi Tribe v. United States, 782 F.3d 662, 667 (Fed. Cir. 2015) (statute); Cleveland Chair Co. v. United States, 557 F.2d 244, 246 (Ct. Cl. 1977) (contract); see also 28 U.S.C. § 1491(a)(1) (providing jurisdiction over claims "founded upon . . . any Act of Congress . . . or contract with the United States").

The initial issue is whether HERA establishes a fiduciary relationship between the FHFA-C and the Enterprises' shareholders. The court begins with the language of the statute. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). "If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect." Rosete v. Office of Pers. Mgmt., 48 F.3d 514, 517 (Fed. Cir. 1995); accord Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Congress provided in HERA that the FHFA-C is only required to act in the interests of itself or the Enterprises. 12 U.S.C. § 4617(b)(2)(J). That statement reflects a clear intent: the FHFA-C does not owe a fiduciary duty to shareholders because the conservator is not required to consider shareholders' interests.[24] See id.; see also Collins, 938 F.3d at 580 (noting that HERA "may permit" the FHFA-C to pursue actions that are "inconsistent with fiduciary duties"). The plain language controls, and therefore the court does not consider the peripheral considerations urged by plaintiffs such as the implications of the word "conservator," the FHFA-C's control over the Enterprises, or the FHFA-C's other powers. In sum, plaintiffs cannot establish jurisdiction for their fiduciary duty claim by relying on HERA.

The next issue is whether Treasury owes a fiduciary duty to shareholders because it purchased securities pursuant to HERA.[25] Plaintiffs contend that Treasury assumed such a duty

[24] The court's interpretation of HERA's plain language is buttressed by the fact that Congress seemingly made a deliberate decision to exclude shareholder interests from the FHFA-C's considerations. Congress modeled HERA on the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Jacobs, 908 F.3d at 893. Under FIRREA, Congress permitted the FDIC as conservator to consider the best interests of a bank, its depositors, or the FDIC. 12 U.S.C. § 1821(d)(2)(J)(ii). Although Congress permitted the FDIC to take into consideration the interests of its depositors, Congress omitted the analogue of depositors—shareholders—from the list of germane interests that the conservator can consider when acting pursuant to HERA. Compare id. (FIRREA), with 12 U.S.C. § 4617(b)(2)(J) (HERA). The omission is telling.

[25] The gravamen of plaintiffs' direct fiduciary duty claim is that the FHFA-C owed a fiduciary duty to plaintiffs. See 1st Am. Compl. ¶¶ 166-167. Indeed, plaintiffs state in their complaint that the "FHFA violated its fiduciary duty to Plaintiffs," id. ¶ 172, and make no similar allegation with regard to Treasury. Although plaintiffs have not alleged that their direct fiduciary duty claim is premised on Treasury's actions in particular, the court nonetheless considers the parties' arguments on whether such a claim would be within the court's jurisdiction for two reasons. First, the parties have fully briefed the issue without noting the discrepancy between plaintiffs' arguments and the allegations in their complaint. Second, the court's

when it agreed to the PSPAs because of the determinations that Congress required the Treasury Secretary to make prior to buying the securities. Before purchasing securities pursuant to HERA, the Secretary is required to determine that the purchase is necessary to protect taxpayers and evaluate various considerations in connection with protecting the taxpayers. 12 U.S.C. §§ 1455(*l*)(1)(B)-(C), 1719(g)(1)(B)-(C). One of those considerations is the need to maintain the Enterprises as privately owned companies. Id. §§ 1455(*l*)(1)(C), 1719(g)(1)(C). At no point, however, did Congress direct (or even suggest) that the Secretary must protect the shareholders. The court declines to stretch the statutory language to support a fiduciary relationship based on any incidental benefit shareholders may derive from the Secretary considering the need to keep the Enterprises privately owned in the context of protecting taxpayers. Simply stated, Treasury did not assume any fiduciary obligations to the Enterprises' shareholders by virtue of HERA.

Finally, the court turns to whether Treasury owed a fiduciary duty to the Enterprises' other shareholders because it acquired control rights by agreeing to the PSPAs. Plaintiffs' argument is premised on the state-law principle (which they term "general corporate law") that a controlling shareholder owes a fiduciary duty to the minority shareholders. The court is not convinced. First, plaintiffs' allegation of a fiduciary relationship is not founded on a contract within the meaning of the Tucker Act. Plaintiffs are not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs. They invoke the contracts solely to establish that Treasury is a controlling shareholder and rely on that conclusion to argue that it has a fiduciary duty based on state law. The contract, otherwise stated, is one step removed from the purported genesis of the fiduciary duty—the application of state-law principles. That gap is too much in light of the court's obligation to narrowly construe the Tucker Act's waiver of sovereign immunity. See Smith, 855 F.2d at 1552 (noting that the Tucker Act is narrowly construed); see also Perry II, 864 F.3d at 619-20 (rejecting the legal theory that the Enterprises' shareholders' need to reference the PSPAs for their fiduciary duty claim was enough to conclude that the claim was rooted in a contract for purposes of the Tucker Act).

Second, plaintiffs fail to demonstrate the applicability of the state-law principles underlying their theory for why Treasury assumed fiduciary duties. Federal law governs the obligations Treasury incurred by entering into the PSPAs. See Boyle v. United Techs. Corp., 487 U.S. 500, 519 (1988) ("The proposition that federal common law continues to govern the 'obligations to and rights of the United States under its contracts' is nearly as old as Erie [v. Tompkins, 304 U.S. 64 (1938),] itself."). Although courts may shape federal law by drawing from state-law principles, plaintiffs do not explain why doing so is appropriate in this instance.

Third, plaintiffs do not prevail even if their fiduciary duty claim could be founded on a contract and federal common law incorporates the state-law principles regarding controlling shareholders' fiduciary obligations. Under Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders. See Ivanhoe Partners v. Newmont Min. Corp., 535 A.2d 1334, 1344 (Del. 1987); Parsch v. Massey, 79 Va. Cir. 446 (2009); see also Quadrant Structured Prod. Co. v. Vertin, 102 A.3d 155, 183 (Del. Ch. 2014) (acknowledging that

resolution of the issue is immaterial to the ultimate outcome because, as discussed below, plaintiffs lack standing to pursue their direct claims in counts I, III, and VI.

those "who effectively control a corporation" owe a fiduciary duty to others).[26] To have the requisite level of control, the controlling shareholder must (1) be able to exercise a majority of the corporation's voting power or (2) direct the corporation without owning a majority of stock. Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1113 (Del. 1994). The latter, effective exercise of control, "is not an easy test to satisfy; the individual or group must be, "as a practical matter, . . . no differently situated than if they had majority voting control." In re PNB Holding Co. S'holders Litig., No. CIV.A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006). Plaintiffs have not established that Treasury meets either control test. First, plaintiffs do not allege that Treasury owns any of the Enterprises' voting stock. Treasury purchased preferred stock and acquired the right to buy common (i.e., voting) stock, but there is no indication that Treasury exercised its warrants or otherwise acquired common stock.[27] Second, plaintiffs do not demonstrate that Treasury exercised effective control over the Enterprises. Although Treasury acquired the right to preclude the Enterprises from taking certain actions, Treasury did not control the Enterprises because it could not direct any action—it could only respond to certain requests made by the Enterprises. As a practical matter, therefore, Treasury is situated differently than if it had majority voting power.

In sum, plaintiffs' fiduciary duty claim is a tort claim because plaintiffs have not established that the FHFA-C or Treasury owed shareholders a fiduciary duty based on a statute or contract. The court, therefore, dismisses count VI—breach of fiduciary duty—because it lacks jurisdiction over tort claims.

2. Plaintiffs' takings and illegal-exaction claims do not sound in tort.

Defendant also argues that plaintiffs' Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the FHFA-C. Plaintiffs counter that they have pleaded the predicates for takings and illegal-exaction claims, which means that it is irrelevant whether they also alleged facts that are germane to tortious actions.

When a party pleads the predicates for a takings claim or illegal-exaction claim, the court possesses jurisdiction to entertain such claims. See Hansen v. United States, 65 Fed. Cl. 76, 80-81 (2005) ("[S]o long as there is some material evidence in the record that establishes the predicates for a [claim covered by the Tucker Act,] . . . a plaintiff succeeds in demonstrating

[26] The court refers to Delaware and Virginia law because Fannie is a Delaware corporation, and Freddie is a Virginia corporation. When evaluating Virginia law, the court also looks to Delaware state court decisions because Virginia courts do so to resolve unsettled issues in the Commonwealth. E.g., U.S. Inspect Inc. v. McGreevy, No. 160966, 2000 WL 33232337, at *4 (Va. Cir. Ct. Nov. 27, 2000).

[27] Even if Treasury had exercised its option to buy a majority of the voting stock, it would not be a controlling shareholder because the FHFA-C succeeded to all of the shareholders' rights. See 12 U.S.C. § 4617(b)(2)(A) (noting that the FHFA-C, by operation of law, succeeds to all rights and powers of any Enterprise shareholder). Treasury, therefore, would have no voting power.

subject matter jurisdiction in this court . . . ."). Those claims, at a basic level, are contentions that the government expropriated private property lawfully (takings) or unlawfully (illegal exaction). See Orient Overseas Container Line (UK) Ltd. v. United States, 48 Fed. Cl. 284, 289 (2000) ("Takings claims arise because of a deprivation of property that is authorized by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation." (citation omitted)). If a party alleges the necessary predicates for these claims, the court is not deprived of jurisdiction even if the complaint contains allegations that could support a tort claim. See El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1353 (Fed. Cir. 2004) ("That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims."); Rith Energy, Inc. v. United States, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that this court has jurisdiction over a takings claim "even if the government's action was subject to legal challenge on some other ground"). Here, plaintiffs plead the predicates for takings and illegal-exaction claims by alleging, in essence, that they were forced to give their property to the government because of lawful or unlawful government conduct. Therefore, it is of no import to the court's jurisdiction whether plaintiffs have alleged facts that would also support a tort claim.

V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiffs' claims, defendant challenges plaintiffs' standing to pursue their claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. Starr Int'l Co. v. United States, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is "assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties." Kowalski v. Tesmer, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that controls. See Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted."), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014). Thus, in a suit brought by shareholders, it is the substance of the allegations and not the label assigned to the allegations—i.e., direct or derivative—that matters. See Starr, 856 F.3d at 966-67; see also In re Sunrise Sec. Litig., 916 F.2d 874, 882 (3d Cir. 1990) ("Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties."). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based on the rights of the company. See Starr, 856 F.3d at 966-67; see also Weir v. Stagg, No. 09-21745-CIV, 2011 WL 13174531, at *9 (S.D. Fla. Feb. 7, 2011) ("Shareholders do not have standing to bring a direct action for injuries suffered by a corporation, but rather, must bring a derivative action."). A shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the corporation's injuries—to have standing to litigate those claims. See Starr, 856 F.3d at 966-67.

Defendant challenges plaintiffs' standing to bring their claims on two grounds. Defendant first argues that plaintiffs lack standing because their claims, pled as direct claims, actually belong to the Enterprises and are therefore derivative in nature. The parties in this case and the related cases fully briefed and argued this issue prior to the court issuing the Fairholme II decision. The court concluded in Fairholme II that Fannie and Freddie shareholders lack standing to pursue direct claims that are derivative in nature.

Thereafter, the court solicited short supplemental briefs from plaintiffs and defendant regarding the applicability of the holdings in Fairholme II to this case. In their supplemental brief, plaintiffs suggest that their allegations in support of counts I and III of the amended complaint, for purposes of establishing standing, are materially different from the allegations regarding the takings and illegal-exaction claims asserted in Fairholme, while defendant contends in its supplemental brief that there are no material differences.[28] Defendant also argues that plaintiffs cannot assert their contract-based claims in counts IV and V because they have no contract with the United States. The court addresses each of these standing issues in turn.

A. Plaintiffs' allegations are not materially different from the allegations in Fairholme.

As an initial matter, plaintiffs contend that their allegations are materially different from those advanced in Fairholme, such that the standing inquiry would be affected. Specifically, plaintiffs argue that their case does not focus on overpayments taken from the Enterprises, but on a direct appropriation of plaintiffs' property rights in their stock and their rights to distributions from the Enterprises. In essence, plaintiffs attempt to distinguish what they characterize as the Fairholme plaintiffs' allegation of indirect harm to the shareholders from their own allegation of the expropriation of their economic interests.

As defendant points out, however, the direct claims in Fairholme and the claims that rely on the same legal theories in this case are virtually indistinguishable in nature. Counts I, III, and VI of the amended complaint in this case mirror, in every essential way, the direct takings, illegal-exaction, and fiduciary duty claims in Fairholme. Expropriation of the shareholders' economic interests, by means of the Net Worth Sweep, was alleged in Fairholme, just as it is alleged in the amended complaint in this case. Compare Fairholme II, 147 Fed. Cl. at 20, 46-47, with 1st Am. Compl. ¶¶ 10, 13, 57, 70, 73, 87, 128, 144, 168. Thus, the standing analysis in Fairholme II is fully applicable to the claims presented here in counts I, III, and VI of the amended complaint.

B. Plaintiffs' claims actually belong to the Enterprises.

Having determined that plaintiffs' allegations in counts I, III, and VI do not differ materially from those advanced in Fairholme, the court turns to defendant's contention that plaintiffs lack standing to litigate these claims. Defendant's standing argument is premised on its assertion that plaintiffs' claims actually belong to the Enterprises—and are therefore derivative in nature—because, to prevail, plaintiffs would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises. Plaintiffs counter that they assert direct claims

[28] Plaintiffs concede that their allegations in support of the fiduciary duty claim in count VI of the amended complaint are indistinguishable from those supporting the same type of claim in Fairholme.

because the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises' capital structure to plaintiffs' detriment, which renders the claims for such conduct both direct and derivative under the dual-nature exception.[29] Defendant replies that the Federal Circuit rejected the notion that a plaintiff states a direct claim by alleging it was targeted by the challenged action. Defendant also contends that the dual-nature exception is not applicable because Treasury was not a controlling shareholder, the Enterprises did not issue new shares, and the PSPA Amendments did not involve the reallocation of power.

Neither theory plaintiffs advance for why their claims are substantively direct, rather than derivative, is persuasive. First, it is of no import whether the government targeted shareholders with the PSPA Amendments. See Starr, 856 F.3d at 973 (noting that the plaintiffs did not "sufficiently explain why the Government's subjective motivations are relevant to the inquiry into direct standing"). The direct-versus-derivative inquiry "turns on the plaintiff's injury, not the defendant's motive." Pagan v. Calderon, 448 F.3d 16, 30 (1st Cir. 2006). Second, plaintiffs have not asserted claims that qualify as both direct and derivative based on the dual-nature exception. The Federal Circuit explained that, pursuant to this exception, shareholder claims may be both direct and derivative "when a 'reduction in [the] economic value and voting power affected the minority stockholders uniquely . . . .'" Starr, 856 F.3d at 968 (quoting Gentile v. Rossette, 906 A.2d 91, 99 (Del. 2006)). Specifically, shareholder claims are both direct and derivative if

> "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value," and "(2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders."

Id. (quoting Gentile, 906 A.2d at 100). The exception does not apply here because Treasury was not a controlling shareholder at the time the PSPA Amendments were executed,[30] the PSPA Amendments did not involve the issuance of new shares, and shareholder voting power was not reallocated under the PSPA Amendments. It is not enough, contrary to plaintiffs' contention, that the government allegedly exacted economic value from the other shareholders by rearranging the corporate structure. See El Paso Pipeline GP Co. v. Brinckerhoff, 152 A.3d 1248, 1264 (Del. 2016) (applying Gentile and holding a plaintiff does not state a direct claim under the dual-nature exception by pleading the "extraction of solely economic value from the minority by a controlling stockholder"). Because plaintiffs have not established that their

[29] The plaintiffs in the related cases also asserted that their claims must be construed as direct claims to vindicate important federal policies if shareholders cannot assert derivative claims because of HERA. But as this court held in Fairholme II, the shareholders of the Enterprises, notwithstanding HERA, have standing to assert derivative claims because of the FHFA-C's conflict of interest. 147 Fed. Cl. at 49-51.

[30] Treasury is not a controlling shareholder for the reasons set forth in Section IV.D.1, supra.

"direct" claims are substantively direct in nature, they cannot demonstrate that they have standing to litigate those claims.

Plaintiffs fare no better if the court moves beyond their arguments for why their "direct" claims are substantively direct in nature. Federal law governs whether plaintiffs' claims are direct or derivative. See Starr, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. Id.; see also Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 97 (1991) (noting the "presumption that state law should be incorporated into federal common law"). Under Delaware law, the test for whether a shareholder's claim is derivative or direct depends on the answers to two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004) (en banc). "Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow." Gentile, 906 A.2d at 99, discussed in Starr, 856 F.3d at 965. Such claims are derivative even "though the overpayment may diminish the value of the corporation's stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend." Protas v. Cavanagh, No. CIV.A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012); see also Hometown Fin. Inc. v. United States, 56 Fed. Cl. 477, 486 (2003) ("[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to nothing more than a diminution in stock value or a loss of dividends.").

In their complaint, plaintiffs focus on the expropriation of the Enterprises' assets via compulsory payments of all profits. The gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury. Regardless of plaintiffs' label (direct) or theory (taking, illegal exaction, or breach of fiduciary duty) for their claims, the claims are substantively derivative in nature because they are premised on allegations of overpayment.[31] See Gentile, 906 A.2d at 99; see also Roberts, 889 F.3d at 409 (explaining that the plaintiffs asserted "classic derivative claims" when they alleged that "the [PSPA Amendments] illegally dissipated corporate assets by transferring them to Treasury"). Plaintiffs

[31] Plaintiffs would remain unsuccessful if their allegations of waste and mismanagement (styled as self-dealing, overreach, or abuse of discretion) were construed to be indicative of some action other than overpayment. Any claims premised on waste and mismanagement are derivative in nature. Kramer v. W. Pac. Indus., Inc., 546 A.2d 348, 353 (Del. 1988) (noting that "mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature"). Plaintiffs' claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. See Hometown, 56 Fed. Cl. at 486 (stock prices); In re Straight Path Commc'ns Inc. Consol. S'holder Litig., No. CV 2017-0486-SG, 2017 WL 5565264, at *4 (Del. Ch. Nov. 20, 2017) ("Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . . .").

cannot transform their substantively derivative claims into direct claims by merely alleging that, as a result of overpayments, they were deprived of their stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiffs' purported "harms are 'merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.'" Protas, 2012 WL 1580969, at *6 (quoting Gentile, 906 A.2d at 99); see also Agostino v. Hicks, 845 A.2d 1110, 1122 (Del. Ch. 2004) ("[T]he inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation."). Because plaintiffs' claims are derivative in nature, plaintiffs lack standing to pursue those claims on their own behalf.

In sum, plaintiffs have not established that they have standing to litigate three of their claims (counts I, III, and VI) because they do not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court dismisses these claims on standing grounds to the extent that it has subject-matter jurisdiction over those claims.[32]

C. Plaintiffs lack standing to bring their contract claims because they are not in privity with the United States.

Finally, the court turns to plaintiffs' claims founded on the stock certificates issued by each Enterprise, which are alleged to be contracts under relevant state law. The key issue is whether the United States is a party to these contracts so that plaintiffs are in privity with the United States and thus have standing for the claims set forth in counts IV and V of the amended complaint. It is well established that "[a] plaintiff must be in privity with the United States to have standing to sue the sovereign on a contract claim." Sullivan v. United States, 625 F.3d 1378, 1379-80 (Fed. Cir. 2010) (citing Anderson v. United States, 344 F.3d 1343, 1351 (Fed. Cir. 2003)); accord Fid. & Guar. Ins. Underwriters, Inc. v. United States, 805 F.3d 1082, 1087 (Fed. Cir. 2015).

Plaintiffs argue that once the FHFA-C became the conservator for the Enterprises, the contracts, which were formerly between each Enterprise and the shareholder, became contracts between the United States and the shareholder. According to plaintiffs, "while the initial contracts did not involve the Government, the Government—through [the FHFA-C]—became a party to the contracts by assuming the [Enterprises'] obligations, which it then breached when it [chose] to implement the Net Worth Sweep to further the Government's interests." Class Pls.' Suppl. Opp'n to Def.'s Mot. to Dismiss 7. Plaintiffs' privity allegation is founded on part of a sentence in the Federal Circuit's decision in First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279, 1289 (Fed. Cir. 1999), which describes permissible exceptions to the usual privity requirements for suits in contract against the United States. Plaintiffs' reliance on First Hartford is misplaced.

The discussion of privity in First Hartford upon which plaintiffs rely began with a statement of the general rule: "[T]he 'government consents to be sued only by those with whom it has privity of contract.'" Id. (quoting Erickson Air Crane Co. of Wash. v. United States, 731

[32] As explained above, the court lacks jurisdiction over plaintiffs' fiduciary duty claim. See supra Section IV.D.1.

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F.2d 810, 813 (Fed. Cir. 1984)). The Federal Circuit also noted a number of exceptions to the general rule and cited cases as examples of these exceptions, none of which apply here. Id. It then summarized the principle uniting these exceptions: "[T]he common thread that unites these exceptions is that the party standing outside of privity by contractual obligation stands in the shoes of a party within privity." Id. According to plaintiffs, the FHFA-C stepped into the shoes of the Enterprises and became a party to the contracts with the shareholders that were expressed in their stock certificates, and the shareholders are now in privity of contract with the United States. Whatever the attractiveness of plaintiffs' legal construct, the privity analysis in First Hartford that is specifically referenced by plaintiffs does not support their thesis.

The plaintiffs in First Hartford were shareholders of Dollar Dry Dock Bank of New York ("Dollar") who attempted to show privity of contract with the United States to support their direct breach-of-contract claims against the United States in this court. 194 F.3d at 1282, 1289. Because they had no contract with the United States, they attempted to stand in the shoes of the bank, which itself had a contract with the FDIC, the alleged breaching party. Id. at 1289. In other words, their breach-of-contract claim was founded on the FDIC's breach of its contract with Dollar. Id. The Federal Circuit ruled that the plaintiffs could not stand in the shoes of the bank because, as shareholders of a corporation, they had no contractual obligations vis-à-vis the bank's contracting partners. Id.

Plaintiffs' reliance on this portion of First Hartford is flawed. First, in that case, the plaintiffs attempted to step into the shoes of the bank to establish privity of contract with the United States. Here, however, plaintiffs attempt to force the FHFA-C into the shoes of the Enterprises to establish privity of contract. These are not analogous inquiries as to privity. Put another way, the legal question of whether the shareholders in First Hartford could stand in the shoes of Dollar is materially different from the question of whether the FHFA-C stands in the shoes of the Enterprises. The cited analysis in First Hartford does not touch upon the role of a government agency that becomes the conservator of a corporation, and whether that agency, as conservator, steps into the shoes of the corporation.[33]

The question remains, then, whether the FHFA-C steps into the shoes of Fannie and Freddie, for privity-of-contract purposes, because it is the conservator for the Enterprises. As an initial matter, it is plaintiffs' burden to show privity of contract with the United States, and their citation to First Hartford is insufficiently persuasive to meet this burden. Also unpersuasive is plaintiffs' attempt to extend the exceptions to the general requirement of privity set forth in First Hartford. They argue:

[33] Unlike the parties in this case, who dispute whether the FHFA-C is the United States for jurisdictional purposes, see supra Section IV.B, the Federal Circuit in First Hartford treated the FDIC as the United States both for jurisdictional purposes and for the privity-of-contract question, without comment. See 194 F.3d at 1288 (finding jurisdiction for a takings claim founded on actions of the FDIC); id. at 1284, 1289 (finding no standing for breach-of-contract claims because only Dollar, not the shareholders, was in privity of contract with the FDIC and the United States).

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> Typically, situations falling within this framework involve a third-party private person stepping into the shoes of private party that is in privity with the Government. There is no reason, however, to treat a third-party Government entity stepping into the shoes of a private party by contract and statute differently than a third-party private entity stepping into those same shoes.

Class Pls.' Suppl. Opp'n to Def.'s Mot. to Dismiss 7 (citing First Hartford, 194 F.3d at 1289). However, they do not supply any authority for the proposition that "a third-party Government entity" (i.e., the FHFA) that purportedly steps into the shoes of a "private party" (i.e., Fannie or Freddie) in a contractual relationship with another private party (i.e., a shareholder) is in privity of contract with that other private party. Accordingly, no argument of plaintiffs convinces the court that plaintiffs have standing for their breach-of-contract claims.[34]

Unmentioned by the parties is a different privity analysis in First Hartford. 194 F.3d at 1295-96. In First Hartford, one of the plaintiffs' contract-based claims was for the rescission of their contracts to purchase shares from Dollar, described as "share purchase contracts." Id. at 1296. If these contracts are the equivalent of plaintiffs' stock certificate contracts with the Enterprises, and if the FDIC's role as receiver for Dollar could be considered to be equivalent to the FHFA-C's role as conservator for the Enterprises, the Federal Circuit's privity analysis of the rescission claim would not support plaintiffs' standing to bring their contract claims against the FHFA-C.[35] In First Hartford, the Federal Circuit concluded that

> [t]he rescission sought by First Hartford in its complaint is that of the contract under which First Hartford purchased its shares when . . . Dollar converted from mutually-held to stock-form. As noted by the Court of Federal Claims, "[a] 'rescission' amounts to the unmaking of a contract or an undoing of it from the beginning and not merely a termination of the contract." The federal government was not a party to the contracts by which First Hartford and other investors purchased shares in Dollar. Unless both the plaintiff and the defendant are parties to the disputed contract, a rescission claim must be dismissed for failure to state a claim upon which relief can be granted. Accordingly, while we do not foreclose that shareholder capital is perhaps one of several measures of damages that ultimately might be considered on the [derivative] contract counts, the Court of Federal Claims cannot rescind the share purchase contracts to which the federal government was not a party and thus this count was correctly dismissed.

[34] Plaintiffs also reference Slattery, 583 F.3d at 827-28. There is, however, no analysis of privity of contract, or of the discussion of privity in First Hartford, in that opinion. Plaintiffs' argument based on Slattery is undeveloped, cursory, and ultimately unpersuasive.

[35] For its jurisdictional inquiry, the court concluded that the FHFA-C did not step into the shoes of the Enterprises. See Section IV.B, supra. Although the terminology is similar, the guiding precedent for the jurisdictional and standing inquiries is not the same. See id.

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Id. at 1295-96 (citation omitted) (quoting First Hartford Corp. Pension Plan & Tr. v. United States, 42 Fed. Cl. 599, 616 n.26 (1998), aff'd in part, rev'd in part and remanded, 194 F.3d at 1279).

Having considered plaintiffs' arguments regarding privity and standing, plaintiffs have not met their burden to establish that they have standing to assert the breach-of-contract claim in count IV, or the breach-of-the-covenant-of-good-faith-and-fair-dealing claim in count V. The court therefore dismisses these counts of their amended complaint for lack of standing.

VI. CONCLUSION

For the reasons stated above, the court dismisses all of plaintiffs' claims. The court lacks jurisdiction to entertain plaintiffs' judicial takings claim and their fiduciary duty claim. Further, plaintiffs lack standing to bring their contract claims due to the absence of privity with the United States, and lack standing to bring their nominally direct takings, illegal-exaction, and fiduciary duty claims because the nature of these claims is derivative, not direct.[36] The court therefore **GRANTS** defendant's motion to dismiss.[37] The clerk is directed to enter judgment in this consolidated case accordingly. No costs.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

[36] Because all of plaintiffs' claims must be dismissed for lack of jurisdiction or for lack of standing, the court need not reach defendant's remaining arguments that these claims should be dismissed for failure to state a claim upon which relief can be granted.

[37] Plaintiffs' motion to certify a class action is accordingly moot.

Case 1:13-cv-00465-MMS Document 461 Filed 03/09/20 Page 1 of 5

In the United States Court of Federal Claims

No. 13-465C
(Filed: March 9, 2020)

FAIRHOLME FUNDS, INC. et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Certification of Interlocutory Appeal; 28 U.S.C. § 1292(d)(2)

Charles J. Cooper, Washington, DC, for plaintiffs.

Kenneth M. Dintzer, United States Department of Justice, Washington, DC, for defendant.

ORDER

Plaintiffs and defendant each filed an unopposed motion requesting that the court certify for interlocutory appeal its December 6, 2019 opinion granting in part and denying in part defendant's motion to dismiss. Defendant also moves to stay further proceedings pending the resolution of the interlocutory appeal process, which plaintiffs do not oppose. For the reasons explained below, the court grants the motions and will (1) modify the December 6, 2019 opinion to include the language necessary for an interlocutory appeal and (2) stay further proceedings in this case.

I. BACKGROUND

Plaintiffs challenge actions taken in connection with the conservatorships of the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie").[1] In their complaint, plaintiffs aver that the Federal Housing Finance Agency ("FHFA") in its role as conservator ("FHFA-C") for Fannie and Freddie (collectively, the "Enterprises") infringed on plaintiffs' rights when the FHFA-C executed the third amendment to the Preferred Stock Purchase Agreements ("PSPA Amendments"). Plaintiffs allege four types of claims: a taking, illegal exaction, breach of contract, and breach of fiduciary duty. Each type of

[1] For the sake of brevity, this order recites only the facts and background necessary for the purposes of resolving the parties' motions. Additional information on the genesis of this suit and the underlying facts is set forth in the December 6, 2019 opinion on defendant's motion to dismiss. See Fairholme Funds, Inc. v. United States, 146 Fed. Cl. 17, 31-36 (2019).

claim is styled as (1) a direct claim and (2) a derivative claim on behalf of each Enterprise. Defendant moved to dismiss the complaint on the bases that the court lacked subject-matter jurisdiction over the claims, plaintiffs lacked standing to pursue their claims, and plaintiffs failed to state a claim on which relief may be granted. The court, after reviewing hundreds of pages of briefing and hearing nearly nine hours of oral argument, dismissed the direct claims. Specifically, the court explained that (1) it lacked jurisdiction to entertain plaintiffs' direct fiduciary duty claim and implied-in-fact contract claim, (2) plaintiffs who first purchased Enterprise stock after the PSPA Amendments lacked standing to pursue their direct claims, and (3) plaintiffs lacked standing to pursue their self-styled direct claims because those claims were substantively derivative. The court, however, denied defendant's request to dismiss the derivative claims.

Following the court's decision, both plaintiffs and defendant requested that the court certify its December 6, 2019 opinion for interlocutory review. Plaintiffs support their motion by highlighting three general questions presented in the opinion that they contend warrant certification:

(1) Whether the court lacks subject-matter jurisdiction over plaintiffs' direct claims for breach of fiduciary duty and breach of implied-in-fact contract.

(2) Whether plaintiffs who purchased stock in Fannie and Freddie after the PSPA Amendments lack standing to pursue their direct takings claims.

(3) Whether plaintiffs lack standing to pursue their self-styled direct claims because those claims are substantively derivative in nature.[2]

And defendant focuses on three different questions that it believes support certification:

(1) Whether plaintiffs have standing to assert derivative claims notwithstanding the Housing and Economic Recovery Act of 2008's ("HERA") succession clause, 12 U.S.C. § 4617(b)(2)(A)(i) (2018).

---

[2] Plaintiffs note that the issues they identify (and those presented by defendant) have subsidiary questions of law that they believe also need to be addressed on appeal. The court need not delve into those questions because the United States Court of Appeals for the Federal Circuit ("Federal Circuit") "may consider 'any question reasonably bound up with the certified order, whether it is antecedent to, broader or narrower than, or different from the question specified by the [Claims Court].'" A&D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1150 (Fed. Cir. 2014) (alteration in original) (quoting 16C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1357 (3d ed. 2012)); accord Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 205 (1996) (noting that an appellate court "may address any issue fairly included within the certified order because 'it is the order that is appealable, and not the controlling question identified by the district court.'" (quoting 9 J. Moore & B. Ward, Moore's Federal Practice ¶ 110.25[1] (2d ed. 1995))); see also id. ("[A]ppellate jurisdiction applies to the order certified to the court of appeals, and is not tied to the particular question formulated by the district court.").

(2) Whether the FHFA-C's actions are attributable to the United States such that the court possesses subject-matter jurisdiction to entertain plaintiffs' derivative takings and illegal exaction claims.

(3) Whether plaintiffs' allegations that the FHFA entered into an implied-in-fact contract with the Enterprises to operate the conservatorships for shareholder benefit fail as a matter of law.

If the court certifies the December 6, 2019 opinion for interlocutory appeal, defendant asks that the court also stay further proceedings in this case until the Federal Circuit decides whether to entertain the parties' appeals and, if applicable, the final disposition of those appeals.

II. ANALYSIS

"Courts have long understood that '[i]nterlocutory appeals are reserved for exceptional or rare cases . . . .'" White Mountain Apache Tribe v. United States, No. 17-359, 2018 WL 6293242, at *2 (Fed. Cl. Dec. 3, 2018) (quoting Starr Int'l Co. v. United States, 112 Fed. Cl. 601, 603 (2013)); accord Coast Fed. Bank, FSB v. United States, 49 Fed. Cl. 11, 13 (2001); see Zoltek Corp. v. United States, 672 F.3d 1309, 1328 (Fed. Cir. 2012) (Dyk, J., dissenting) (discussing the legislative history of the statute authorizing interlocutory appeals). The trial court has discretion on whether to certify an issue for an interlocutory appeal. Starr, 112 Fed. Cl. at 603. The court certifies issues by "includ[ing] in the [interlocutory] order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(d)(2) (2018). In short, there is a three-part test for certifying issues for interlocutory appeal: The court must conclude that (1) there is a controlling question of law; (2) there is a substantial ground for difference of opinion with respect to that question; and (3) an immediate appeal may materially advance the ultimate termination of the litigation.[3] Id.; accord United Launch Servs., LLC v. United States, 139 Fed. Cl. 721, 723 (2018). The court will address each factor in turn.

The first factor is whether the parties are requesting permission to appeal a controlling question of law. A party makes the necessary showing by seeking to appeal matters that "materially affect issues remaining to be decided in the trial court." Coast Fed. Bank, 49 Fed. Cl. at 13 (quoting Pikes Peak Family Hous., LLC v. United States, 40 Fed. Cl. 673, 686 (1998)); accord In re Lloyd's Am. Trust Fund Litig., No. 96-1262, 1997 WL 758739, at *4 (S.D.N.Y. Aug. 12, 1997) (noting that there is a controlling question if "reversal . . . could result in dismissal of the action" or "significantly affect the conduct of the action").[4] Both parties have

---

[3] Even if this court certifies its opinion for interlocutory appeal, the Federal Circuit may decide not to entertain the appeal. 28 U.S.C. § 1292(d)(2); accord AD Glob. Fund, LLC ex rel. N. Hills Holding, Inc. v. United States, 68 Fed. Cl. 663, 665 (2005).

[4] The statutory standard for interlocutory appeals in federal district court is "virtually identical" to the provision supplying the standard in this court. Am. Mgmt. Sys., Inc. v. United

done so here. Defendant seeks interlocutory review of justiciability issues (standing and subject-matter jurisdiction) that could end plaintiffs' lawsuit and one question—related to the alleged implied-in-fact contract—that, depending on the appellate decision, could significantly affect the issues to be tried. On the flip side, plaintiffs are concerned with a number of dismissed claims, and a reversal of the court's decision on those claims would significantly alter any future litigation in this case. Thus, the first factor weighs in favor of certification.

The second factor is whether the parties are seeking review of topics on which there is a substantial ground for a difference of opinion. A court may find that there is substantial room for disagreement on an issue when there is a circuit split or the parties dedicated extensive briefing to the topic. See Klamath Irr. Dist. v. United States, 69 Fed. Cl. 160, 163 (2005) (explaining that the second prong "more often . . . manifests itself as splits among the circuit courts"); Coast Fed. Bank, 49 Fed. Cl. at 14 (acknowledging that a large amount of briefing on an issue "suggests that there is room for disagreement"). Those considerations are present here. The court ruled against the weight of authority in other jurisdictions on some topics, see, e.g., Fairholme, 146 Fed. Cl. at 48-50, and the parties devoted hundreds of briefing pages and hours of oral argument to the disputed issues. Furthermore, as the court acknowledged during oral argument on defendant's motion to dismiss, this case is an "intellectual feast" with "thorny legal issues." Tr. 391. The second factor, therefore, weighs in favor of certification.

The third factor is whether an interlocutory appeal will materially advance the termination of the litigation. The focus here is, "in large part[,] on considerations of 'judicial economy' and the need to avoid 'unnecessary delay and expense' and 'piecemeal litigation.'" Coast Fed. Bank, 49 Fed. Cl. at 14 (quoting Northrop Corp. v. United States, 27 Fed. Cl. 795, 798-99 (1993)); see also Lummi Tribe of the Lummi Reservation, Wash. v. United States, 870 F.3d 1313, 1315 (Fed. Cir. 2017) ("[T]his court granted the government's petition for interlocutory appeal to 'ensure that the [United States Court of Federal Claims] is the court of proper jurisdiction before requiring it and the parties to undergo extensive unnecessary proceedings.'" (quoting appellate order)). The court and other parties will preserve their resources with an interlocutory appeal because a definitive ruling on the issues identified by the parties will offer clear guidance on the materially similar claims in seventeen related cases pending before the undersigned. And the parties in the instant case will also benefit from an expedited appellate ruling. Without an interlocutory appeal, the parties will likely begin costly discovery that would be unnecessary if an appellate court reverses this court's decision that it possesses jurisdiction over the derivative claims. Similarly, an interlocutory appellate decision on the viability of the direct claims will conserve resources because, if the dismissal of those claims is reversed, the parties will be able to consolidate their discovery efforts for the overlapping aspects of the direct and derivative claims. Thus, the third factor also weighs in favor of certification.

States, 57 Fed. Cl. 275, 276 (2003) (quoting United States v. Connolly, 716 F.2d 882, 883 n.1 (Fed. Cir. 1983)). See 28 U.S.C. § 1292 (setting forth standards for interlocutory review).

III. CONCLUSION

Because all of the factors that the court must consider under 28 U.S.C. § 1292(d)(2) weigh in favor of certification, the court concludes that it is appropriate to certify its December 6, 2019 opinion for interlocutory appeal. The court, therefore, **GRANTS** plaintiffs' and defendant's respective motions to certify the December 6, 2019 opinion for interlocutory appeal. The court will amend its December 6, 2019 opinion by appending the following language to the end of the opinion:

> The court finds that this opinion involves the following controlling questions of law with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from the opinion may materially advance the ultimate termination of the litigation:
>
> (1) Whether the court lacks subject-matter jurisdiction over plaintiffs' direct claims for breach of fiduciary duty and breach of implied-in-fact contracts.
>
> (2) Whether plaintiffs who purchased stock in Fannie and Freddie after the PSPA Amendments lack standing to pursue their direct takings claims.
>
> (3) Whether plaintiffs lack standing to pursue their self-styled direct claims because those claims are substantively derivative in nature.
>
> (4) Whether plaintiffs have standing to assert derivative claims notwithstanding HERA's succession clause.
>
> (5) Whether the FHFA-C's actions are attributable to the United States such that the court possesses subject-matter jurisdiction to entertain plaintiffs' derivative takings and illegal exaction claims.
>
> (6) Whether plaintiffs' allegations that the FHFA entered into an implied-in-fact contract with the Enterprises to operate the conservatorships for shareholder benefit fail as a matter of law.

The court also **GRANTS** defendant's motion to stay further proceedings in this case pending the completion of the interlocutory appeal process. **By no later than 14 days after the completion of that process,** the parties shall file a joint status report in which they propose further proceedings, if any are necessary.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

In the United States Court of Federal Claims

No. 18-281 C
Filed: June 8, 2020

OWL CREEK ASIA I, L.P.
et al.

v. **JUDGMENT**

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed June 8, 2020, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs' complaint is dismissed for lack of jurisdiction to entertain their fiduciary duty and implied-in-fact-contract claims and plaintiffs lack of standing to pursue any of their claims. No costs.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

Case 1:18-cv-00529-MMS Document 59 Filed 06/08/20 Page 1 of 1

In the United States Court of Federal Claims

No. 18-529 C
Filed: June 8, 2020

MASON CAPITAL, L.P. and
MASON CAPITAL MASTER
FUND L.P.

v. **JUDGMENT**

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed June 8, 2020, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs' complaint is dismissed for lack of jurisdiction to entertain their fiduciary duty and implied-in-fact-contract claims and plaintiffs lack of standing to pursue any of their claims. No costs.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

In the United States Court of Federal Claims

No. 18-369 C
Filed: June 8, 2020

AKANTHOS OPPORTUNITY MASTER FUND, L.P.

v. **JUDGMENT**

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed June 8, 2020, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff's complaint is dismissed for lack of jurisdiction to entertain its fiduciary duty and implied-in-fact-contract claims and plaintiff's lack of standing to pursue any of its claims. No costs.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

In the United States Court of Federal Claims

No. 18-370 C
Filed: June 8, 2020

APPALOOSA INVESTMENT LIMITED PARTNERSHIP I et al.

v.

JUDGMENT

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed June 8, 2020, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs' complaint is dismissed for lack of jurisdiction to entertain their fiduciary duty and implied-in-fact-contract claims and plaintiffs lack of standing to pursue any of their claims. No costs.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

In the United States Court of Federal Claims

No. 18-371 C
Filed: June 8, 2020

CSS, LLC

v. **JUDGMENT**

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed June 8, 2020, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff's complaint is dismissed for lack of jurisdiction to entertain its fiduciary duty and implied-in-fact-contract claims and plaintiff's lack of standing to pursue any of its claims. No costs.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

In the United States Court of Federal Claims

No. 13-698 C
(Filed: May 15, 2020)

ARROWOOD INDEMNITY COMPANY, et al.

Plaintiffs

v **JUDGMENT**

THE UNITED STATES

Defendant

Pursuant to the court's Opinion And Order, filed May 15, 2020, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs' complaint is dismissed.

Lisa L. Reyes
Clerk of Court

By: s/ Anthony Curry

Deputy Clerk

<u>NOTE</u>: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of <u>all plaintiffs</u>. Filing fee is $505.00.

In the United States Court of Federal Claims

No. 13-466 C
Filed: June 26, 2020

JOSEPH CACCIAPALLE
et al.

v. **JUDGMENT**

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed June 26, 2020, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs' claims are dismissed for lack of jurisdiction or lack of standing. No costs.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

ECF,IAPPEAL,MOTIONSTAYED,PROTO

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:13−cv−00465−MMS

FAIRHOLME FUNDS, INC. et al v. USA
Assigned to: Senior Judge Margaret M. Sweeney
Case: 1:13−cv−00466−MMS
Case in other court: 17−01015
20−00122
Cause: 28:1491 Tucker Act

Date Filed: 07/09/2013
Jury Demand: None
Nature of Suit: 514 Taking − Other
Jurisdiction: U.S. Government Defendant

Plaintiff

FAIRHOLME FUNDS, INC.
on behalf of its series The Fairholme Fund

represented by **Charles J. Cooper**
Cooper & Kirk, PLLC
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Washington, DC 20036
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Email: ccooper@cooperkirk.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

ACADIA INSURANCE COMPANY

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

ADMIRAL INDEMNITY COMPANY

represented by **Charles J. Cooper**
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LEAD ATTORNEY
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Plaintiff

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Plaintiff

BERKLEY INSURANCE COMPANY

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Plaintiff

BERKLEY REGIONAL INSURANCE COMPANY

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Plaintiff

CAROLINA CASUALTY INSURANCE COMPANY

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Plaintiff		
CONTINENTAL WESTERN INSURANCE COMPANY	represented by	**Charles J. Cooper** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*
Plaintiff		
MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY	represented by	**Charles J. Cooper** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*
Plaintiff		
NAUTILUS INSURANCE COMPANY	represented by	**Charles J. Cooper** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*
Plaintiff		
PREFERRED EMPLOYERS INSURANCE COMPANY	represented by	**Charles J. Cooper** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*
Plaintiff		
THE FAIRHOLME FUND *a series of Fairholme Funds, Inc.*	represented by	**Charles J. Cooper** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*
Plaintiff		
ANDREW T. BARRETT	represented by	**Charles J. Cooper** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

V.

Defendant		
USA	represented by	**Elizabeth Marie Hosford** U. S. Department of Justice − Civil Div. Post Office Box 480 Ben Franklin Station Washington, DC 20044 (202) 616−0332 Fax: (202) 305−7643 Email: elizabeth.hosford@usdoj.gov *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED* **Kenneth Michael Dintzer** U. S. Department of Justice − Civil Div. Post Office Box 480 Ben Franklin Station Washington, DC 20044 (202) 616−0385 Fax: (202) 514−8624 Email: kenneth.dintzer@usdoj.gov *TERMINATED: 09/30/2020*

<u>**Amicus**</u>

LOUISE RAFTER	represented by	**Gregory P Joseph** Joseph Hage Aaronson LLC 485 Lexington Avenue 30th Floor New York, NY 10017 (212) 407−1200 Fax: (212) 407−1299 Email: gjoseph@jha.com *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED* **Lawrence David Rosenberg** Jones Day (DC) 51 Louisiana Avenue, N.W. Washington, DC 20001−2113 (202) 879−7622 Fax: (202) 626−1700 Email: ldrosenberg@jonesday.com *TERMINATED: 08/24/2015* *ATTORNEY TO BE NOTICED*

<u>**Amicus**</u>

JOSEPHINE RATTIEN	represented by	**Gregory P Joseph** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED* **Lawrence David Rosenberg** (See above for address) *TERMINATED: 08/24/2015* *ATTORNEY TO BE NOTICED*

<u>**Amicus**</u>

STEPHEN RATTIEN	represented by	**Gregory P Joseph** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED* **Lawrence David Rosenberg** (See above for address) *TERMINATED: 08/24/2015* *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

<u>**Amicus**</u>

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<u>**Amicus**</u>

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MICHAEL MCCREDY BAKER represented by **Steve W. Berman**
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CITY OF AUSTIN POLICE RETIREMENT SYSTEM represented by **Steve W. Berman**
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Amicus

JOHN YOO

Date Filed	#	Docket Text
07/09/2013	1	COMPLAINT against All Defendants (Filing fee $400, Receipt number 075300) (Copy Served Electronically on Department of Justice), filed by All Plaintiffs.**Answer due by 9/9/2013.** (Attachments: # 1 Civil Cover Sheet)(ar) (Entered: 07/09/2013)
07/09/2013	2	NOTICE of Assignment to Judge Margaret M. Sweeney (ar) (Entered: 07/09/2013)
07/09/2013	3	NOTICE of Designation of Electronic Case. (ar) (Entered: 07/09/2013)
07/09/2013	4	NOTICE of Directly Related Case(s) [13−385], filed by All Plaintiffs. (ar) (Entered: 07/09/2013)
07/09/2013	5	Rule 7.1 Disclosure Statement, filed by All Plaintiffs. (ar) (Entered: 07/09/2013)
07/17/2013	6	NOTICE of Appearance by Kenneth Michael Dintzer for USA . (Dintzer, Kenneth) (Entered: 07/17/2013)
08/09/2013	7	MOTION to Stay All Proceedings *and alternatively*, MOTION for Extension of Time until 12/9/2013 to File Answer re 1 Complaint, (Response due by 8/26/2013.), filed by USA.(Volk, Daniel) (Entered: 08/09/2013)
08/26/2013	8	Unopposed MOTION for Extension of Time until 8/30/2013 to Respond to Government's Stay Motion , filed by All Plaintiffs.**Response due by 9/12/2013.**(Cooper, Charles) (Entered: 08/26/2013)
08/27/2013	9	ORDER granting 8 Motion for Extension of Time.**Plaintiffs' response to motion to stay due 8/30/13.** Signed by Judge Margaret M. Sweeney. (ps2) Copy to parties. (Entered: 08/27/2013)
08/30/2013	10	RESPONSE to 7 MOTION to Stay All Proceedings *and alternatively* MOTION for Extension of Time until 12/9/2013 to File Answer re 1 Complaint, , filed by All Plaintiffs.**Reply due by 9/9/2013.** (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Cooper, Charles) (Entered: 08/30/2013)
09/09/2013	11	REPLY to Response to Motion re 7 MOTION to Stay All Proceedings *and alternatively* MOTION for Extension of Time until 12/9/2013 to File Answer re 1 Complaint, , filed by USA. (Volk, Daniel) (Entered: 09/09/2013)
09/18/2013	12	ORDER denying 7 defendant's Motion to Stay after full briefing and careful consideration, and for the reasons set forth in plaintiffs' response in opposition. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 09/18/2013)

09/24/2013	13	Unopposed MOTION for Status Conference , filed by USA.**Response due by 10/11/2013.**(Volk, Daniel) (Entered: 09/24/2013)
09/26/2013	14	ORDER granting 13 Motion for Status Conference. After consulting with counsel, the court has scheduled a status conference for Thursday, September 26, 2013 at 11:30 a.m. EDT. The parties shall appear by telephone, and the court will contract the parties to initiate the conference call. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 09/26/2013)
09/26/2013		Minute Entry for proceeding held in Washington, DC on 9/26/2013 before Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio copy of the proceeding (click HERE)(lp1) (Entered: 09/26/2013)
09/26/2013	15	ORDER: Defendant's answer due 12/9/13. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 09/26/2013)
10/07/2013	16	Notice Of Filing Of Certified Transcript for proceedings held on September 26, 2013. (dls) (Entered: 10/07/2013)
10/07/2013	17	TRANSCRIPT of Proceedings held on September 26, 2013 before Judge Margaret M. Sweeney. Total No. of Pages: 18. Procedures Re: Electronic Transcripts and Redactions. To purchase a copy, contact the clerk's office at (202) 357−6414. Notice of Intent to Redact due 10/15/2013. Redacted Transcript Deadline set for 11/7/2013. Release of Transcript Restriction set for 1/6/2014. (dls) (dls). (Entered: 10/07/2013)
10/29/2013	18	ORDER: Coordinating with case nos. 13−466C, 13−496C and 13−542C, as well as with 13−385C, 13−672C, 13−608C, and 13−698C. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. Modified on 4/8/2014 − clarification (jt1). (Entered: 10/29/2013)
12/06/2013	19	Unopposed MOTION for Leave to Exceed Page Limit of Motion to Dismiss by 10 pages , filed by USA.**Response due by 12/23/2013.**(Hosford, Elizabeth) (Entered: 12/06/2013)
12/09/2013	20	MOTION to Dismiss pursuant to Rules 12(b)(1) and (6) , filed by USA.**Response due by 1/9/2014.**(Schwind, Gregg) (Entered: 12/09/2013)
12/11/2013	21	ORDER granting 19 Motion for Leave to File Excess Pages. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 12/11/2013)
12/20/2013	22	MOTION for Discovery *and Continuance To Permit Discovery*, filed by All Plaintiffs.**Response due by 1/6/2014.** (Attachments: # 1 Exhibit A − Declaration of Vincent J. Colatriano, # 2 Exhibit 1)(Cooper, Charles) (Entered: 12/20/2013)
12/31/2013	23	Unopposed MOTION for Extension of Time until 01/21/2014 to File Response *to Plaintiffs' Motion for Discovery*, filed by USA.**Response due by 1/17/2014.**(Schwind, Gregg) (Entered: 12/31/2013)
01/02/2014	24	ORDER granting 23 Motion for Extension of Time to File Response. Response due 1/21/14. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 01/02/2014)
01/02/2014	25	ORDER: The court grants plaintiffs' unopposed request to suspend the briefing schedule for the United States' Motion to Dismiss pending the court's resolution of plaintiffs' motion for discovery. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 01/02/2014)
01/15/2014	26	Second MOTION for Extension of Time until 02/04/2014 to File Response *to Plaintiffs' Motion for Discovery*, filed by USA.**Response due by 2/3/2014.**(Schwind, Gregg) (Entered: 01/15/2014)
01/16/2014	27	ORDER granting 26 Motion for Extension of Time to File Response until 2/4/14. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 01/16/2014)
02/04/2014	28	Third MOTION for Extension of Time until 02/10/2014 to File Response *to Plaintiffs' Motion for Discovery*, filed by USA.**Response due by 2/21/2014.**(Schwind, Gregg) (Entered: 02/04/2014)

02/06/2014	29	ORDER: On February 3, 2014, the court issued orders in Washington Federal et al. v. United States, No. 13−385 and Fisher et al. v. United States, No. 608, directing plaintiffs to advise the court by February 18, 2014, whether they, like Fairholme, intend to seek discovery related to the court's jurisdiction. On February 4, 2014, defendant filed a third motion for enlargement of time to response to plaintiffs' motion for discovery, in light of this order. For good cause shown, the court hereby grants defendant's motion for discovery until the date plaintiffs in Washington Federal and Fisher respond to the court's orders. In the event either party files a motion for discovery, defendant's response shall be filed by no later than 14 days after the motion(s) is/are filed. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (lld). (Entered: 02/06/2014)
02/12/2014	30	RESPONSE to 22 MOTION for Discovery *and Continuance To Permit Discovery* , filed by USA.**Reply due by 2/24/2014.** (Schwind, Gregg) (Entered: 02/12/2014)
02/24/2014	31	REPLY to Response to Motion re 22 MOTION for Discovery *and Continuance To Permit Discovery* , filed by All Plaintiffs. (Cooper, Charles) (Entered: 02/24/2014)
02/26/2014	32	REPORTED Order granting 22 Motion for Discovery; Status report proposing a discovery schedule due by 3/20/2014.. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. Modified on 3/5/2014 − corrected pdf (jt1). (Entered: 02/26/2014)
03/17/2014	33	MOTION to Lift Stay *of briefing on motion to dismiss* (Response due by 4/3/2014.), MOTION to Stay discovery *, and in the alternative,*, MOTION for Reconsideration *, and motion to stay March 20, 2014 deadline for filing of joint discovery schedule*, filed by USA.(Volk, Daniel) (Entered: 03/17/2014)
03/19/2014	34	ORDER: Defendant's 33 Motion to Lift Stay of Briefing Regarding Motion to Dismiss, or in the Alternative, Motion for Reconsideration of Stay, is DENIED; **Parties shall file joint status report proposing discovery schedule regarding jurisdiction by Friday, March 21, 2014.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 03/19/2014)
03/21/2014	35	JOINT STATUS REPORT , filed by USA. (Schwind, Gregg) (Entered: 03/21/2014)
03/21/2014	36	STATUS REPORT *Proposing Discovery Schedule*, filed by FAIRHOLME FUNDS, INC., THE FAIRHOLME FUND. (Cooper, Charles) (Entered: 03/21/2014)
03/21/2014	37	STATUS REPORT *Proposed Discovery Plan*, filed by USA. (Attachments: # 1 Exhibit 1 and 2)(Schwind, Gregg) (Entered: 03/21/2014)
03/25/2014	38	RESPONSE to 37 Status Report , filed by All Plaintiffs. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Cooper, Charles) (Entered: 03/25/2014)
03/27/2014	39	RESPONSE to *Plaintiffs' Opposition to Discovery Plan*, filed by USA. (Schwind, Gregg) (Entered: 03/27/2014)
04/04/2014	40	SCHEDULING ORDER:**Discovery closes on 7/31/2014. A telephonic status conferences will occur every two weeks, with the first on 4/23/2014, unless both parties concur and inform the court beforehand that the status conference is unnecessary. Joint status report due by 8/14/2014.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 04/04/2014)
04/09/2014	41	ORDER setting forth guidelines for status conferences and other issues in the Fannie Mae/Freddie Mac cases. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 04/09/2014)
04/22/2014	42	JOINT STATUS REPORT , filed by USA. (Schwind, Gregg) (Entered: 04/22/2014)
05/06/2014	43	JOINT STATUS REPORT , filed by USA. (Schwind, Gregg) (Entered: 05/06/2014)
05/07/2014		Minute Entry − Proceeding held in Washington, DC on 5/7/2014 at 11:00 a.m. before Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio copy of the proceeding (click HERE) (ta) (Entered: 05/07/2014)
05/09/2014	44	Notice Of Filing Of Certified Transcript for proceedings held on May 7, 2014. (dls) (Entered: 05/09/2014)

05/09/2014	45	TRANSCRIPT of Proceedings held on May 7, 2014 before Judge Margaret M. Sweeney. Total No. of Pages: 29. Procedures Re: Electronic Transcripts and Redactions. To purchase a copy, contact the clerk's office at (202) 357−6414. Notice of Intent to Redact due 5/16/2014. Redacted Transcript Deadline set for 6/9/2014. Release of Transcript Restriction set for 8/7/2014. (dls) (Entered: 05/09/2014)
05/16/2014	46	Unopposed MOTION to Amend Schedule re: 40 Scheduling Order,, filed by USA.**Response due by 6/2/2014.**(Schwind, Gregg) (Entered: 05/16/2014)
05/16/2014	47	ORDER granting 46 defendant's unopposed motion to amend the court's April 4, 2014 jurisdictional discovery schedule. The parties shall attempt to resolve objections, and discuss any issues regarding the format for production of responsive materials, **no later than Friday, May 23, 2014**. If objections are not resolved by then, the objecting party shall bear the burden of moving for a protective order **no later than Friday, May 30, 2014**. All other portions of the April 4, 2014 discovery order shall remain in effect Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 05/16/2014)
05/20/2014	48	JOINT STATUS REPORT , filed by All Plaintiffs. (Cooper, Charles) (Entered: 05/20/2014)
05/30/2014	49	MOTION for Protective Order , filed by USA.**Response due by 6/16/2014.**(Hosford, Elizabeth) (Entered: 05/30/2014)
06/02/2014	50	Unopposed MOTION to Amend/Correct 49 MOTION for Protective Order *Appendix*, filed by USA.**Response due by 6/19/2014.** (Attachments: # 1 Appendix Corrected Appendix)(Hosford, Elizabeth) (Entered: 06/02/2014)
06/03/2014	51	JOINT STATUS REPORT *Regarding June 4 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 06/03/2014)
06/03/2014	52	ORDER granting 50 defendant's motion to amend the appendix attached to 49 defendant's motion for a protective order. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 06/03/2014)
06/04/2014	53	STATUS REPORT ORDER: The parties shall file a joint status report suggesting a briefing schedule regarding 49 defendant's motion for a protective order **no later than Friday, June 6, 2014**. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 06/04/2014)
06/05/2014	54	Notice Of Filing Of Certified Transcript for proceedings held on June 4, 2014 in Washington, DC. (dw1) (dw1). (Entered: 06/05/2014)
06/05/2014	55	TRANSCRIPT of Proceedings held on June 4, 2014 before Judge Margaret M. Sweeney. Total No. of Pages: 1−46. Procedures Re: Electronic Transcripts and Redactions. To purchase a copy, contact the clerk's office at (202) 357−6414. Notice of Intent to Redact due 6/12/2014. Redacted Transcript Deadline set for 7/7/2014. Release of Transcript Restriction set for 9/5/2014. (dw1) (Entered: 06/05/2014)
06/05/2014		Minute Entry − Proceeding held in Washington, DC on 6/4/2014 at 11:00 a.m. before Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio copy of the proceeding (click HERE) (ta) (Entered: 06/05/2014)
06/06/2014	56	JOINT STATUS REPORT *Regarding Proposed Briefing Schedule*, filed by USA. (Schwind, Gregg) (Entered: 06/06/2014)
06/09/2014	57	SCHEDULING ORDER: Plaintiff's response regarding 49 defendant's motion for a protective order shall be filed **no later than Tuesday, June 10, 2014**; defendant's reply, if any, shall be filed **no later than Tuesday, June 17, 2014**. **Oral Argument set for Thursday, June 19, 2014 at 11:00 AM before Judge Margaret M. Sweeney**. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 06/09/2014)
06/10/2014	58	RESPONSE to 49 MOTION for Protective Order , filed by All Plaintiffs.**Reply due by 6/20/2014.** (Attachments: # 1 Appendix)(Cooper, Charles) (Entered: 06/10/2014)
06/17/2014	59	JOINT STATUS REPORT *Regarding June 18 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 06/17/2014)

06/17/2014	60	REPLY to Response to Motion re 49 MOTION for Protective Order , filed by USA. (Schwind, Gregg) (Entered: 06/17/2014)
06/18/2014	61	JOINT STATUS REPORT *Regarding June 19 Oral Argument*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 06/18/2014)
06/19/2014	62	ORDER: The parties shall file respective status reports **no later than Monday, June 23, 2014 at 12:00 p.m.**, and a proposed protective order **no later than Tuesday, June 24, 2014 at 5:00 p.m**. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 06/19/2014)
06/19/2014		Minute Entry – Was the proceeding sealed to the public N. Proceeding held in Washington, DC on 6/19/2014 at 11:00 a.m., ended on 6/19/2014, before Judge Margaret M. Sweeney: Oral Argument. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio copy of the proceeding (click HERE) (ta) (Entered: 06/19/2014)
06/20/2014	63	Notice Of Filing Of Certified Transcript for proceedings held on June 19, 2014 in Washington, DC. (dw1) (Entered: 06/20/2014)
06/20/2014	64	TRANSCRIPT of Proceedings held on June 19, 2014 before Judge Margaret M. Sweeney. Total No. of Pages: 1–60. Procedures Re: Electronic Transcripts and Redactions. To purchase a copy, contact the clerk's office at (202) 357–6414. Notice of Intent to Redact due 6/27/2014. Redacted Transcript Deadline set for 7/21/2014. Release of Transcript Restriction set for 9/18/2014. (dw1) (Entered: 06/20/2014)
06/23/2014	65	STATUS REPORT *Concerning ESI Date Ranges*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 06/23/2014)
06/23/2014	66	STATUS REPORT , filed by USA. (Schwind, Gregg) (Entered: 06/23/2014)
06/24/2014	67	ORDER: In light of the parties' telephonic request for an extension of time, they shall file a proposed protective order **no later than Friday, July 11, 2014**. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 06/24/2014)
07/10/2014	68	ORDER Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/10/2014)
07/11/2014	69	JOINT STATUS REPORT *Regarding Proposed Protective Order*, filed by USA. (Attachments: # 1 Exhibit 1 (Fairholme Proposed Order), # 2 Exhibit 2 (US Proposed Order), # 3 Exhibit 3 (Combined Proposed Order))(Schwind, Gregg) (Entered: 07/11/2014)
07/14/2014	70	ORDER regarding future status conferences and the jurisdictional discovery deadline in this case. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/14/2014)
07/15/2014	71	JOINT STATUS REPORT *Regarding July 16 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 07/15/2014)
07/16/2014		Minute Entry – Was the proceeding sealed to the public N. Proceeding held in Washington, DC on 7/16/2014 at 2:00 p.m., ended on 7/16/2014, before Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio copy of the proceeding (click HERE) (ta) (Entered: 07/16/2014)
07/16/2014	72	REPORTED ORDER granting in part and denying in part 49 defendant's motion for a protective order. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/16/2014)
07/16/2014	73	PROTECTIVE ORDER. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. Modified on 8/8/2014 – corrected text (jt1). (Entered: 07/16/2014)
07/22/2014	74	Notice Of Filing Of Certified Transcript for proceedings held on July 16, 2014 in Washington, DC. (dw1) (Entered: 07/22/2014)

07/22/2014	75	TRANSCRIPT of Proceedings held on July 16, 2014 before Judge Margaret M. Sweeney. Total No. of Pages: 1−44. Procedures Re: Electronic Transcripts and Redactions. To purchase a copy, contact the clerk's office at (202) 357−6414. Notice of Intent to Redact due 7/29/2014. Redacted Transcript Deadline set for 8/22/2014. Release of Transcript Restriction set for 10/20/2014. (dw1) (Entered: 07/22/2014)
07/25/2014	76	NOTICE, filed by All Plaintiffs *of Filing* (Cooper, Charles) (Entered: 07/25/2014)
08/05/2014	77	JOINT STATUS REPORT *Regarding August 7 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 08/05/2014)
08/05/2014	78	STATUS CONFERENCE AND STATUS REPORT ORDER. **The court will conduct a status conference on 8/11/2014 at a time to be determined. A Joint Status Report regarding the status conference is due by 8/7/2014.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 08/05/2014)
08/06/2014	79	NOTICE, filed by All Plaintiffs re 73 Protective Order of Filing of Application of Nikki Chtaini for Access to Protected Information (Attachments: # 1 Exhibit Declaration of Nikki Chtaini)(Cooper, Charles) (Entered: 08/06/2014)
08/06/2014	80	NOTICE, filed by All Plaintiffs re 73 Protective Order *of Filing of Application of Michael S. Green for Access to Protected Information* (Attachments: # 1 Exhibit Declaration of Michael S. Green)(Cooper, Charles) (Entered: 08/06/2014)
08/07/2014	81	JOINT STATUS REPORT *Regarding August Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 08/07/2014)
08/08/2014	82	ORDER regarding letter sent to the court. Signed by Judge Margaret M. Sweeney. (Attachments: # 1 Letter)(ta) Copy to parties. (Entered: 08/08/2014)
08/08/2014	83	STATUS CONFERENCE ORDER: A status conference shall be held on **Wednesday, August 13, 2014 at 11 a.m.** before Judge Margaret M. Sweeney. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 08/08/2014)
08/12/2014	84	JOINT STATUS REPORT *Regarding August 13 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 08/12/2014)
08/13/2014		Minute Entry − Proceeding held in Washington, DC on 8/13/2014 at 11:00 a.m., ended on 8/13/2014, before Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio copy of the proceeding (click HERE) (ta) (Entered: 08/13/2014)
08/13/2014	85	ORDER setting forth guidelines for future status conferences and requiring joint status report **no later than Friday, September 5, 2014**. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 08/13/2014)
08/15/2014	86	ORDER regarding letter sent to the court. Signed by Judge Margaret M. Sweeney. (Attachments: # 1 Letter)(ta) Copy to parties. (Entered: 08/15/2014)
08/18/2014	87	Notice Of Filing Of Certified Transcript for proceedings held on August 13, 2014 in Washington, DC. (ew) (Entered: 08/18/2014)
08/18/2014	88	TRANSCRIPT of Proceedings held on August 13, 2014 before Judge Magaret M. Sweeney. Total No. of Pages: 1−46. Procedures Re: Electronic Transcripts and Redactions. To purchase a copy, contact the clerk's office at (202) 357−6414. Notice of Intent to Redact due 8/25/2014. Redacted Transcript Deadline set for 9/18/2014. Release of Transcript Restriction set for 11/17/2014. (ew) (Entered: 08/18/2014)
08/25/2014	89	JOINT STATUS REPORT *Regarding August 27 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 08/25/2014)
09/05/2014	90	JOINT STATUS REPORT *Regarding Proposed Discovery Completion Date*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 09/05/2014)
09/08/2014	91	JOINT STATUS REPORT *Regarding September 10 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 09/08/2014)
09/08/2014	92	DISCOVERY SCHEDULING ORDER: All jurisdictional discovery to be completed by 3/27/15; status report **due 4/13/15**. Signed by Judge Margaret M. Sweeney. (ta)

		Copy to parties. (Entered: 09/08/2014)
09/08/2014	93	NOTICE, filed by All Plaintiffs re 73 Protective Order *of Filing of Application of J. Timothy Howard for Access to Protected Information* (Attachments: # 1 Exhibit Declaration of J. Timothy Howard)(Cooper, Charles) (Entered: 09/08/2014)
09/09/2014	94	ORDER rescheduling tentative status conference from 10/8/14 to 10/9/14. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 09/09/2014)
09/11/2014	95	RESPONSE to *Application of Timothy Howard for Access Under Protective Order*, filed by USA. (Attachments: # 1 Exhibit A−D)(Schwind, Gregg) (Entered: 09/11/2014)
09/15/2014	96	RESPONSE to 95 Response *Defendant's Opposition to the Application of J. Timothy Howard for Access to Protected Information*, filed by All Plaintiffs. (Attachments: # 1 Exhibit Declaration of J. Timothy Howard, # 2 Exhibit "The Mortgage Wars" by Timothy Howard (except))(Cooper, Charles) (Entered: 09/15/2014)
09/22/2014	97	JOINT STATUS REPORT *Regarding September 24 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 09/22/2014)
09/22/2014	98	STATUS REPORT ORDER. Joint status report **due by 9/26/14 at 5:00 p.m.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 09/22/2014)
09/26/2014	99	JOINT STATUS REPORT *Regarding October 1 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 09/26/2014)
09/29/2014		NOTICE: No Status Conference set for the week of 09/29/2014. (ac7) (Entered: 09/29/2014)
10/07/2014	100	JOINT STATUS REPORT *Regarding October 9 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 10/07/2014)
10/15/2014	101	REPORTED ORDER denying J. Timothy Howard's application for admission to the protective order. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 10/15/2014)
10/20/2014	102	JOINT STATUS REPORT *Regarding October 22 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 10/20/2014)
10/28/2014	103	MOTION to Stay Proceedings Pending Appeal Of District Court Decision , filed by USA.**Response due by 11/17/2014.** (Attachments: # 1 Exhibit A)(Hosford, Elizabeth) (Entered: 10/28/2014)
11/03/2014	104	JOINT STATUS REPORT *Regarding November 5 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 11/03/2014)
11/17/2014	105	JOINT STATUS REPORT *Regarding November 19 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 11/17/2014)
11/17/2014	106	**SEALED**RESPONSE to 103 Motion to Stay , filed by All Plaintiffs. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G)(Cooper, Charles) (Entered: 11/17/2014)
11/21/2014	107	MOTION for Leave to File Amicus Brief *Opposing Motion for Stay*, filed by LOUISE RAFTER, JOSEPHINE RATTIEN, STEPHEN RATTIEN, PERSHING SQUARE CAPITAL MANAGEMENT, L.P..**Response due by 12/8/2014.** (Attachments: # 1 Exhibit Exhibit A)(Rosenberg, Lawrence) (Entered: 11/21/2014)
11/24/2014	108	ORDER granting 107 motion for leave to file amicus brief opposing defendant's motion to stay proceedings. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 11/24/2014)
11/25/2014	109	MOTION for Leave to File Amicus Brief *Regarding Defendant's Motion to Stay*, filed by WASHINGTON FEDERAL, MICHAEL MCCREDY BAKER, CITY OF AUSTIN POLICE RETIREMENT SYSTEM.**Response due by 12/12/2014.**(Berman, Steve) (Entered: 11/25/2014)
11/25/2014	110	REPLY to Response to Motion re 103 MOTION to Stay Proceedings Pending Appeal Of District Court Decision , filed by USA. (Hosford, Elizabeth) (Entered: 11/25/2014)

11/25/2014	111	RESPONSE to 109 MOTION for Leave to File Amicus Brief *Regarding Defendant's Motion to Stay* , filed by USA.**Reply due by 12/5/2014.** (Schwind, Gregg) (Entered: 11/25/2014)
11/26/2014	112	ORDER granting 109 motion for leave to file amicus brief opposing defendant's motion to stay proceedings. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 11/26/2014)
12/01/2014	113	JOINT STATUS REPORT *Regarding December 3 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 12/01/2014)
12/05/2014	114	AMICUS BRIEF *Regarding Defendant's Motion to Stay*, filed by MICHAEL MCCREDY BAKER, CITY OF AUSTIN POLICE RETIREMENT SYSTEM, WASHINGTON FEDERAL. (Berman, Steve) (Entered: 12/05/2014)
12/10/2014	115	Unopposed MOTION for Leave to Respond to Briefs of Amici Curiae re 103 MOTION to Stay Proceedings Pending Appeal Of District Court Decision , filed by USA.**Response due by 12/29/2014.**(Hosford, Elizabeth) (Entered: 12/10/2014)
12/12/2014	116	ORDER granting 115 defendant's motion for leave to respond to amicus briefs regarding motion to stay proceedings. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 12/12/2014)
12/15/2014	117	JOINT STATUS REPORT *Regarding December 17 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 12/15/2014)
12/18/2014	118	NOTICE, filed by All Plaintiffs re 106 Response, *of Filing of Plaintiffs' Public, Redacted Response in Opposition to Defendant's Motion to Stay All Proceedings* (Attachments: # 1 Plaintiffs' Public, Redacted Response in Opposition to Defendant's Motion to Stay All Proceedings)(Cooper, Charles) (Entered: 12/18/2014)
12/29/2014	119	JOINT STATUS REPORT *Regarding December 31 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 12/29/2014)
01/12/2015	120	JOINT STATUS REPORT *Regarding January 14 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 01/12/2015)
01/23/2015	121	NOTICE of Additional Authority *Supporting Rafter Amici* (Rosenberg, Lawrence) (Entered: 01/23/2015)
01/26/2015	122	JOINT STATUS REPORT *Regarding January 28 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 01/26/2015)
01/26/2015	123	STATUS CONFERENCE ORDER: A status conference shall be held on **Wednesday, January 28, 2015 at 10 a.m.** before Judge Margaret M. Sweeney. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 01/26/2015)
01/26/2015	124	**NOTICE REGARDING EX PARTE AND OTHER INAPPROPRIATE COMMUNICATIONS TO CHAMBERS.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 01/26/2015)
01/26/2015	125	NOTICE, filed by All Plaintiffs re 73 Protective Order *of Filing of Applications of Robert Corso, Mark McMahon, Maria Nizza, Nikhil Rupani, Christo Tazankov, and John Campbell for Access to Protected Information* (Attachments: # 1 Declarations of Robert Corso, Mark McMahon, Maria Nizza, Nikhil Rupani, Christo Tzankov, and John Campbell)(Cooper, Charles) (Entered: 01/26/2015)
01/28/2015		Minute Entry − Was the proceeding sealed to the public? N. Proceeding held in Washington, DC on 1/28/2015 at 10:00 a.m., ended on 1/28/2015, before Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio copy of the proceeding (click HERE) (ta) (Entered: 01/28/2015)
01/29/2015	126	Notice Of Filing Of Certified Transcript for proceedings held on January 28, 2015 in Washington, D.C. (ew) (Entered: 01/30/2015)
01/29/2015	127	TRANSCRIPT of Proceedings held on January 28, 2015 before Judge Margaret M. Sweeney. Total No. of Pages: 1−38. Procedures Re: Electronic Transcripts and Redactions. To order a copy of the proceeding (click HERE) Notice of Intent to Redact

		due 2/5/2015. Redacted Transcript Deadline set for 3/2/2015. Release of Transcript Restriction set for 4/30/2015. (ew) (Entered: 01/30/2015)
02/02/2015	128	NOTICE, filed by USA *With Respect to Applications of Robert Corso, Mark McMahon, Maria Nizza, Nikhil Rupani, Christo Tzankov, and John Campbell for Access to Protected Information* (Schwind, Gregg) (Entered: 02/02/2015)
02/03/2015	129	NOTICE of Additional Authority (Attachments: # 1 Exhibit A)(Schwind, Gregg) (Entered: 02/03/2015)
02/05/2015	130	RESPONSE to 129 Notice of Additional Authority , filed by All Plaintiffs. (Cooper, Charles) (Entered: 02/05/2015)
02/09/2015	131	JOINT STATUS REPORT *Regarding February 11, 2015 Status Conference*, filed by USA. (Schwind, Gregg) (Entered: 02/09/2015)
02/23/2015	132	JOINT STATUS REPORT *Regarding February 25 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 02/23/2015)
02/23/2015	133	STATUS CONFERENCE ORDER: **Status Conference set for 2/25/15 at 11:00 a.m. before Judge Margaret M. Sweeney.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 02/23/2015)
02/25/2015		Minute Entry − Was the proceeding sealed to the public? N. Proceeding held in Washington, DC on 2/25/15 at 11:00 a.m., ended on 2/25/15, before Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio copy of the proceeding (click HERE) (ta) (Entered: 02/25/2015)
02/27/2015	134	Notice Of Filing Of Certified Transcript for proceedings held on February 25, 2015 in Washington, D.C. (ew) (Entered: 02/27/2015)
02/27/2015	135	TRANSCRIPT of Proceedings held on February 25, 2015 before Judge Margaret M. Sweeney. Total No. of Pages: 1−33. Procedures Re: Electronic Transcripts and Redactions. To order a copy of the proceeding (click HERE) Notice of Intent to Redact due 3/6/2015. Redacted Transcript Deadline set for 3/30/2015. Release of Transcript Restriction set for 5/29/2015. (ew) (Entered: 02/27/2015)
03/06/2015	136	Joint MOTION for Extension of Time,until June 29, 2015, to Complete Discovery , filed by USA.**Response due by 3/23/2015.**(Schwind, Gregg) (Entered: 03/06/2015)
03/09/2015	137	JOINT STATUS REPORT *Regarding March 11 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 03/09/2015)
03/16/2015	138	ORDER granting 136 motion for extension of time to complete discovery. **All jurisdictional discovery to be completed by 6/29/15; status report due 7/13/15.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 03/16/2015)
03/23/2015	139	JOINT STATUS REPORT *Regarding March 25 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 03/23/2015)
03/23/2015	140	STATUS CONFERENCE ORDER: **Status Conference set for 3/31/15 at 11:00 a.m. before Judge Margaret M. Sweeney.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 03/23/2015)
03/30/2015	141	NOTICE, filed by All Plaintiffs *Concerning Attorneys in Related Cases Who Plan To Listen to March 31 Status Conference* (Cooper, Charles) (Entered: 03/30/2015)
03/31/2015		Minute Entry − Was the proceeding sealed to the public? N. Proceeding held in Washington, DC on 3/31/15, ended on 3/31/15, before Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio copy of the proceeding (click HERE) (ta) (Entered: 03/31/2015)
03/31/2015	142	NOTICE, filed by All Plaintiffs *of Filing of Application of Joseph Orlando for Access to Protected Information* (Attachments: # 1 Declaration of Joseph A. Orlando)(Cooper, Charles) (Entered: 03/31/2015)

04/01/2015	143	Notice Of Filing Of Certified Transcript for proceedings held on March 31, 2015 in Washington, D.C. (ew) (Entered: 04/01/2015)
04/01/2015	144	TRANSCRIPT of Proceedings held on March 31, 2015 before Judge Margaret M. Sweeney. Total No. of Pages: 1−30. Procedures Re: Electronic Transcripts and Redactions. To order a copy of the proceeding (click HERE) Notice of Intent to Redact due 4/8/2015. Redacted Transcript Deadline set for 5/4/2015. Release of Transcript Restriction set for 7/2/2015. (ew) (Entered: 04/01/2015)
04/06/2015	145	JOINT STATUS REPORT *Regarding April 8 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 04/06/2015)
04/07/2015	146	APPLICATION for Access to Protected Material by Robert Hutchins, Andrew Ackel, Amanda Levesque, Leigh Lovelady, and Timothy Varner, filed by USA.(Schiavetti, Anthony) (Entered: 04/07/2015)
04/20/2015	147	JOINT STATUS REPORT *Regarding April 22 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 04/20/2015)
04/23/2015	148	**SEALED** MOTION *to Remove the "Protected Information" Designation from Defendant's March 20 Privilege Log*, filed by All Plaintiffs.**Response due by 5/11/2015.** (Attachments: # 1 Appendix)(Cooper, Charles) (Entered: 04/23/2015)
05/04/2015	149	JOINT STATUS REPORT *Regarding May 6 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 05/04/2015)
05/08/2015	150	Unopposed MOTION for Extension of Time until 5/18/2015 to File Response as to 148 MOTION *to Remove the "Protected Information" Designation from Defendant's March 20 Privilege Log* , filed by All Defendants.**Response due by 5/26/2015.**(Laufgraben, Eric) (Entered: 05/08/2015)
05/11/2015	151	ORDER granting 150 Motion for Extension of Time to File Response. **Response due by 5/18/15.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 05/11/2015)
05/12/2015	152	MOTION To Remove the "Protected Information" Designation from Defendant's March 20 Privilege Log re 148 MOTION *to Remove the "Protected Information" Designation from Defendant's March 20 Privilege Log (Public, Redacted Version)*, filed by All Plaintiffs.**Response due by 5/29/2015.**(Cooper, Charles) (Entered: 05/12/2015)
05/18/2015	153	JOINT STATUS REPORT *Regarding May 20 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 05/18/2015)
05/18/2015	154	RESPONSE to 148 MOTION *to Remove the "Protected Information" Designation from Defendant's March 20 Privilege Log* , filed by USA.**Reply due by 5/29/2015.** (Schwind, Gregg) (Entered: 05/18/2015)
05/27/2015	155	REPLY to Response to Motion re 148 MOTION *to Remove the "Protected Information" Designation from Defendant's March 20 Privilege Log* , filed by ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, FAIRHOLME FUNDS, INC., MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, THE FAIRHOLME FUND. (Attachments: # 1 Exhibits I, J, and K)(Cooper, Charles) (Entered: 05/27/2015)
06/01/2015	156	JOINT STATUS REPORT *Regarding June 3 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 06/01/2015)
06/01/2015	157	MOTION for Leave to File Sur−Reply , filed by USA.**Response due by 6/18/2015.** (Attachments: # 1 Sur−Reply)(Schwind, Gregg) (Entered: 06/01/2015)
06/02/2015	158	ORDER granting 157 defendant's motion for leave to file sur−response. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 06/02/2015)

06/02/2015	159	MOTION for Leave to File Sur−Rebuttal , filed by All Plaintiffs.**Response due by 6/19/2015.** (Attachments: # 1 Sur−Rebuttal)(Cooper, Charles) (Entered: 06/02/2015)
06/04/2015	160	ORDER granting 159 plaintiffs' motion for leave to file sur−reply. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 06/04/2015)
06/08/2015	161	Supplemental MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by USA.**Response due by 7/9/2015.** (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Schwind, Gregg) (Entered: 06/08/2015)
06/12/2015	162	**SEALED** MOTION to Remove the "Protected Information" Designations from Depositions , filed by All Plaintiffs.**Response due by 6/29/2015.** (Attachments: # 1 Appendix)(Cooper, Charles) (Entered: 06/12/2015)
06/15/2015	163	JOINT STATUS REPORT *Regarding June 17 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 06/15/2015)
06/17/2015	164	MOTION to Stay Briefing *on Defendant's Supplemental Motion to Dismiss*, filed by All Plaintiffs.**Response due by 7/6/2015.**(Cooper, Charles) (Entered: 06/17/2015)
06/18/2015	165	**SEALED** MOTION to Remove the "Protected Information" Designation from Certain Grant Thornton Documents , filed by All Plaintiffs.**Response due by 7/6/2015.** (Attachments: # 1 Appendix Volume 1, # 2 Appendix Volume 2, # 3 Appendix Volume 3)(Cooper, Charles) (Entered: 06/18/2015)
06/24/2015	166	**SEALED** MOTION to Remove the "Protected Information" Designation from Certain Treasury and FHFA Documents , filed by All Plaintiffs.**Response due by 7/13/2015.** (Attachments: # 1 Appendix)(Cooper, Charles) (Entered: 06/24/2015)
06/24/2015	167	NOTICE of Additional Authority (Attachments: # 1 Exhibit (Piszel Opinion))(Schwind, Gregg) (Entered: 06/24/2015)
06/25/2015	168	MOTION To Remove the "Protected Information" Designations from the Depositions of Edward DeMarco and Mario Ugoletti (Public Redacted Version) re 162 MOTION to Remove the "Protected Information" Designations from Depositions , filed by All Plaintiffs.**Response due by 7/13/2015.**(Cooper, Charles) (Entered: 06/25/2015)
06/26/2015	169	**SEALED** MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Deloitte , filed by All Plaintiffs.**Response due by 7/13/2015.** (Attachments: # 1 Appendix)(Cooper, Charles) (Entered: 06/26/2015)
06/26/2015	170	**SEALED** MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Fannie Mae , filed by All Plaintiffs.**Response due by 7/13/2015.** (Attachments: # 1 Appendix)(Cooper, Charles) (Entered: 06/26/2015)
06/26/2015	171	**SEALED** MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Freddie Mac , filed by All Plaintiffs.**Response due by 7/13/2015.** (Attachments: # 1 Appendix)(Cooper, Charles) (Entered: 06/26/2015)
06/26/2015	172	**SEALED** MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by PricewaterhouseCoopers , filed by All Plaintiffs.**Response due by 7/13/2015.** (Attachments: # 1 Appendix)(Cooper, Charles) (Entered: 06/26/2015)
06/29/2015	173	NOTICE, filed by USA *Application for Access to Protected Information* (Hosford, Elizabeth) (Entered: 06/29/2015)
06/29/2015	174	STATUS CONFERENCE ORDER: **A status conference shall be held on Tuesday, July 7, 2015 at 1 p.m. before Judge Margaret M. Sweeney. Because protected information will be discussed, the status conference shall be closed to the public. Only those counsel admitted to the protective order may participate.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 06/29/2015)
06/29/2015	175	MOTION for Extension of Time until 07/13/2015 to File Response as to 162 MOTION to Remove the "Protected Information" Designations from Depositions , filed by USA.**Response due by 7/16/2015.**(Schwind, Gregg) (Entered: 06/29/2015)

06/29/2015	176	ORDER granting 175 Motion for Extension of Time to File Response to 162 Motion to Remove the "Protected Information" Designation from Certain Depositions. **Defendant's response due by 7/13/15.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 06/29/2015)
06/30/2015	177	MOTION to Intervene *And For Order De−Designating Discovery Materials*, filed by The New York Times Company.**Response due by 7/17/2015.**(McCraw, David) (Entered: 06/30/2015)
07/02/2015	178	RESPONSE to 167 Notice of Additional Authority , filed by All Plaintiffs. (Cooper, Charles) (Entered: 07/02/2015)
07/02/2015	179	NOTICE, filed by All Plaintiffs *of Joint Filing of Applications for Access to Protected Information* (Attachments: # 1 Deloitte Applications, # 2 Fannie Mae Applications, # 3 Freddie Mac Applications, # 4 PwC Applications)(Cooper, Charles) (Entered: 07/02/2015)
07/06/2015	180	JOINT STATUS REPORT *Regarding July 7 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 07/06/2015)
07/06/2015	181	Unopposed MOTION for Extension of Time to File Response as to 165 MOTION to Remove the "Protected Information" Designation from Certain Grant Thornton Documents , filed by Grant Thornton LLP.**Response due by 7/23/2015.**(Harper, Richard) (Entered: 07/06/2015)
07/06/2015	182	RESPONSE to 164 MOTION to Stay Briefing *on Defendant's Supplemental Motion to Dismiss* , filed by USA.**Reply due by 7/16/2015.** (Hosford, Elizabeth) (Entered: 07/06/2015)
07/06/2015	183	Unopposed MOTION for Extension of Time until 7/13/2015 to To Respond To Plaintiffs' Motion To Remove The "Protected Information" Designation From Certain Grant Thorton Documents , filed by USA.**Response due by 7/23/2015.**(Acevedo, Mariana) (Entered: 07/06/2015)
07/07/2015	184	NOTICE, filed by All Plaintiffs *of Joint Filing of Application of Charles E. Davidow for Access to Protected Information* (Attachments: # 1 Davidow Application)(Cooper, Charles) (Entered: 07/07/2015)
07/07/2015	185	ORDER vacating status conference scheduled for 7/7/15. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/07/2015)
07/07/2015	186	**SEALED** ORDER granting limited relief as to 162 . Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/07/2015)
07/07/2015	187	**SEALED** ORDER granting 183 Motion for Extension of Time. **Defendant's response due by 7/13/15.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/07/2015)
07/08/2015	188	Joint MOTION for Extension of Time,until 09/04/2015, to Complete Discovery , filed by USA.**Response due by 7/27/2015.**(Schwind, Gregg) (Entered: 07/08/2015)
07/08/2015	189	Unopposed MOTION for Extension of Time until August 10, 2015 to File Response as to 161 Supplemental MOTION to Dismiss pursuant to Rule 12(b)(1) *(Time Sensitive)*, filed by All Plaintiffs.**Response due by 7/27/2015.**(Cooper, Charles) (Entered: 07/08/2015)
07/08/2015	190	ORDER granting 181 Motion for Extension of Time to File Response. **Response due by 7/13/15.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/08/2015)
07/08/2015	191	ORDER granting 189 Motion for Extension of Time to File Response. **Response due by 8/10/15.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/08/2015)
07/08/2015	192	STATUS CONFERENCE ORDER: **A status conference shall be held on Thursday, August 13, 2015 at 1 p.m. before Judge Margaret M. Sweeney. Because protected information will be discussed, the status conference shall be closed to the public. Only those counsel admitted to the protective order may participate. The parties' sealed joint status report is due by August 11, 2015 at 5 p.m.** Signed by Judge

		Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/08/2015)
07/09/2015	193	ORDER granting 188 motion for extension of time to complete discovery. **All jurisdictional discovery to be completed by 9/4/15; status report due 9/18/15.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/09/2015)
07/09/2015	194	**SEALED** ORDER granting limited relief. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/09/2015)
07/13/2015	195	MOTION for Extension of Time until August 17, 2015 to Respond to Plaintiffs June 18, 2015 Motion to Remove the Protected Information Designation from Certain Grant Thornton Documents , filed by GRANT THORNTON LLP.**Response due by 7/30/2015.**(Harper, Richard) (Entered: 07/13/2015)
07/13/2015	196	Unopposed MOTION for Extension of Time to File Response as to 172 MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by PricewaterhouseCoopers , 170 MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Fannie Mae , 171 MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Freddie Mac , 169 MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Deloitte , filed by FEDERAL HOME LOAN MORTGAGE CORPORATION.**Response due by 7/30/2015.**(Ciatti, Michael) (Entered: 07/13/2015)
07/13/2015	197	NOTICE, filed by All Plaintiffs *of Filing of Applications of Stacey K. Grisgsby, Eric L. Zagar, and Joshua B. Kaplan for Access to Protected Information* (Attachments: # 1 Stacey K. Grigsby Application, # 2 Eric L. Zagar Application, # 3 Joshua B. Kaplan Application)(Cooper, Charles) (Entered: 07/13/2015)
07/13/2015	198	MOTION for Extension of Time until 08/17/2015 to Respond to Plaintiffs' Various Motions to Remove Protected Information Designation from Certain Documents, and The New York Times Company's Motion to Intervene , filed by USA.**Response due by 7/30/2015.**(Bezak, Reta) (Entered: 07/13/2015)
07/14/2015	199	RESPONSE to 198 MOTION for Extension of Time until 08/17/2015 to Respond to Plaintiffs' Various Motions to Remove Protected Information Designation from Certain Documents, and The New York Times Company's Motion to Intervene , 195 MOTION for Extension of Time until August 17, 2015 to Respond to Plaintiffs June 18, 2015 Motion to Remove the Protected Information Designation from Certain Grant Thornton Documents , filed by All Plaintiffs.**Reply due by 7/24/2015.** (Cooper, Charles) (Entered: 07/14/2015)
07/14/2015	200	RESPONSE to 198 MOTION for Extension of Time until 08/17/2015 to Respond to Plaintiffs' Various Motions to Remove Protected Information Designation from Certain Documents, and The New York Times Company's Motion to Intervene , filed by The New York Times Company.**Reply due by 7/24/2015.** (McCraw, David) (Entered: 07/14/2015)
07/14/2015	201	REPLY to Response to Motion re 198 MOTION for Extension of Time until 08/17/2015 to Respond to Plaintiffs' Various Motions to Remove Protected Information Designation from Certain Documents, and The New York Times Company's Motion to Intervene , filed by USA. (Bezak, Reta) (Entered: 07/14/2015)
07/14/2015	202	MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Fannie Mae (Public, Redacted Version) re 170 MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Fannie Mae , filed by All Plaintiffs.**Response due by 7/31/2015.**(Cooper, Charles) (Entered: 07/14/2015)
07/14/2015	203	MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Deloitte (Public, Redacted Version) re 169 MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Deloitte , filed by All Plaintiffs.**Response due by 7/31/2015.** (Attachments: # 1 Appendix)(Cooper, Charles) (Entered: 07/14/2015)

07/14/2015	204	MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by PricewaterhouseCoopers (Public, Redacted Version) re 172 MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by PricewaterhouseCoopers , filed by All Plaintiffs.**Response due by 7/31/2015.**(Cooper, Charles) (Entered: 07/14/2015)
07/14/2015	205	MOTION to Remove the "Protected Information" Designation from Certain Treasury and FHFA Documents (Public, Redacted Version) re 166 MOTION to Remove the "Protected Information" Designation from Certain Treasury and FHFA Documents , filed by All Plaintiffs.**Response due by 7/31/2015.**(Cooper, Charles) (Entered: 07/14/2015)
07/14/2015	206	MOTION to Remove the "Protected Information" Designation from Certain Grant Thornton Documents (Public, Redacted Version) re 165 MOTION to Remove the "Protected Information" Designation from Certain Grant Thornton Documents , filed by All Plaintiffs.**Response due by 7/31/2015.** (Attachments: # 1 Appendix Volume 1, # 2 Appendix Volume 2, # 3 Appendix Volume 3)(Cooper, Charles) (Entered: 07/14/2015)
07/15/2015	207	MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Freddie Mac (Public, Redacted Version) re 171 MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Freddie Mac , filed by All Plaintiffs.**Response due by 8/3/2015.**(Cooper, Charles) (Entered: 07/15/2015)
07/15/2015	208	ORDER granting in part and denying in part 195 , 196 , and 198 . **Responses to plaintiffs' various motions due by 8/10/15.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/15/2015)
07/15/2015	209	ORDER: **Defendant's response to The New York Times Company's Motion to Intervene due by 8/10/15.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/15/2015)
07/16/2015	210	REPLY to Response to Motion re 164 MOTION to Stay Briefing *on Defendant's Supplemental Motion to Dismiss* , filed by All Plaintiffs. (Cooper, Charles) (Entered: 07/16/2015)
07/20/2015	211	**SEALED** MOTION for Leave to File Materials Designated as "Protected Information" Under Seal , filed by All Plaintiffs.**Response due by 8/6/2015.** (Attachments: # 1 Appendix Volume 1, # 2 Appendix Volume 2)(Cooper, Charles) (Entered: 07/20/2015)
07/21/2015	212	ORDER granting 211 Motion for Leave to File Certain Materials Designated as "Protected Information" Under Seal with the D.C. Circuit and the D.C. District Court. Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 07/21/2015)
07/22/2015	213	Unopposed MOTION for Extension of Time until 07/27/2015 to File *a Proposed Amended Protective Order*, filed by All Plaintiffs.**Response due by 8/10/2015.**(Cooper, Charles) (Entered: 07/22/2015)
07/23/2015	214	ORDER granting 213 Motion for Extension of Time to File Proposed Amended Protective Order (discussed in the court's 7/10/2015 order in Cacciapalle v. United States, no. 13−466C (consolidated)). **Plaintiffs shall file the proposed amended protective order by 7/27/2015.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 07/23/2015)
07/27/2015	215	Unopposed MOTION to Amend/Correct 73 Protective Order , filed by All Plaintiffs.**Response due by 8/13/2015.** (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Cooper, Charles) (Entered: 07/27/2015)
07/29/2015	216	ORDER granting plaintiffs' unopposed motion to amend the protective order. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/29/2015)
07/29/2015	217	AMENDED PROTECTIVE ORDER. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/29/2015)

08/03/2015	218	(Public, Redacted Version) MOTION for Leave to File Materials Designated as "Protected Information" Under Seal re 211 MOTION for Leave to File Materials Designated as "Protected Information" Under Seal , filed by All Plaintiffs.**Response due by 8/20/2015.** (Attachments: # 1 Appendix Volume 1, # 2 Appendix Volume 2)(Cooper, Charles) (Entered: 08/03/2015)
08/06/2015	219	Unopposed MOTION for Extension of Time until September 9, 2015 to File a Response to the Government's Supplemental Motion to Dismiss , filed by All Plaintiffs.**Response due by 8/24/2015.**(Cooper, Charles) (Entered: 08/06/2015)
08/07/2015	220	ORDER granting 219 Motion for Extension of Time to Respond to 161 Defendant's Supplemental Motion to Dismiss. **Plaintiff's Response due by 9/9/2015.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 08/07/2015)
08/10/2015	221	RESPONSE to 177 MOTION to Intervene *And For Order De−Designating Discovery Materials* , filed by USA.**Reply due by 8/20/2015.** (Koprowski, Agatha) (Entered: 08/10/2015)
08/10/2015	222	RESPONSE to 166 MOTION to Remove the "Protected Information" Designation from Certain Treasury and FHFA Documents , 162 MOTION to Remove the "Protected Information" Designations from Depositions , 165 MOTION to Remove the "Protected Information" Designation from Certain Grant Thornton Documents , filed by USA.**Reply due by 8/20/2015.** (Schiavetti, Anthony) (Entered: 08/10/2015)
08/10/2015	223	**SEALED**RESPONSE to 170 MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Fannie Mae , 169 MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Deloitte , filed by FEDERAL NATIONAL MORTGAGE ASSOCIATION.**Reply due by 8/20/2015.** (Attachments: # 1 Appendix)(Hudson, David) (Entered: 08/10/2015)
08/10/2015	224	**SEALED**RESPONSE to 165 Motion for Miscellaneous Relief, *TO REMOVE THE PROTECTED INFORMATION DESIGNATION FROM CERTAIN GRANT THORNTON DOCUMENTS*, filed by GRANT THORNTON LLP.(Harper, Richard) (Entered: 08/10/2015)
08/10/2015	225	**SEALED**RESPONSE to 171 Motion for Miscellaneous Relief, *to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Freddie Mac*, filed by FEDERAL HOME LOAN MORTGAGE CORPORATION. (Attachments: # 1 Appendix)(Ciatti, Michael) (Entered: 08/10/2015)
08/11/2015	226	NOTICE, filed by PERRY CAPITAL LLC re 217 Protective Order *of Filing of Applications of Certain Counsel Representing Perry Capital LLC for Access to Protected Information* (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Text of Proposed Order (Exhibit D), # 5 Text of Proposed Order (Exhibit E))(Chesley, John) (Entered: 08/11/2015)
08/12/2015	227	RESPONSE to 226 Notice *in Opposition*, filed by USA. (Bezak, Reta) (Entered: 08/12/2015)
08/17/2015	228	REPLY to Response to Motion re 177 MOTION to Intervene *And For Order De−Designating Discovery Materials* , filed by THE NEW YORK TIMES COMPANY. (McCraw, David) (Entered: 08/17/2015)
08/18/2015	229	NOTICE, filed by BRYNDON FISHER, BRUCE REID, ERICK SHIPMON re 217 Protective Order (Attachments: # 1 Exhibit A − Declaration of Francis Der)(Schubert, Robert) (Entered: 08/18/2015)
08/18/2015	230	NOTICE, filed by BRYNDON FISHER, BRUCE REID, ERICK SHIPMON re 217 Protective Order *Corrected Notice Re: Dkt. No. 229* (Attachments: # 1 Exhibit A − Declaration of Francis Der)(Schubert, Robert) (Entered: 08/18/2015)
08/20/2015	231	RESPONSE to 227 Response *Reply in Support of Application for Access to Protected Information*, filed by PERRY CAPITAL LLC. (Chesley, John) (Entered: 08/20/2015)
08/20/2015	232	**SEALED**REPLY to Response to Motion re 166 MOTION to Remove the "Protected Information" Designation from Certain Treasury and FHFA Documents , 170 MOTION to Remove the "Protected Information" Designation from Certain

		Unredacted Information in Documents Produced by Fannie Mae , 171 MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Freddie Mac , 162 MOTION to Remove the "Protected Information" Designations from Depositions , 165 MOTION to Remove the "Protected Information" Designation from Certain Grant Thornton Documents , 169 MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Deloitte , filed by All Plaintiffs. (Attachments: # 1 Exhibit 1 − Fairholme's Public, Redacted Motion for Judicial Notice and Supplementation of the Record (D.C. Cir.))(Cooper, Charles) (Entered: 08/20/2015)
08/21/2015	233	APPLICATION for Access to Protected Material by Jennifer O'Connor, James Walsh, and Allison Murphy, filed by USA.(Schiavetti, Anthony) (Entered: 08/21/2015)
08/21/2015	234	REDACTED DOCUMENT, filed by FEDERAL HOME LOAN MORTGAGE CORPORATION redacting 225 Response, *In Opposition To Plaintiffs' Motion To Remove The "Protected Information" Designation From Certain Documents Produced By Freddie Mac*. (Ciatti, Michael) (Entered: 08/21/2015)
08/21/2015	235	STATUS CONFERENCE ORDER: **A status conference shall be held on Friday, September 4, 2015 at 10 a.m. before Judge Margaret M. Sweeney. Because protected information will be discussed, the status conference shall be closed to the public. Only those counsel admitted to the protective order may participate. The parties' sealed joint status report is due by Wednesday, September 2, 2015 at 5 p.m.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 08/21/2015)
08/24/2015	236	REDACTED DOCUMENT, filed by GRANT THORNTON LLP redacting 224 Response *In Opposition To Plaintiffs' Motion to Remove the "Protected Information" Designated from Certain Grant Thornton Documents*. (Harper, Richard) (Entered: 08/24/2015)
08/24/2015	237	Consented MOTION to Substitute Attorney Gregory P. Joseph in place of Lawrence David Rosenberg , filed by PERSHING SQUARE CAPITAL MANAGEMENT, L.P., LOUISE RAFTER, JOSEPHINE RATTIEN, STEPHEN RATTIEN. (Attachments: # 1 Exhibit Ex. 1, # 2 Exhibit Ex. 2)(Joseph, Gregory) (Entered: 08/24/2015)
08/24/2015		NOTICE re: Motion to Substitute Attorney (Consented) pursuant to Rule 83.1(c)(4). Added attorney Gregory P Joseph for PERSHING SQUARE CAPITAL MANAGEMENT, L.P.,LOUISE RAFTER,JOSEPHINE RATTIEN,Gregory P Joseph and STEPHEN RATTIEN. Attorney Lawrence David Rosenberg terminated. (ac7) (Entered: 08/24/2015)
09/01/2015	238	NOTICE, filed by MICHAEL MCCREDY BAKER, CITY OF AUSTIN POLICE RETIREMENT SYSTEM, WASHINGTON FEDERAL *Notice of Filing of Applications of Jennifer Fountain Connolly, Robert M. Rosen and Joshua B. Kaplan for Access to Protected Information* (Attachments: # 1 Exhibit A − Declaration of Jennifer Fountain Connolly, # 2 Exhibit B − Declaration of Robert M. Roseman, # 3 Exhibit C − Declaration of Joshua B. Kaplan)(Berman, Steve) (Entered: 09/01/2015)
09/02/2015	239	**SEALED**JOINT STATUS REPORT *Regarding September 4 Status Conference*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 09/02/2015)
09/04/2015		Minute Entry − Was the proceeding sealed to the public? Y. Proceeding held in Washington, DC on 9/4/15 at 10 a.m., ended on 9/4/15, before Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio copy of the proceeding (click HERE) (ta) (Entered: 09/04/2015)
09/04/2015	240	ORDER resolving various motions. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 09/04/2015)
09/14/2015	241	REDACTED DOCUMENT, filed by All Plaintiffs redacting 232 Reply to Response to Motion,,,, . (Attachments: # 1 Exhibit 1 − Public, Redacted Version of D.C. Cir. Motion for Judicial Notice)(Cooper, Charles) (Entered: 09/14/2015)
09/15/2015	242	REDACTED DOCUMENT, filed by FEDERAL NATIONAL MORTGAGE ASSOCIATION redacting 223 Response to Motion, *Response to Motion to Remove*

		the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Fannie Mae and Deloitte. (Attachments: # 1 Appendix)(Hudson, David) (Entered: 09/15/2015)
09/22/2015	243	**SEALED**Notice Of Filing Of Certified Transcript for proceedings held on September 4, 2015, in Washington, D.C. (ac7) (Entered: 09/22/2015)
09/22/2015	244	**SEALED**TRANSCRIPT of Proceedings held on September 4, 2015 before Judge Margaret M. Sweeney. Total No. of Pages: 1−68. To purchase a copy, contact the clerk's office at (202) 357−6414. (ac7) (Entered: 09/22/2015)
09/29/2015	245	MOTION for General Leave to File Discovery Materials Under Seal in Other Litigation Challenging the Net Worth Sweep , filed by All Plaintiffs.**Response due by 10/16/2015.**(Cooper, Charles) (Entered: 09/29/2015)
09/30/2015	246	ORDER granting 245 motion. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 09/30/2015)
10/02/2015	247	**SEALED** MOTION to Quash , filed by FEDERAL NATIONAL MORTGAGE ASSOCIATION.**Response due by 10/19/2015.** (Attachments: # 1 Appendix)(Hudson, David) (Entered: 10/02/2015)
10/07/2015	248	NOTICE, filed by PERRY CAPITAL LLC re 226 Notice (Other), *Regarding Pending Applications of Certain Counsel Representing Perry Capital LLC For Access To Protected Information, or, in the Alternative, Motion to Amend the Amended Protective Order* (Chesley, John) (Entered: 10/07/2015)
10/08/2015	249	ORDER re 248 Notice filed by PERRY CAPITAL LLC. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 10/08/2015)
10/09/2015	250	**SEALED**Corrected MOTION to Quash , filed by FEDERAL NATIONAL MORTGAGE ASSOCIATION.**Response due by 10/26/2015.** (Attachments: # 1 Appendix)(Hudson, David) (Attachment 1 replaced on 10/9/2015) (ar). (Entered: 10/09/2015)
10/14/2015	251	NOTICE, filed by All Plaintiffs *Notice of Appearance of Additional Attorneys* (Cooper, Charles) (Entered: 10/14/2015)
10/19/2015	252	**SEALED**RESPONSE to 250 Corrected MOTION to Quash , filed by All Plaintiffs.**Reply due by 10/29/2015.** (Attachments: # 1 Appendix)(Cooper, Charles) (Entered: 10/19/2015)
10/29/2015	253	**SEALED**REPLY to Response to Motion re 250 Corrected MOTION to Quash , filed by FEDERAL NATIONAL MORTGAGE ASSOCIATION.(Hudson, David) (Entered: 10/29/2015)
11/06/2015	254	NOTICE, filed by PERRY CAPITAL LLC re 217 Protective Order, 249 Order, 226 Notice (Other), *of Filing of Applications of Certain Counsel Representing Perry Capital LLC for Access to Protected Information* (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Text of Proposed Order (Exhibit D), # 5 Text of Proposed Order (Exhibit E))(Chesley, John) (Entered: 11/06/2015)
11/09/2015	255	ORDER granting relief requested in 254 Notice filed by Perry Capital LLC. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 11/09/2015)
11/09/2015	256	SECOND AMENDED PROTECTIVE ORDER. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 11/09/2015)
11/10/2015	257	**SEALED** ORDER denying 250 Motion to Quash. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 11/10/2015)
11/16/2015	258	REDACTED DOCUMENT, filed by FEDERAL NATIONAL MORTGAGE ASSOCIATION redacting 250 Corrected MOTION to Quash . (Attachments: # 1 Appendix)(Hudson, David) (Entered: 11/16/2015)
11/16/2015	259	REDACTED DOCUMENT, filed by FEDERAL NATIONAL MORTGAGE ASSOCIATION redacting 253 Reply to Response to Motion . (Hudson, David) (Entered: 11/16/2015)

11/16/2015	260	NOTICE, filed by THOMAS SAXTON, IDA SAXTON, BRADLEY PAYNTER *OF FILING OF APPLICATIONS OF CERTAIN COUNSEL REPRESENTING PLAINTIFFS IN SAXTON V. FHFA, NO. 15−47 (N.D. IOWA) FOR ACCESS TO PROTECTED INFORMATION* (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Schneebeck, Harold) (Entered: 11/16/2015)
11/16/2015	261	REDACTED DOCUMENT, filed by All Plaintiffs redacting 252 Response to Motion *to Quash*. (Attachments: # 1 Appendix)(Cooper, Charles) (Entered: 11/16/2015)
11/16/2015	262	JOINT STATUS REPORT *Regarding Unsealing of the Court's Order of November 10, 2015*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 11/16/2015)
11/16/2015	263	RESPONSE to 260 Notice (Other), *in Opposition*, filed by USA. (Bezak, Reta) (Entered: 11/16/2015)
11/17/2015	264	ORDER reissuing for publication 257 Order. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 11/17/2015)
11/18/2015	265	UNREPORTED ORDER granting 260 Saxton Plaintiffs' Counsel's Applications for Access to Protected Information. Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 11/18/2015)
11/18/2015	266	~~NOTICE of Appearance by Harold N. Schneebeck for BRADLEY PAYNTER, IDA SAXTON, THOMAS SAXTON .. (Schneebeck, Harold)~~ (Stricken pursuant to 11/19/2015 Order) (ac7). (Entered: 11/18/2015)
11/19/2015	267	ORDER Striking 266 Notice of Appearance. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 11/19/2015)
11/19/2015	268	APPLICATION for Access to Protected Material by Certain Counsel, filed by JOSEPH CACCIAPALLE. (Attachments: # 1 Exhibit)(Zagar, Eric) (Entered: 11/19/2015)
11/19/2015	269	ORDER granting 268 APPLICATION for Access to Protected Material by Certain Counsel filed by JOSEPH CACCIAPALLE. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 11/19/2015)
11/23/2015	270	**SEALED** MOTION to Compel , filed by All Plaintiffs.**Response due by 12/10/2015.** (Attachments: # 1 Appendix Volume 1, # 2 Appendix Volume 2, # 3 Appendix Volume 3, # 4 Appendix Volume 4)(Cooper, Charles) (Entered: 11/23/2015)
11/24/2015	271	APPLICATION for Access to Protected Material by Jonathan Neuberger, Stuart Gurrea, Rachel Lin and Yiting Ji, filed by USA. (Attachments: # 1 Exhibit Declarations)(Acevedo, Mariana) (Entered: 11/24/2015)
12/07/2015	272	REDACTED DOCUMENT, filed by All Plaintiffs redacting 270 MOTION to Compel . (Attachments: # 1 Appendix Volume 1 − Redacted, # 2 Appendix Volume 2 − Redacted, # 3 Appendix Volume 3 − Redacted, # 4 Appendix Volume 4 − Redacted)(Cooper, Charles) (Entered: 12/07/2015)
12/08/2015	273	Unopposed MOTION for Extension of Time until 01/11/2016 to File Response as to 270 MOTION to Compel , filed by USA.**Response due by 12/28/2015.**(Bezak, Reta) (Entered: 12/08/2015)
12/08/2015	274	APPLICATION for Access to Protected Material by Nicholas L. McQuaid, Albert L. Sanders, Jr., and Brent S. Wible, filed by USA.(Schiavetti, Anthony) (Entered: 12/08/2015)
12/08/2015	275	ORDER granting 273 Motion for Extension of Time to File re 270 . Response. **Defendant's response due by 1/11/16.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 12/08/2015)
12/11/2015	276	NOTICE, filed by ARNETIA JOYCE ROBINSON *of Applications for Access to Protected Information of Certain Attorneys* (Attachments: # 1 Exhibit Declaration of Robert B. Craig, # 2 Exhibit Declaration of Jonathan D. Tebbs)(Orr, Jennifer) (Entered: 12/11/2015)

12/11/2015	277	RESPONSE to 276 Notice (Other) *in Opposition*, filed by USA. (Bezak, Reta) (Entered: 12/11/2015)
12/14/2015	278	RESPONSE to 277 Response, 276 Notice (Other) *Reply in Support of Applications for Access to Protected Information*, filed by ARNETIA JOYCE ROBINSON. (Orr, Jennifer) (Entered: 12/14/2015)
12/18/2015	279	ORDER re 276 Notice filed by ARNETIA JOYCE ROBINSON. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 12/18/2015)
12/24/2015	280	Second MOTION for Extension of Time until 01/21/2016 to File Response as to 270 MOTION to Compel , filed by USA.**Response due by 1/11/2016.**(Bezak, Reta) (Entered: 12/24/2015)
12/28/2015	281	ORDER granting 280 Motion for Extension of Time to File Response to 270 MOTION to Compel. **Response due by 1/21/2016.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 12/28/2015)
01/20/2016	282	Joint MOTION for Extension of Time until 01/28/2016 to file Joint Status Report , filed by USA.**Response due by 2/8/2016.**(Bezak, Reta) (Entered: 01/20/2016)
01/21/2016	283	ORDER granting 282 Motion for Extension of Time. **Status Report due by 1/28/16.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 01/21/2016)
01/21/2016	284	**SEALED**RESPONSE to 270 MOTION to Compel , filed by USA.**Reply due by 2/1/2016.** (Attachments: # 1 Appendix)(Moses, Jana) (Entered: 01/21/2016)
01/25/2016	285	**SEALED**Unopposed MOTION Expedited *Relief*, filed by USA.**Response due by 2/11/2016.** (Schiavetti, Anthony) (Entered: 01/25/2016)
01/25/2016	286	**SEALED**RESPONSE to 285 Unopposed MOTION Expedited *Relief* , filed by All Plaintiffs.**Reply due by 2/4/2016.**(Cooper, Charles) (Entered: 01/25/2016)
01/26/2016	287	**SEALED** ORDER. Joint status report due by 1/29/16. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 01/26/2016)
01/28/2016	288	JOINT STATUS REPORT *Suggesting Future Proceedings*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 01/28/2016)
01/29/2016	289	JOINT STATUS REPORT *Regarding Unsealing of the Court's Order of January 26, 2016*, filed by USA. (Schiavetti, Anthony) (Entered: 01/29/2016)
02/01/2016	290	**SEALED**REPLY to Response to Motion re 270 MOTION to Compel , filed by All Plaintiffs. (Attachments: # 1 Appendix)(Cooper, Charles) (Entered: 02/01/2016)
02/04/2016	291	**SEALED**REPLY to Response to Motion re 285 Unopposed MOTION Expedited *Relief* , filed by USA.(Schiavetti, Anthony) (Entered: 02/04/2016)
02/08/2016	292	ORDER reissuing for publication 287 Order. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 02/08/2016)
02/09/2016	293	MOTION for Leave to File Washington Federal Plaintiffs' Response To Joint Status Report Suggesting Further Proceedings , filed by MICHAEL MCCREDY BAKER, CITY OF AUSTIN POLICE RETIREMENT SYSTEM, WASHINGTON FEDERAL.**Response due by 2/26/2016.** (Attachments: # 1 Exhibit A)(Berman, Steve) (Entered: 02/09/2016)
02/09/2016	294	REDACTED DOCUMENT, filed by USA redacting 285 Unopposed MOTION Expedited *Relief PUBLIC VERSION*. (Schiavetti, Anthony) (Entered: 02/09/2016)
02/09/2016	295	REDACTED DOCUMENT, filed by USA redacting 291 Reply to Response to Motion *PUBLIC VERSION*. (Schiavetti, Anthony) (Entered: 02/09/2016)
02/09/2016	296	REDACTED DOCUMENT, filed by All Plaintiffs redacting 286 Response to Motion . (Cooper, Charles) (Entered: 02/09/2016)
02/11/2016	297	REDACTED DOCUMENT, filed by All Plaintiffs redacting 290 Reply to Response to Motion *to Compel*. (Attachments: # 1 Redacted Appendix)(Cooper, Charles) (Entered: 02/11/2016)

02/12/2016	298	MOTION to Withdraw 267 Order Striking Document , filed by BRADLEY PAYNTER, IDA SAXTON, THOMAS SAXTON.**Response due by 2/29/2016.**(Schneebeck, Harold) (Entered: 02/12/2016)
02/12/2016	299	NOTICE, filed by JOSEPH CACCIAPALLE *Notice of Application for Access to Protected Information* (Attachments: # 1 Declaration of Matthew Goldstein)(Zagar, Eric) (Entered: 02/12/2016)
02/12/2016	300	ORDER denying as moot 298 motion to withdraw. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 02/12/2016)
02/19/2016	301	REDACTED DOCUMENT, filed by USA redacting 284 Response to Motion *to Compel*. (Attachments: # 1 Appendix)(Bezak, Reta) (Entered: 02/19/2016)
03/01/2016	302	NOTICE, filed by MICHAEL MCCREDY BAKER, CITY OF AUSTIN POLICE RETIREMENT SYSTEM, WASHINGTON FEDERAL *Notice of Filing Applications of Andrew D. Abramowitz and James McGovern for Access to Protected Information* (Berman, Steve) (Entered: 03/01/2016)
03/04/2016	303	APPLICATION for Access to Protected Material by CHRISTIAN D. AMBLER, filed by CHRISTIAN D. AMBLER. (Attachments: # 1 Exhibit)(Ambler, Christian) (Entered: 03/04/2016)
03/31/2016	304	**SEALED**Joint MOTION JOINT MOTION TO REMOVE THE PROTECTED INFORMATION DESIGNATIONS FROM DOCUMENTS FILED IN THE D.C. CIRCUIT CITED IN THE MERITS BRIEFING, AND, IN THE ALTERNATIVE, JOINT MOTION TO MODIFY THE PROTECTIVE ORDER TO PERMIT REFERENCE TO THESE MATERIALS AT ORAL ARGUMENT re 166 MOTION to Remove the "Protected Information" Designation from Certain Treasury and FHFA Documents , 170 MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Fannie Mae , 162 MOTION to Remove the "Protected Information" Designations from Depositions , 165 MOTION to Remove the "Protected Information" Designation from Certain Grant Thornton Documents , 171 MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Freddie Mac , 169 MOTION to Remove the "Protected Information" Designation from Certain Unredacted Information in Documents Produced by Deloitte , filed by All Plaintiffs.**Response due by 4/18/2016.** (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I)(Hume, Hamish) **(Pursuant to 4/11/2016 Order, #311, Attachments 3−9 Unsealed)** (ac7). (Entered: 03/31/2016)
04/01/2016	305	NOTICE, filed by USA re 304 Joint MOTION JOINT MOTION TO REMOVE THE PROTECTED INFORMATION DESIGNATIONS FROM DOCUMENTS FILED IN THE D.C. CIRCUIT CITED IN THE MERITS BRIEFING, AND, IN THE ALTERNATIVE, JOINT MOTION TO MODIFY THE PROTECTIVE ORDER TO PERMIT REFERENCE TO THESE MATERIAL (Bezak, Reta) (Entered: 04/01/2016)
04/01/2016	306	ORDER: **Defendant's response to plaintiffs' motion 304 due by 4/8/16 at 12 p.m. EDT.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 04/01/2016)
04/07/2016	307	MOTION for Leave to File Amicus Brief , filed by JOHN YOO.**Response due by 4/25/2016.** (Attachments: # 1 Proposed Amicus Brief of John Yoo)(Gray, C.) (Entered: 04/07/2016)
04/08/2016	308	RESPONSE to 307 MOTION for Leave to File Amicus Brief , 304 Joint MOTION JOINT MOTION TO REMOVE THE PROTECTED INFORMATION DESIGNATIONS FROM DOCUMENTS FILED IN THE D.C. CIRCUIT CITED IN THE MERITS BRIEFING, AND, IN THE ALTERNATIVE, JOINT MOTION TO MODIFY THE PROTECTIVE ORDER TO PERMIT REFERENCE TO THESE MATERIAL , filed by USA.**Reply due by 4/18/2016.** (Bezak, Reta) (Entered: 04/08/2016)
04/08/2016	309	**SEALED**REPLY to Response to Motion re 304 Joint MOTION JOINT MOTION TO REMOVE THE PROTECTED INFORMATION DESIGNATIONS FROM DOCUMENTS FILED IN THE D.C. CIRCUIT CITED IN THE MERITS BRIEFING, AND, IN THE ALTERNATIVE, JOINT MOTION TO MODIFY THE

		PROTECTIVE ORDER TO PERMIT REFERENCE TO THESE MATERIAL *At Oral Argument*, filed by All Plaintiffs.(Hume, Hamish) (Entered: 04/08/2016)
04/11/2016	310	**SEALED** ORDER denying 307 Motion for Leave to File Amicus Brief. Redacted order forthcoming. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 04/11/2016)
04/11/2016	311	**SEALED** ORDER granting in part and denying in part 304 Motion. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 04/11/2016)
04/13/2016	312	JOINT STATUS REPORT *Regarding Unsealing of the Court's De−Designation Order of April 11, 2016*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 04/13/2016)
04/13/2016	313	ORDER reissuing for publication 311 Order. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 04/13/2016)
04/13/2016	315	**Docketed For Administrative Purposes** REPORTED ORDER granting Motion to De−Designate Seven Documents. Signed by Judge Margaret M. Sweeney. (jt1) Copy to parties. (Entered: 04/15/2016)
04/14/2016	314	NOTICE, filed by FEDERAL NATIONAL MORTGAGE ASSOCIATION (Walsh, Michael) (Entered: 04/14/2016)
04/18/2016	316	JOINT STATUS REPORT *Regarding Unsealing of the Court's Order of April 11, 2016 Denying Leave to File Amicus Brief*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 04/18/2016)
04/18/2016	317	ORDER reissuing 310 Order on Motion for Leave to File Amicus Brief. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 04/18/2016)
04/20/2016	318	NOTICE, filed by DAVID JACOBS, GARY HINDES *of Applications of Certain Counsel Representing Plaintiffs in Jacobs v. Federal Housing Finance Agency, No. 15−708−GMS (D. Del.) for Access to Protected Information* (Attachments: # 1 Exhibit A Declaration of Myron T. Steele, # 2 Exhibit B Declaration of Michael A. Pittenger, # 3 Exhibit C Declaration of Christoper N. Kelly, # 4 Exhibit D Declaration of Alan R. Silverstein)(Pittenger, Michael) (Entered: 04/20/2016)
05/06/2016	319	NOTICE, filed by ARNETIA JOYCE ROBINSON *of Filing of Additional Application for Access to Protected Information* (Attachments: # 1 Exhibit Declaration of Jennifer B. Orr)(Orr, Jennifer) (Entered: 05/06/2016)
05/10/2016	320	ORDER granting nunc pro tunc 293 Motion for Leave to File Response to Joint Status Report. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 05/10/2016)
05/11/2016	321	**SEALED** MOTION to Remove the "Protected Information" Designations from Documents Referred to in Amended Complaint and in Merits Briefing, and, in the Alternative, Motion to Modify the Protective Order to Permit Reference to these Materials at Oral Argument , filed by ARNETIA JOYCE ROBINSON.**Response due by 5/31/2016.** (Attachments: # 1 Exhibit A − List of the Documents, # 2 Exhibit B − Amended Complaint, # 3 Exhibit C − Email, # 4 Appendix Volume 1 (Exhibits 1−15), # 5 Appendix Volume 2 (Exhibits 16−27), # 6 Appendix Volume 3 (Exhibits 28−40), # 7 Appendix Volume 4 (Exhibits 41−55))(Orr, Jennifer) (Entered: 05/11/2016)
05/11/2016	322	Joint MOTION for Scheduling Order re 321 MOTION to Remove the "Protected Information" Designations from Documents Referred to in Amended Complaint and in Merits Briefing, and, in the Alternative, Motion to Modify the Protective Order to Permit Reference to these Materials at Oral A , filed by ARNETIA JOYCE ROBINSON, USA.**Response due by 5/31/2016.**(Bezak, Reta) (Entered: 05/11/2016)
05/13/2016	323	ORDER granting 322 Motion for Entry of Scheduling Order. **Producing entities to provide information regarding removal of protected designations by 5/16/2016. In the absence of an agreement regarding the removal of protected designations, response(s) to 321 Motion due by 5/19/2016, and reply in support of 321 Motion due by 5/20/2016.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 05/13/2016)

05/19/2016	324	NOTICE, filed by ARNETIA JOYCE ROBINSON *OF WITHDRAWAL OF MOTION TO REMOVE THE "PROTECTED INFORMATION" DESIGNATION FROM DOCUMENTS* (Orr, Jennifer) (Entered: 05/19/2016)
05/20/2016	325	ORDER. **By no later than Friday, May 27, 2016, defendant shall provide the court with hard copies of the documents identified in the order for in camera review.** Signed by Judge Margaret M. Sweeney. (sp) (Entered: 05/20/2016)
05/20/2016	326	**SEALED** ORDER denying 285 Motion Regarding Apparent Violation of Second Amended Protective Order. **The parties shall file, by no later than Friday, May 27, 2016, a joint status report advising whether the order should remain sealed.** Signed by Judge Margaret M. Sweeney. (sp) (Entered: 05/20/2016)
05/25/2016	327	MOTION for Clarification of 325 Order , filed by USA.**Response due by 6/13/2016.**(Bezak, Reta) (Entered: 05/25/2016)
05/25/2016	328	ORDER granting in part and denying in part 327 Motion for Clarification. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 05/25/2016)
05/31/2016	329	Joint MOTION for Extension of Time until 05/31/2016 to to File Joint Status Report , filed by USA.**Response due by 6/17/2016.** (Attachments: # 1 Exhibit)(Bezak, Reta) (Entered: 05/31/2016)
06/01/2016	330	ORDER granting 329 Joint Motion for Extension of Time to File Joint Status Report. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 06/01/2016)
06/01/2016	331	ORDER reissuing 326 ORDER denying 285 Motion Regarding Apparent Violation of Second Amended Protective Order. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 06/01/2016)
06/06/2016	332	NOTICE, filed by MICHAEL MCCREDY BAKER, CITY OF AUSTIN POLICE RETIREMENT SYSTEM, WASHINGTON FEDERAL *Notice of Filing of Application of Andrew N. Dodemaide for Access to Protected Information* (Berman, Steve) (Entered: 06/06/2016)
06/10/2016	333	NOTICE, filed by USA *of Filing of Declaration* (Bezak, Reta) (Entered: 06/10/2016)
06/21/2016	334	REDACTED DOCUMENT, filed by ARNETIA JOYCE ROBINSON redacting 321 MOTION to Remove the "Protected Information" Designations from Documents Referred to in Amended Complaint and in Merits Briefing, and, in the Alternative, Motion to Modify the Protective Order to Permit Reference to these Materials at Oral A . (Attachments: # 1 Exhibit A − List of the Documents, # 2 Exhibit B − Amended Complaint, # 3 Exhibit C − Email, # 4 Appendix Volume 1 (Exhibits 1−15), # 5 Appendix Volume 2 (Exhibits 16−27), # 6 Appendix Volume 3 (Exhibits 28−40), # 7 Appendix Volume 4 (Exhibits 41−55))(Orr, Jennifer) (Entered: 06/21/2016)
09/20/2016	335	**SEALED** OPINION AND ORDER granting 270 Motion to Compel. By no later than October 14, 2016, defendant shall file a memorandum with the court explaining why the court should not require defendant to pay plaintiffs' reasonable expenses incurred in making the motion, including attorney's fees. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 09/20/2016)
09/30/2016	336	**SEALED**JOINT STATUS REPORT , filed by All Plaintiffs. (Attachments: # 1 Exhibit Agreed Upon Redactions to September 20 Order)(Cooper, Charles) (Entered: 09/30/2016)
09/30/2016	337	MOTION to Intervene, filed by MICHAEL SAMMONS. Service: 9/30/2016. **Filed by leave of the Judge.**(hw1) (Entered: 09/30/2016)
09/30/2016	338	ORDER denying 337 Motion to Intervene. Signed by Judge Margaret M. Sweeney. (hw1) Copy to parties. Modified on 4/4/2017 − minor typographical change to pdf(jt1). (Entered: 09/30/2016)
10/03/2016	339	NOTICE OF APPEAL, filed by MICHAEL SAMMONS. Filing fee $ 505, receipt number CFC100002395. Copies to judge, opposing party and CAFC. (hw1) (Entered: 10/03/2016)
10/03/2016		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals for the Federal Circuit re 339 Notice of Appeal (hw1) (Entered: 10/03/2016)

10/03/2016	340	ORDER reissuing for publication OPINION and ORDER 335 . Signed by Judge Margaret M. Sweeney. (sp) (Entered: 10/03/2016)
10/06/2016		CAFC Case Number 2017−1015 for 339 Notice of Appeal filed by MICHAEL SAMMONS. (hw1) (Entered: 10/06/2016)
10/13/2016	341	MOTION for Extension of Time until 11/14/2016 to File Response as to 335 Order on Motion to Compel, Sealed Opinion,, 340 Reported Opinion , filed by USA.**Response due by 10/31/2016.**(Laufgraben, Eric) (Entered: 10/13/2016)
10/13/2016	342	RESPONSE to 341 MOTION for Extension of Time until 11/14/2016 to File Response as to 335 Order on Motion to Compel, Sealed Opinion,, 340 Reported Opinion , filed by All Plaintiffs.**Reply due by 10/24/2016.** (Cooper, Charles) (Entered: 10/13/2016)
10/14/2016	343	ORDER granting 341 Motion for Extension of Time to File Response. **Defendant shall have until November 14, 2016 to submit its filing and plaintiffs shall have until December 21, 2016 to file their response.** Signed by Judge Margaret M. Sweeney. (sp) (Entered: 10/14/2016)
10/25/2016	344	Emergency MOTION for Enforcement of Court Order re 335 Order on Motion to Compel, Sealed Opinion,, , filed by All Plaintiffs.**Response due by 11/14/2016.**(Cooper, Charles) (Entered: 10/25/2016)
10/26/2016	345	ORDER granting 344 Motion. **Defendant shall file a praecipe with the court by no later than the close of business on Friday, October 28, 2016 indicating that it either intends to seek further review with respect to the documents the court ordered produced or that it will produce the documents. If defendant intends to produce the documents, it must do so by no later than Tuesday, November 1, 2016.** Signed by Judge Margaret M. Sweeney. (sp) (Entered: 10/26/2016)
10/26/2016	346	NOTICE OF CROSS APPEAL as to 335 Order on Motion to Compel, Sealed Opinion, filed by USA. Copies to judge, opposing party and CAFC. (Bezak, Reta) Modified on 10/28/2016 to add text for clarity. (hw1). (Entered: 10/26/2016)
10/28/2016	347	NOTICE, filed by USA re 345 Order on Motion for Miscellaneous Relief, (Bezak, Reta) (Entered: 10/28/2016)
10/28/2016		CAFC Case Number 2017−1122 for 346 Notice of Appeal filed by USA. (hw1) (Entered: 10/31/2016)
11/10/2016	348	Second MOTION for Extension of Time until 12/14/2016 to File Response as to 335 Order on Motion to Compel, Sealed Opinion,, 340 Reported Opinion , filed by USA.**Response due by 12/1/2016.**(Bezak, Reta) (Entered: 11/10/2016)
11/10/2016	349	ORDER granting 348 Motion for Extension of Time to File Response. **Defendant shall have up to and including December 14, 2016 to respond to the court's September 20, 2016 order.** Signed by Judge Margaret M. Sweeney. (sp) (Entered: 11/10/2016)
12/13/2016	350	Third MOTION for Extension of Time to File Response as to 335 Order on Motion to Compel, Sealed Opinion,, 340 Reported Opinion , filed by USA.**Response due by 12/30/2016.**(Bezak, Reta) (Entered: 12/13/2016)
12/13/2016	351	ORDER granting 350 Motion for Extension of Time to File Response. **Defendant's response is due 21 days after the United States Court of Appeals for the Federal Circuit rules on its petition for a writ of mandamus.** Signed by Judge Margaret M. Sweeney. (sp) (Entered: 12/13/2016)
01/23/2017	352	NOTICE, filed by JOSEPH CACCIAPALLE *Notice of Application for Access to Protected Information* (Attachments: # 1 Declaration of Gregory J. Dubinsky)(Grigsby, Stacey) (Entered: 01/23/2017)
01/30/2017	355	CAFC Order issued as a MANDATE dismissing (CAFC No. 2017−1122 only), 346 Notice of Cross Appeal filed by USA. The petition for a writ of mandamus CAFC document no. 2 is granted to the extent that the Claims Court is directed to vacate the portions of its order directing the government to disclose FHFA00092209, UST00518402, UST00389678, UST00490551, UST00500982, UST00521902, UST00515290, and UST00550441. The petition for Writ of Mandamus is otherwise

		denied. (hw1) (Entered: 02/02/2017)
01/31/2017	353	ORDER implementing mandate. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 01/31/2017)
01/31/2017	354	ORDER. **The parties shall submit a joint status report on or by Monday, February 21, 2017.** Signed by Judge Margaret M. Sweeney. (sp) (Entered: 01/31/2017)
02/21/2017	356	RESPONSE to 335 Order on Motion to Compel, Sealed Opinion,, *Response to the Court's September 20, 2016 Order Regarding Payment of Plaintiffs' Expenses*, filed by USA. (Laufgraben, Eric) (Entered: 02/21/2017)
02/21/2017	357	Joint MOTION for Extension of Time until 02/24/2017 to file joint status report , filed by USA.**Response due by 3/10/2017.**(Hosford, Elizabeth) (Entered: 02/21/2017)
02/22/2017	358	ORDER granting 357 Motion for Extension of Time.**The joint status report is now due on or by Friday, February 24, 2017.** Signed by Judge Margaret M. Sweeney. (sp) (Entered: 02/22/2017)
02/24/2017	359	JOINT STATUS REPORT *regarding Court's Order of January 31, 2017*, filed by ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, FAIRHOLME FUNDS, INC., MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, THE FAIRHOLME FUND. (Attachments: # 1 Exhibit A)(Cooper, Charles) (Entered: 02/24/2017)
03/07/2017	360	ORDER. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 03/07/2017)
03/14/2017	361	Decision of the Court of Appeals for the Federal Circuit. The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course, approximately by 5/8/2017. (hw1) (Entered: 03/15/2017)
03/20/2017	362	RESPONSE to 356 Response *in Support of the Apportionment of Expenses Pursuant to RCFC 37(a)(5)*, filed by All Plaintiffs. (Attachments: # 1 Declaration of David H. Thompson and Supporting Exhibits)(Cooper, Charles) (Entered: 03/20/2017)
03/20/2017	363	MOTION for Leave to File Amicus Brief, filed by MICHAEL SAMMONS. Service: 03/17/2017.**Response due by 4/6/2017.** (Attachments: # 1 Amicus Brief)(ac7) (Entered: 03/21/2017)
03/24/2017	364	Unopposed MOTION for Extension of Time until 4/6/2017 to File Reply as to 362 Response, 356 Response , filed by USA.**Response due by 4/10/2017.**(Volk, Daniel) (Entered: 03/24/2017)
03/27/2017	365	ORDER. **Defendant's reply to plaintiffs' response to defendant's brief addressing the payment of expenses in connection with plaintiffs' motion to compel is due on or by April 6, 2017.** Signed by Judge Margaret M. Sweeney. (sp) (Entered: 03/27/2017)
04/03/2017	366	RESPONSE to 363 MOTION for Leave to File Amicus Brief , filed by All Defendants.**Reply due by 4/13/2017.** (Moses, Jana) (Entered: 04/03/2017)
04/06/2017	367	NOTICE, filed by MICHAEL MCCREDY BAKER, CITY OF AUSTIN POLICE RETIREMENT SYSTEM, WASHINGTON FEDERAL *Notice of Filing of Application of Karl P. Barth for Access to Protected Information* (Berman, Steve) (Entered: 04/06/2017)
04/06/2017	368	RESPONSE to 362 Response, 360 Order *Defendant's Reply In Support Of Its Response To The Court's Order Regarding Payment Of Plaintiffs' Expenses And Response To Plaintiffs' Motion For An Apportionment Of Expenses*, filed by USA. (Laufgraben, Eric) (Entered: 04/06/2017)
04/11/2017	369	Unopposed MOTION for Extension of Time until 5/30/2017 to Comply with Court's 3/7/2017 Order , filed by USA.**Response due by 4/28/2017.**(Bezak, Reta) (Entered:

		04/11/2017)
04/11/2017	370	RESPONSE to 369 Unopposed MOTION for Extension of Time until 5/30/2017 to Comply with Court's 3/7/2017 Order , filed by All Plaintiffs.**Reply due by 4/21/2017.** (Cooper, Charles) (Entered: 04/11/2017)
04/13/2017	371	ORDER granting 369 Motion for Extension of Time. **Defendant's status report indicating compliance with the court's March 7, 2017 order is now due on or by May 30, 2017.** Signed by Judge Margaret M. Sweeney. (sp) (Entered: 04/13/2017)
04/13/2017	372	REPLY to Response to Motion re 363 MOTION for Leave to File Amicus Brief, filed by MICHAEL SAMMONS. Service: 4/10/2017.(vds) (Entered: 04/14/2017)
04/28/2017	373	REPORTED OPINION denying 363 Motion for Leave to File Amicus Brief. Signed by Judge Margaret M. Sweeney. (pp) Copy to parties. Copy served on Mr. Sammons by first class mail. (Entered: 04/28/2017)
05/12/2017	374	MANDATE of CAFC affirming 338 Order on Motion to Intervene. (hw1) (Entered: 05/17/2017)
05/30/2017	375	REPORTED ORDER regarding the attorney's fees plaintiffs incurred filing and litigating their motion to compel. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 05/30/2017)
05/30/2017	376	STATUS REPORT *confirming compliance with Court's March 7, 2017 and April 13, 2017 Orders*, filed by USA. (Bezak, Reta) (Entered: 05/30/2017)
05/31/2017	377	MOTION for Leave to File Corrected Status Report , filed by USA.**Response due by 6/19/2017.** (Attachments: # 1 Exhibit)(Koprowski, Agatha) (Entered: 05/31/2017)
06/15/2017	378	ORDER granting 377 Motion for Leave to File Corrected Status Report. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 06/15/2017)
06/19/2017	379	NOTICE. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 06/19/2017)
06/26/2017	380	ORDER **directing the parties in the above−captioned case to file a joint status report with the court on or by Friday, June 30, 2017.** Signed by Judge Margaret M. Sweeney. (sp) (Entered: 06/26/2017)
06/28/2017	381	NOTICE, filed by MICHAEL ROP, STEWART KNOEPP, ALVIN WILSON re 73 Protective Order *of Filing Application of Matthew T. Nelson and Ashley G. Chrysler for Access to Protected Information* (Attachments: # 1 Exhibit Declaration of Matthew T. Nelson, # 2 Exhibit Declaration of Ashley G. Chrysler)(Nelson, Matthew) (Entered: 06/28/2017)
06/30/2017	382	JOINT STATUS REPORT *Responding to June 26, 2017 Order*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 06/30/2017)
07/27/2017	383	NOTICE, filed by ATIF BHATTI, TYLER WHITNEY, MICHAEL CARMODY re 256 Protective Order *of Filing of Application of Certain Counsel Representing Plaintiffs in Bhatti v. FHFA for Access to Protected Information* (Attachments: # 1 Affidavit Declaration of Scott G. Knudson, # 2 Affidavit Declaration of Michael M. Sawers)(Knudson, Scott) (Entered: 07/27/2017)
08/03/2017	384	**SEALED**Second MOTION to Compel , filed by All Plaintiffs.**Response due by 8/17/2017.** (Attachments: # 1 Appendix)(Cooper, Charles) (Entered: 08/03/2017)
08/14/2017	385	REDACTED DOCUMENT, filed by All Plaintiffs redacting 384 Second MOTION to Compel . (Attachments: # 1 Appendix Public Redacted Version)(Cooper, Charles) (Entered: 08/14/2017)
08/17/2017	386	**SEALED**RESPONSE to 384 Second MOTION to Compel , filed by USA.**Reply due by 8/24/2017.**(Laufgraben, Eric) (Entered: 08/17/2017)
08/24/2017	387	**SEALED**REPLY to Response to Motion re 384 Second MOTION to Compel , filed by All Plaintiffs.(Cooper, Charles) (Entered: 08/24/2017)
08/28/2017	388	REDACTED DOCUMENT, filed by All Plaintiffs redacting 387 Reply to Response to Motion . (Cooper, Charles) (Entered: 08/28/2017)

09/06/2017	389	REDACTED DOCUMENT, filed by USA redacting 386 Response to Motion . (Bezak, Reta) (Entered: 09/06/2017)
10/04/2017	390	**SEALED** OPINION and ORDER granting 384 Motion to Compel. **The parties' joint status report with proposed redactions is due by no later than November 3, 2017.** Signed by Judge Margaret M. Sweeney. (sp) (Entered: 10/04/2017)
10/17/2017	391	JOINT STATUS REPORT *Regarding Unsealing of October 4, 2017 Opinion*, filed by All Plaintiffs. (Cooper, Charles) (Entered: 10/17/2017)
10/23/2017	392	REPORTED OPINION and ORDER reissuing for publication OPINION and ORDER 390 . Signed by Judge Margaret M. Sweeney. (sp) (Entered: 10/23/2017)
11/09/2017	393	Joint MOTION to Adopt Quick−Peek Order , filed by USA.**Response due by 11/23/2017.**(Bezak, Reta) (Entered: 11/09/2017)
11/09/2017	394	ORDER re quick peek procedure. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 11/09/2017)
01/11/2018	395	JOINT STATUS REPORT , filed by All Plaintiffs. (Cooper, Charles) (Entered: 01/11/2018)
01/12/2018	396	SCHEDULING ORDER: **Amended Complaint due by 2/22/2018. Motion to Dismiss due by 6/22/2018. Response due by 9/20/2018. Reply due by 12/19/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Main Document 396 replaced on 1/16/2018 to correct final paragraph of the order) (ac7). (Entered: 01/12/2018)
02/16/2018	397	NOTICE, filed by PERSHING SQUARE CAPITAL MANAGEMENT, L.P., LOUISE RAFTER, JOSEPHINE RATTIEN, STEPHEN RATTIEN *Letter to Court and Parties re: Protective Order* (Joseph, Gregory) (Entered: 02/16/2018)
02/21/2018	398	Unopposed MOTION for Extension of Time until March 8, 2018 to File Amended Complaint , filed by ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, FAIRHOLME FUNDS, INC., MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, THE FAIRHOLME FUND.**Response due by 3/7/2018.**(Cooper, Charles) (Entered: 02/21/2018)
02/21/2018	399	ORDER granting 398 Motion for Extension of Time. **Amended Complaint due by 3/8/2018. Motion to Dismiss due by 6/29/2018. Response due by 9/20/2018. Reply due by 12/19/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 02/21/2018)
02/27/2018	400	NOTICE, filed by OWL CREEK ASIA I, L.P *re: Document 256 Second Amended Protective Order* (Attachments: # 1 Declaration, # 2 Declaration, # 3 Declaration, # 4 Declaration, # 5 Declaration, # 6 Declaration, # 7 Declaration)(Rosenberg, Lawrence) (Entered: 02/27/2018)
03/08/2018	401	**SEALED**AMENDED COMPLAINT against USA, filed by All Plaintiffs. , filed by All Plaintiffs.Answer due by 3/22/2018. (Cooper, Charles) (Entered: 03/08/2018)
03/14/2018	402	NOTICE, filed by FEDERAL NATIONAL MORTGAGE ASSOCIATION *(Notice Of Filing Of Application Of Counsel Representing Fannie Mae In Preferred Stick Purchase Agreements Third Amendment−Related Litigation, For Access To Protected Information)* (VerGow, Meaghan) (Entered: 03/14/2018)
05/10/2018	403	MOTION Joinder of Nominal Defendants and Issuance of Summonses , filed by ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, ANDREW T. BARRETT, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, FAIRHOLME FUNDS, INC., MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, THE FAIRHOLME FUND.**Response due by 5/24/2018.** (Attachments: # 1 Exhibit Exhibit A)(Cooper, Charles) (Entered: 05/10/2018)

05/10/2018		On May 9, 2018, the court received a written ex parte communication––a letter––from a Fannie Mae/Freddie Mac shareholder. The court did not read the letter; instead, it directed the clerk of court to return the letter to the shareholder. The court has not, and will not, entertain ex parte communications from Fannie Mae/Freddie Mac shareholders. (kb1) (Entered: 05/10/2018)
05/11/2018	404	REDACTED DOCUMENT, filed by All Plaintiffs redacting 401 Amended Complaint . (Cooper, Charles) (Entered: 05/11/2018)
05/17/2018	405	Unopposed MOTION to Stay briefing and consideration of motion for joinder , filed by USA.**Response due by 5/31/2018.**(Volk, Daniel) (Entered: 05/17/2018)
05/21/2018	406	ORDER granting 405 Motion to Stay Briefing on Motion for Joinder. **Defendant's response to plaintiffs' motion for joinder is due no later than 14 days after the court's ruling on defendant's forthcoming motion to dismiss.** Signed by Judge Margaret M. Sweeney. (jhk) (Entered: 05/21/2018)
06/19/2018	407	Unopposed MOTION for Extension of Time until August 1, 2018 to To Brief Defendant's Omnibus Motion To Dismiss , filed by USA.**Response due by 7/3/2018.**(Acevedo, Mariana) (Entered: 06/19/2018)
06/21/2018	408	ORDER granting 407 Motion for Extension of Time. **The motion to dismiss is due no later than 8/1/18. The response is due no later than 10/23/18. The reply is due no later than 1/22/19.** Signed by Judge Margaret M. Sweeney. (jhk) (Entered: 06/21/2018)
07/27/2018	409	Unopposed MOTION for Leave to Exceed Page Limit of Motion To Dismiss by 45 pages , filed by USA.**Response due by 8/10/2018.**(Acevedo, Mariana) (Entered: 07/27/2018)
07/30/2018	410	ORDER granting 409 Motion for Leave to File Excess Pages. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 07/30/2018)
08/01/2018	411	MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 8/29/2018.**(Acevedo, Mariana) (Entered: 08/01/2018)
08/03/2018	412	MOTION to Amend Pleadings – Rule 15 401 Amended Complaint , filed by All Plaintiffs.**Response due by 8/17/2018.**(Cooper, Charles) (Entered: 08/03/2018)
08/03/2018	413	**SEALED**AMENDED COMPLAINT against USA, filed by All Plaintiffs. Amendment to 401 Amended Complaint *(Second)*, filed by All Plaintiffs.Answer due by 8/17/2018. (Cooper, Charles) (Entered: 08/03/2018)
08/08/2018	414	Unopposed MOTION to Amend/Correct 256 Protective Order , filed by OWL CREEK ASIA I, L.P, APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, AKANTHOS OPPORTUNITY MASTER FUND, L.P., CSS, LLC, MASON CAPITAL L.P..**Response due by 8/22/2018.** (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Rosenberg, Lawrence) (Entered: 08/08/2018)
08/09/2018	415	ORDER granting 414 Motion to Amend/Correct. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 08/09/2018)
08/17/2018	416	Unopposed MOTION for Extension of Time until 8/31/18 to File Response *To Plaintiffs' Motion To Amend The Complaint*, filed by USA.**Response due by 8/31/2018.**(Acevedo, Mariana) (Entered: 08/17/2018)
08/20/2018	417	THIRD AMENDED PROTECTIVE ORDER. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 08/20/2018)
08/20/2018	418	ORDER granting 416 Motion for Extension of Time. **Defendant shall file its response to plaintiffs' motion to amend its complaint by no later than 8/31/2018.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 08/20/2018)
08/30/2018	419	RESPONSE to 412 MOTION to Amend Pleadings – Rule 15 401 Amended Complaint , filed by USA.**Reply due by 9/6/2018.** (Acevedo, Mariana) (Entered: 08/30/2018)
09/10/2018	420	ORDER granting 412 Motion to Amend Pleadings. **Defendant shall file its motion to dismiss by no later than 10/1/2018; plaintiff shall file their response by no later than 10/23/2018; and defendant shall file its reply by no later than 1/22/2019.**

		Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 09/10/2018)
10/01/2018	421	Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 10/29/2018.**(Acevedo, Mariana) (Entered: 10/01/2018)
10/02/2018	422	REDACTED DOCUMENT, filed by ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, ANDREW T. BARRETT, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, FAIRHOLME FUNDS, INC., MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, THE FAIRHOLME FUND redacting 413 Amended Complaint . (Cooper, Charles) (Entered: 10/02/2018)
10/10/2018	423	ORDER Amending Deadlines. **The response to defendant's motion to dismiss is due by no later than 11/2/2018, and the reply in support of that motion is due by no later than 2/1/2019.** Signed by Chief Judge Margaret M. Sweeney.(jhk) (Entered: 10/10/2018)
10/10/2018	424	NOTICE, filed by JOSEPH CACCIAPALLE re 417 Protective Order *of Filing of Unopposed Application of W. Todd Thomas and James A. Kraehenbuehl for Access to Protected Information* (Attachments: # 1 Application of J. Kraehenbuehl)(Hume, Hamish) (Entered: 10/10/2018)
10/12/2018	425	NOTICE, filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED re 417 Protective Order */ Notice of Filing of Unopposed Applications of Sandra Hauser, Drew W. Marrocco, and Richard M. Zuckerman For Access To Protected Information* (Attachments: # 1 Attachment A)(Barr, Michael) (Entered: 10/12/2018)
10/31/2018	426	Unopposed MOTION for Leave to File Omnibus and Supplemental Opposition Briefs , Unopposed MOTION for Leave to Exceed Page Limit , filed by All Plaintiffs.**Response due by 11/14/2018.**(Cooper, Charles) (Entered: 10/31/2018)
11/01/2018	427	ORDER granting 426 Motion for Leave to File Omnibus Response with Excess Pages and Supplemental Opposition Brief. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/01/2018)
11/02/2018	428	RESPONSE to 421 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, ANDREW T. BARRETT, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, FAIRHOLME FUNDS, INC., MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, THE FAIRHOLME FUND.**Reply due by 11/16/2018.** (Cooper, Charles) (Entered: 11/02/2018)
11/02/2018	429	SUPPLEMENTAL BRIEF re: 421 Motion to Dismiss − Rules 12(b)(1) and (6) , filed by ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, ANDREW T. BARRETT, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, FAIRHOLME FUNDS, INC., MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, THE FAIRHOLME FUND. (Cooper, Charles) (Entered: 11/02/2018)
11/02/2018	430	**SEE 7/11/2019 ORDER STRIKING DOCUMENT** ~~RESPONSE to 421 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by BRYNDON FISHER, BRUCE REID.~~**~~Reply due by 11/16/2018.~~** ~~(Schubert, Robert)~~ (Entered: 11/02/2018)

01/29/2019	431	Unopposed MOTION for Extension of Time until 4/29/19 to File Reply , filed by USA.**Response due by 2/12/2019.**(Acevedo, Mariana) (Entered: 01/29/2019)
01/30/2019	432	ORDER granting in part and denying in part 431 Motion for Extension of Time to File Reply. **Defendant shall file its reply by no later than 5/6/2019. Defendant may file an omnibus reply that contains no more than 100 pages. Defendant shall complete and file the attached template concerning its motion−to−dismiss arguments by no later than 3/1/2019, and then file the same with regard to its reply by no later than 5/6/2019.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/30/2019)
03/01/2019	433	NOTICE, filed by USA (Acevedo, Mariana) (Entered: 03/01/2019)
05/06/2019	434	REPLY to Response to Motion re 421 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA. (Acevedo, Mariana) (Entered: 05/06/2019)
05/06/2019	435	NOTICE, filed by USA (Acevedo, Mariana) (Entered: 05/06/2019)
05/29/2019	436	NOTICE, filed by All Plaintiffs *of Withdrawal*. (Nielson, Howard) (Entered: 05/29/2019)
06/25/2019		**IMPORTANT NOTICE:** On ***Monday, August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Currently, many attorneys within a firm may share a single PACER account, but once NextGen is imple mented e−filing attorneys will no longer be able to use shared PACER accounts. To access the upgraded system, each e−filing attorney must have an individual upgraded PACER account. Preparing for NextGen CM/ECF is a two−step process. Step one is to upgrade your PACER account, and step two is to link your upgraded PACER account to your current CM/ECF filing account. This notice only addresses the first step because the second step can't be completed until on or after August 26, 2019. The first step is to check and see if your PACER account is an "Upgraded" PACER account. Many PACER accounts have already been upgraded. If either of the following statements is true, you have an upgraded PACER account and no action is required until on or after August 26, 2019: 1) you currently e−file in another NextGen court or 2) your PACER account was created after August 10, 2014. If neither of these statements is true, you must upgrade your PACER account. Additional notices will be sent at a later date on how to handle the second step in this process. If you still have questions please contact the PACER Service Center at 800−676−6856 or the Clerk's Office CM/ECF Help Desk at (202)357−6402.. (dh) (ADI) (Entered: 06/25/2019)
07/11/2019	437	ORDER Striking 430 Response to Motion. **The court strikes docket entry 430 because it was filed by individuals who are not parties in this case.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 07/11/2019)
07/19/2019		**IMPORTANT NOTICE:** On ***August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Preparing for NextGen is a two−step process. Step one is to upgrade your PACER account. If you have not yet re gistered for an individual PACER account or upgraded your existing PACER account, please do so immediately. Step two is to link your upgraded PACER account to your current CM/ECF filing account. Step two cannot be completed until on or after ***August 26, 2019***. To link your upgraded PACER account ***on or after August 26, 2019***, you must know your current CM/ECF login and password. Do not rely on your login and password to be saved in your web browser, because that method will not work with the NextGen upgrade. If you do not know your login and/or password or have any additional questions, please call the court's Clerks Office CM/ECF Help Desk at (202) 357−6402.. (dh) (ADI) (Entered: 07/19/2019)
08/15/2019		***IMPORTANT NOTICE:*** On ***August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://uscfc.uscourts.gov. ***Please note that the court's CM/ECF system will be unavailable from 12:00 p.m. (EDT) on Friday, August 23, 2019, until 6:00 a.m. (EDT) on Monday, August 26, 2019.*** Although the Clerk's

		Office will be open on August 23, 2019, it will be deemed inaccessible under Rule 6 of the Rules of the United States Court of Federal Claims for purposes of calculating deadlines. Preparing for NextGen is a two−step process. Step one is to upgrade your PACER account. You should have your individual upgraded PACER account at this time. Step two is to link your upgraded PACER account to your current CM/ECF filing account on or after ***on or after August 26, 2019***. Instructions for linking your account can be found on the court's website at http://uscfc.uscourts.gov. To link your accounts, you ***MUST*** know your CM/ECF login and password−−−do not rely on your browser to remember your login credentials. If you are unsure of your CM/ECF login and/or password, contact the Clerk's Office CM/ECF Help Desk ***immediately*** at (202) 357−6402. You may also call the Help Desk with any other questions.. (dh) (ADI) (Entered: 08/15/2019)
08/28/2019	438	ORDER Setting Oral Argument on 421 Amended Motion to Dismiss and Staying Consideration of the Amended Motion. **Oral Argument set for 11/19/2019 at 9:00 AM (EST) in the National Courts Building before Chief Judge Margaret M. Sweeney. The court is staying further consideration of defendant's amended motion to dismiss until that date.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 08/28/2019)
09/09/2019	439	NOTICE of Additional Authority , filed by All Plaintiffs. (Attachments: # 1 Exhibit Exhibit A: Opinion)(Cooper, Charles) (Entered: 09/09/2019)
11/04/2019	440	RESPONSE to 439 Notice of Additional Authority , filed by USA. (Bezak, Reta) (Entered: 11/04/2019)
11/05/2019	441	NOTICE, filed by MICHAEL MCCREDY BAKER, CITY OF AUSTIN POLICE RETIREMENT SYSTEM, WASHINGTON FEDERAL *Notice of Filing of Application of Kevin K. Green for Access to Protected Information*. (Berman, Steve) (Entered: 11/05/2019)
11/14/2019		NOTICE. **On 11/19/2019 at 9:00 AM, the court is holding oral argument on defendant's motion to dismiss in this case. There will be overflow seating available. Following the conclusion of the argument, an audio recording will be available for purchase on the docket.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/14/2019)
11/18/2019	442	Joint MOTION Use Of Electronic And Cellular Devices , filed by USA.**Response due by 12/2/2019.**(Acevedo, Mariana) (Entered: 11/18/2019)
11/18/2019	443	ORDER granting 442 Motion for Use of Electronic Devices During Oral Argument. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/18/2019)
11/25/2019	444	Notice of Filing of Certified Transcript for proceedings held on November 19, 2019 in Washington, D.C. (ac7) (Entered: 11/25/2019)
11/25/2019	445	TRANSCRIPT of proceedings held on November 19, 2019 before Chief Judge Margaret M. Sweeney. Total No. of Pages: 1−392. Procedures Re: Electronic Transcripts and Redactions. To order a copy of the transcript, click HERE. Notice of Intent to Redact due 12/2/2019. Redacted Transcript Deadline set for 12/23/2019. Release of Transcript Restriction set for 2/20/2020. (ac7) (Entered: 11/25/2019)
12/02/2019	446	DIGITAL AUDIO RECORDING of November 19, 2019 Oral Argument before Chief Judge Margaret M. Sweeney on Defendant's Motion to Dismiss. (jhk) (Entered: 12/02/2019)
12/02/2019		Minute Entry − Was the proceeding sealed to the public? No. The court held oral argument on Defendant's Motion to Dismiss in Washington, DC on November 19, 2019, before Chief Judge Margaret M. Sweeney. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. A copy of the audio recording is also available on the docket. (jhk) (Entered: 12/02/2019)
12/06/2019	447	**SEALED** OPINION and ORDER granting in part and denying in part 421 Motion to Dismiss. **The court grants defendant's motion to dismiss with respect to the direct claims and denies defendant's motion to dismiss with respect to the derivative claims. The parties shall propose redactions by 12/16/2019 and file a joint status report in which they propose further proceedings by 1/10/2020.**

		Signed by Chief Judge Margaret M. Sweeney. (jhk) (Main Document 447 replaced on 12/13/2019 to correct a typographical error) (rp). (Entered: 12/06/2019)
12/12/2019	448	JOINT STATUS REPORT , filed by USA. (Acevedo, Mariana) (Entered: 12/12/2019)
12/13/2019	449	REPORTED OPINION and ORDER reissuing for publication 447 Sealed Opinion and Order granting in part and denying in part 421 Motion to Dismiss. Signed by Chief Judge Margaret M. Sweeney. (jhk) Service on parties made. (Entered: 12/13/2019)
01/10/2020	450	Joint MOTION for Extension of Time until 1/24/20 to Deadline For Filing Joint Status Report , filed by USA.**Response due by 1/24/2020.**(Acevedo, Mariana) (Entered: 01/10/2020)
01/10/2020	451	ORDER granting 450 Motion for Extension of Time. **The parties shall file a joint status report in which they suggest further proceedings by no later than 1/24/2020.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/10/2020)
01/24/2020	452	Unopposed MOTION for Extension of Time until 2/7/2020 to File Joint Status Report , filed by USA.**Response due by 2/7/2020.**(Laufgraben, Eric) (Entered: 01/24/2020)
01/27/2020	453	ORDER granting 452 Motion for Extension of Time. **The parties shall file a joint status report in which they suggest further proceedings by no later than 2/7/2020.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/27/2020)
02/07/2020	454	JOINT STATUS REPORT , filed by USA. (Hosford, Elizabeth) (Entered: 02/07/2020)
02/10/2020	455	SCHEDULING ORDER. **The parties shall file their respective motions for an interlocutory appeal by no later than 2/21/20, and file a response to that motion by no later than 3/4/20.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/10/2020)
02/21/2020	456	MOTION to Certify Interlocutory Appeal , filed by USA.**Response due by 3/6/2020.**(Laufgraben, Eric) (Entered: 02/21/2020)
02/21/2020	457	MOTION to Certify Interlocutory Appeal , filed by ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, ANDREW T. BARRETT, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, FAIRHOLME FUNDS, INC., MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, THE FAIRHOLME FUND.**Response due by 3/6/2020.**(Cooper, Charles) (Entered: 02/21/2020)
02/27/2020	458	STATUS CONFERENCE ORDER. **The court will hold a status conference in this case on 3/5/2020 at 2:00 PM. The parties may appear telephonically or in person.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/27/2020)
03/04/2020	459	RESPONSE to 456 MOTION to Certify Interlocutory Appeal , filed by ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, ANDREW T. BARRETT, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, FAIRHOLME FUNDS, INC., MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, THE FAIRHOLME FUND.**Reply due by 3/11/2020.** (Cooper, Charles) (Entered: 03/04/2020)
03/04/2020	460	RESPONSE to 457 MOTION to Certify Interlocutory Appeal , filed by USA.**Reply due by 3/11/2020.** (Laufgraben, Eric) (Entered: 03/04/2020)
03/06/2020		Minute Entry − Was the proceeding sealed to the public? no. Proceeding held in Washington, DC on 3/5/2020 before Chief Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. (jhk) (Entered: 03/06/2020)

03/09/2020	461	REPORTED ORDER granting 456 Motion to Certify Interlocutory Appeal and 457 Motion to Certify Interlocutory Appeal. Proceedings in this case are stayed pending the interlocutory appeal process. **Joint status report regarding further proceedings due within 14 days of the completion of the interlocutory appeal process.** Signed by Chief Judge Margaret M. Sweeney. (kb1) (Entered: 03/09/2020)
03/09/2020	462	REPORTED OPINION reissuing 449 REPORTED OPINION and ORDER following order granting 456 MOTION to Certify Interlocutory Appeal and 457 MOTION to Certify Interlocutory Appeal. Signed by Chief Judge Margaret M. Sweeney. (kb1) (Entered: 03/09/2020)
03/27/2020		CAFC Case Number 2020−121 for 457 MOTION to Certify Interlocutory Appeal filed by Plaintiffs. (ac7) (Entered: 03/31/2020)
03/27/2020		CAFC Case Number 2020−122 for 456 MOTION to Certify Interlocutory Appeal, filed by USA. (ac7) (Entered: 03/31/2020)
04/07/2020	463	Notice of Filing of Certified Transcript for proceedings held on March 5, 2020 in Washington, D.C. (ew) (Entered: 04/07/2020)
04/07/2020	464	TRANSCRIPT of proceedings held on March 5, 2020 before Chief Judge Margaret M. Sweeney. Total No. of Pages: 1−77. Procedures Re: Electronic Transcripts and Redactions. To order a copy of the transcript, click HERE. Notice of Intent to Redact due 4/14/2020. Redacted Transcript Deadline set for 5/5/2020. Release of Transcript Restriction set for 7/6/2020. (ew) (Entered: 04/07/2020)
07/28/2020	465	NOTICE OF INTERLOCUTORY APPEAL, filed by ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, ANDREW T. BARRETT, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, FAIRHOLME FUNDS, INC., MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, THE FAIRHOLME FUND. Filing fee $ 505, receipt number AUSFCC−6336761. (Cooper, Charles) (Entered: 07/28/2020)
07/30/2020		Transmission of Docket Sheet to US Court of Appeals for the Federal Circuit re 465 Notice of Interlocutory Appeal. (ac7) (Entered: 07/30/2020)
09/30/2020	466	NOTICE of Appearance by Elizabeth Marie Hosford for USA . (Hosford, Elizabeth) (Entered: 09/30/2020)

APPEAL,CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:18−cv−00281−MMS

OWL CREEK ASIA I, L.P et al v. USA Assigned to: Senior Judge Margaret M. Sweeney Case in other court: 20−01934 Cause: 28:1491 Tucker Act	Date Filed: 02/23/2018 Date Terminated: 06/08/2020 Jury Demand: None Nature of Suit: 514 Taking − Other Jurisdiction: U.S. Government Defendant

Plaintiff

OWL CREEK ASIA I, L.P	represented by	**Lawrence David Rosenberg** Jones Day (DC) 51 Louisiana Avenue, N.W. Washington, DC 20001−2113 (202) 879−7622 Fax: (202) 626−1700 Email: ldrosenberg@jonesday.com *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Plaintiff

OWL CREEK ASIA II, L.P.	represented by	**Lawrence David Rosenberg** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Plaintiff

OWL CREEK I, L.P.	represented by	**Lawrence David Rosenberg** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Plaintiff

OWL CREEK II, L.P.	represented by	**Lawrence David Rosenberg** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Plaintiff

OWL CREEK ASIA MASTER FUND, LTD.	represented by	**Lawrence David Rosenberg** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Plaintiff

OWL CREEK CREDIT OPPORTUNITIES MASTER FUND, L.P.	represented by	**Lawrence David Rosenberg** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Plaintiff

OWL CREEK OVERSEAS MASTER FUND, LTD. *and*	represented by	**Lawrence David Rosenberg** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Plaintiff

OWL CREEK SRI MASTER FUND, LTD. represented by **Lawrence David Rosenberg**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

USA represented by
Elizabeth Marie Hosford
U. S. Department of Justice − Civil Div.
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TERMINATED: 09/30/2020

Date Filed	#	Docket Text
02/23/2018	1	COMPLAINT against USA (TRE) (Filing fee $400, Receipt number 9998−4502172) (Copy Served Electronically on Department of Justice), filed by OWL CREEK CREDIT OPPORTUNITIES MASTER FUND, L.P., OWL CREEK ASIA II, L.P., OWL CREEK II, L.P., OWL CREEK ASIA MASTER FUND, LTD., OWL CREEK SRI MASTER FUND, LTD., OWL CREEK ASIA I, L.P, OWL CREEK OVERSEAS MASTER FUND, LTD., OWL CREEK I, L.P..**Answer due by 4/24/2018.** (Attachments: # 1 Civil Cover Sheet)(ac7) (Entered: 02/23/2018)
02/23/2018	2	NOTICE of Directly Related Case(s) [13−385, 13−465, 13−698, 13−496, 13−542, 13−608, 13−672, 14−470], filed by All Plaintiffs. (ac7) (Entered: 02/23/2018)
02/23/2018	3	Rule 7.1 Disclosure Statement, filed by All Plaintiffs. (ac7) (Entered: 02/23/2018)
02/23/2018	4	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 02/23/2018)
02/23/2018	5	NOTICE of Designation of Electronic Case. (ac7) (Entered: 02/23/2018)
03/05/2018	6	NOTICE of Appearance by Kenneth Michael Dintzer for USA . (Dintzer, Kenneth) (Entered: 03/05/2018)
04/23/2018	7	Unopposed MOTION to Amend Schedule *to Coordinate Cases*, filed by All Plaintiffs.**Response due by 5/7/2018.** (Attachments: # 1 Text of Proposed Order)(Rosenberg, Lawrence) (Entered: 04/23/2018)
04/24/2018	8	Unopposed MOTION for Extension of Time until 6/29/2018 to Respond to Complaint , filed by USA.**Response due by 5/8/2018.**(Bezak, Reta) (Entered: 04/24/2018)
04/24/2018	9	ORDER granting 7 Motion to coordinate cases and set briefing schedule. Case coordinated with nos. 13−385, 13−465, 13−466, 13−496, 13−542, 13−608, 13−698, and 13−672. **Motion to Dismiss due by 6/29/2018. Response due by 9/20/2018. Reply due by 12/19/2018.** Signed by Judge Margaret M. Sweeney.(jhk) (Entered: 04/24/2018)

04/25/2018	10	ORDER denying as moot 8 Motion for Extension of Time. Signed by Judge Margaret M. Sweeney. (jhk) (Entered: 04/25/2018)
05/10/2018		On May 9, 2018, the court received a written ex parte communication−−a letter−−from a Fannie Mae/Freddie Mac shareholder. The court did not read the letter; instead, it directed the clerk of court to return the letter to the shareholder. The court has not, and will not, entertain ex parte communications from Fannie Mae/Freddie Mac shareholders. (kb1) (Entered: 05/10/2018)
06/19/2018	11	Unopposed MOTION for Extension of Time until August 1, 2018 to To Brief Defendant's Omnibus Motion To Dismiss , filed by USA.**Response due by 7/3/2018.**(Acevedo, Mariana) (Entered: 06/19/2018)
06/21/2018	12	ORDER granting 11 Motion for Extension of Time. **The motion to dismiss is due no later than 8/1/18. The response is due no later than 10/23/18. The reply is due no later than 1/22/19.** Signed by Judge Margaret M. Sweeney. (jhk) (Entered: 06/21/2018)
07/27/2018	13	Unopposed MOTION for Leave to Exceed Page Limit of Motion To Dismiss by 45 pages (Response due by 8/10/2018.), MOTION to Expedite , filed by USA.(Acevedo, Mariana) (Entered: 07/27/2018)
07/30/2018	14	ORDER granting 13 Motion for Leave to File Excess Pages. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 07/30/2018)
08/01/2018	15	MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 8/29/2018.**(Acevedo, Mariana) (Entered: 08/01/2018)
08/16/2018	16	AMENDED COMPLAINT against USA, filed by All Plaintiffs. *First Amended Complaint*, filed by All Plaintiffs.Answer due by 8/30/2018. (Rosenberg, Lawrence) (Entered: 08/16/2018)
08/16/2018	17	MOTION to Amend Schedule *Regarding Defendant's Motion to Dismiss*, filed by All Plaintiffs.**Response due by 8/30/2018.**(Rosenberg, Lawrence) (Entered: 08/16/2018)
08/30/2018	18	RESPONSE to 17 MOTION to Amend Schedule *Regarding Defendant's Motion to Dismiss* , filed by USA.**Reply due by 9/6/2018.** (Acevedo, Mariana) (Entered: 08/30/2018)
09/06/2018	19	REPLY to Response to Motion re 17 MOTION to Amend Schedule *Regarding Defendant's Motion to Dismiss* , filed by All Plaintiffs. (Rosenberg, Lawrence) (Entered: 09/06/2018)
09/12/2018	20	ORDER granting 17 Motion to Amend Schedule. **Defendant shall file its motion to dismiss by no later 10/1/2018. Plaintiffs shall file their response by no later than 10/23/2018. Defendant shall file its reply by no later than 1/22/2019.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 09/12/2018)
10/01/2018	21	Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 10/29/2018.**(Acevedo, Mariana) (Entered: 10/01/2018)
10/10/2018	22	ORDER Amending Deadlines. **The response to defendant's motion to dismiss is due by no later than 11/2/2018, and the reply in support of that motion is due by no later than 2/1/2019.** Signed by Chief Judge Margaret M. Sweeney.(jhk) (Entered: 10/10/2018)
10/29/2018	23	Unopposed MOTION for Leave to Exceed Page Limit of Opposition to Defendant's Omnibus Motion to Dismiss by 20 pages , filed by All Plaintiffs.**Response due by 11/13/2018.** (Attachments: # 1 Text of Proposed Order)(Rosenberg, Lawrence) (Entered: 10/29/2018)
10/31/2018	24	ORDER granting 23 Motion for Leave to File Excess Pages. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 10/31/2018)
11/02/2018	25	**SEALED**RESPONSE to 21 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) *Combined Opposition to Defendant's Omnibus Motion to Dismiss*, filed by All Plaintiffs.**Reply due by 11/16/2018.** (Attachments: # 1 Appendix)(Rosenberg, Lawrence) (Entered: 11/02/2018)

11/19/2018	26	Unopposed MOTION to Amend/Correct 25 Response to Motion [Dispositive], , filed by All Plaintiffs.**Response due by 12/3/2018.**(Rosenberg, Lawrence) (Entered: 11/19/2018)
11/21/2018	27	ORDER granting 26 Motion to Amend/Correct Brief. **The brief must be filed by 11/28/2018.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/21/2018)
11/26/2018	28	**SEALED**RESPONSE to 21 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) *Corrected Combined Opposition to Defendant's Omnibus Motion to Dismiss*, filed by All Plaintiffs.**Reply due by 12/10/2018.**(Rosenberg, Lawrence) (Entered: 11/26/2018)
01/29/2019	29	Unopposed MOTION for Extension of Time until 4/29/19 to File Reply , filed by USA.**Response due by 2/12/2019.**(Acevedo, Mariana) (Entered: 01/29/2019)
01/30/2019	30	ORDER granting in part and denying in part 29 Motion for Extension of Time to File Reply. **Defendant shall file its reply by no later than 5/6/2019. Defendant may file an omnibus reply that contains no more than 100 pages. Defendant shall complete and file the attached template concerning its motion−to−dismiss arguments by no later than 3/1/2019, and then file the same with regard to its reply by no later than 5/6/2019.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Main Document 30 replaced on 1/30/2019) (ac7). (Entered: 01/30/2019)
02/22/2019	31	REDACTED DOCUMENT, filed by All Plaintiffs redacting 28 Response to Motion [Dispositive], *Corrected Combined Opposition to Defendant's Omnibus Motion to Dismiss*. (Attachments: # 1 Appendix to Junior Preferred Plaintiffs' Combined Opposition to Omnibus Motion to Dismiss (REDACTED))(Rosenberg, Lawrence) (Entered: 02/22/2019)
03/01/2019	32	NOTICE, filed by USA (Acevedo, Mariana) (Entered: 03/01/2019)
05/06/2019	33	REPLY to Response to Motion re 21 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA. (Laufgraben, Eric) (Entered: 05/06/2019)
05/06/2019	34	NOTICE, filed by USA re 30 Order on Motion for Extension of Time to File Reply,, (Laufgraben, Eric) (Entered: 05/06/2019)
06/24/2019		**IMPORTANT NOTICE:** On ***Monday, August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Currently, many attorneys within a firm may share a single PACER account, but once NextGen is imple mented e−filing attorneys will no longer be able to use shared PACER accounts. To access the upgraded system, each e−filing attorney must have an individual upgraded PACER account. Preparing for NextGen CM/ECF is a two−step process. Step one is to upgrade your PACER account, and step two is to link your upgraded PACER account to your current CM/ECF filing account. This notice only addresses the first step because the second step can't be completed until on or after August 26, 2019. The first step is to check and see if your PACER account is an "Upgraded" PACER account. Many PACER accounts have already been upgraded. If either of the following statements is true, you have an upgraded PACER account and no action is required until on or after August 26, 2019: 1) you currently e−file in another NextGen court or 2) your PACER account was created after August 10, 2014. If neither of these statements is true, you must upgrade your PACER account. Additional notices will be sent at a later date on how to handle the second step in this process. If you still have questions please contact the PACER Service Center at 800−676−6856 or the Clerk's Office CM/ECF Help Desk at (202)357−6402.. (dh) (ADI) (Entered: 06/24/2019)
06/28/2019	35	MOTION for Oral Argument *on Motion to Dismiss*, filed by All Plaintiffs.**Response due by 7/12/2019.**(Rosenberg, Lawrence) (Entered: 06/28/2019)
07/03/2019	36	ORDER granting 35 Motion for Oral Argument. **The court will hold oral argument on those portions of defendant's motion to dismiss that concern jurisdiction and standing. The court will provide additional information to the parties via e−mail.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 07/03/2019)
07/20/2019		**IMPORTANT NOTICE:** On ***August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF

		(NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Preparing for NextGen is a two−step process. Step one is to upgrade your PACER account. If you have not yet re gistered for an individual PACER account or upgraded your existing PACER account, please do so immediately. Step two is to link your upgraded PACER account to your current CM/ECF filing account. Step two cannot be completed until on or after ***August 26, 2019***. To link your upgraded PACER account ***on or after August 26, 2019***, you must know your current CM/ECF login and password. Do not rely on your login and password to be saved in your web browser, because that method will not work with the NextGen upgrade. If you do not know your login and/or password or have any additional questions, please call the court's Clerks Office CM/ECF Help Desk at (202) 357−6402. (dh) (ADI) (Entered: 07/20/2019)
08/16/2019		***IMPORTANT NOTICE:*** On ***August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://uscfc.uscourts.gov. ***Please note that the court's CM/ECF system will be unavailable from 12:00 p.m. (EDT) on Friday, August 23, 2019, until 6:00 a.m. (EDT) on Monday, August 26, 2019.*** Although the Clerk's Office will be open on August 23, 2019, it will be deemed inaccessible under Rule 6 of the Rules of the United States Court of Federal Claims for purposes of calculating deadlines. Preparing for NextGen is a two−step process. Step one is to upgrade your PACER account. You should have your individual upgraded PACER account at this time. Step two is to link your upgraded PACER account to your current CM/ECF filing account***on or after August 26, 2019***. Instructions for linking your account can be found on the court's website at http://uscfc. uscourts.gov. To link your accounts, you ***MUST*** know your CM/ECF login and password−−−do not rely on your browser to remember your login credentials. If you are unsure of your CM/ECF login and/or password, contact the Clerk's Office CM/ECF Help Desk ***immediately*** at (202) 357−6402. You may also call the Help Desk with any other questions.. (dh) (ADI) (Entered: 08/16/2019)
08/28/2019	37	ORDER Setting Oral Argument on 21 Amended Motion to Dismiss and Staying Consideration of the Amended Motion. **Oral Argument set for 11/19/2019 at 9:00 AM (EST) in the National Courts Building before Chief Judge Margaret M. Sweeney. The court is staying further consideration of defendant's amended motion to dismiss until that date.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 08/28/2019)
09/18/2019	38	NOTICE of Additional Authority, filed by All Plaintiffs. (Attachments: # 1 Exhibit 1 − Collins Opinion)(Rosenberg, Lawrence) (Entered: 09/18/2019)
10/14/2019	39	MOTION For Pro Hac Vice participation (Attorney: Bruce S. Bennett. Is attorney admitted to her/his highest state court? Yes. Name of court: California. , filed by All Plaintiffs.(Rosenberg, Lawrence) (Entered: 10/14/2019)
10/15/2019	40	ORDER granting 39 Motion for Pro Hac Vice Admission. **Bruce S. Bennett may appear and participate as counsel in this case's proceedings.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 10/15/2019)
11/14/2019		NOTICE. **On 11/19/2019 at 9:00 AM, the court is holding oral argument on defendant's motion to dismiss in this case. There will be overflow seating available. Following the conclusion of the argument, an audio recording will be available for purchase on the docket.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/14/2019)
11/18/2019	41	Joint MOTION Use Of Electronic And Cellular Devices , filed by USA.**Response due by 12/2/2019.**(Acevedo, Mariana) (Entered: 11/18/2019)
11/18/2019	42	ORDER granting 41 Motion for Use of Electronic Devices During Oral Argument. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/18/2019)
12/02/2019		Minute Entry − Was the proceeding sealed to the public? No. The court heard oral argument on defendant's Motion to Dismiss in Washington, DC on November 19, 2019, before Chief Judge Margaret M. Sweeney. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. A copy of

		the audio recording is also available on the docket for Fairholme Funds, Inc. v. United States, 13−465. (jhk) (Entered: 12/02/2019)
01/28/2020	43	ORDER Staying Further Consideration of 15 Motion to Dismiss pending the determination of further proceedings in Fairholme Funds, Inc. v. United States, No. 13−465C. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/28/2020)
02/19/2020	44	MOTION to Lift Stay , filed by All Plaintiffs.**Response due by 3/4/2020.**(Rosenberg, Lawrence) (Entered: 02/19/2020)
02/19/2020	45	MOTION to Amend Pleadings − Rule 15 16 Amended Complaint , filed by All Plaintiffs.**Response due by 3/4/2020.** (Attachments: # 1 Exhibit A Proposed Second Amended Complaint, # 2 Exhibit B Redline, # 3 Declaration in Support of Motion)(Rosenberg, Lawrence) (Entered: 02/19/2020)
02/20/2020	46	STATUS REPORT ORDER. **The parties are directed to file a joint status report regarding potential stipulations by 2/25/2020.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/20/2020)
02/20/2020	47	ORDER Directing Response. **The government shall file a response by 2/26/20 in which it states its position on plaintiffs' request to stay briefing on the motion to amend the complaint.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/20/2020)
02/25/2020	48	STATUS REPORT *Joint Status Report*, filed by All Plaintiffs. (Rosenberg, Lawrence) (Entered: 02/25/2020)
02/26/2020	49	NOTICE, filed by USA . (Acevedo, Mariana) (Entered: 02/26/2020)
02/27/2020	50	STATUS CONFERENCE ORDER. **The court will hold a status conference in this case on 3/5/2020 at 2:00 PM. The parties may appear telephonically or in person.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/27/2020)
03/02/2020	51	ORDER Staying Further Consideration of 45 Motion to Amend Pleadings. **The court stays briefing on plaintiffs' motion to amend their complaint. The parties shall file a joint status report in which they propose further proceedings by no later than 14 days after the court issues a decision on defendant's motion to dismiss.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 03/02/2020)
03/04/2020	52	MOTION for Extension of Time until 3/18/2020 to File Response as to 44 MOTION to Lift Stay , filed by USA.**Response due by 3/18/2020.**(Laufgraben, Eric) (Entered: 03/04/2020)
03/06/2020	53	ORDER granting 52 Motion for Extension of Time to File Response. **Defendant shall file its response by 3/18/2020.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 03/06/2020)
03/06/2020	54	NOTICE, filed by All Plaintiffs *Of Filing Potential Order and Chart in Support*. (Rosenberg, Lawrence) (Entered: 03/06/2020)
03/06/2020		Minute Entry − Was the proceeding sealed to the public? no. Proceeding held in Washington, DC on 3/5/2020 before Chief Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. (jhk) (Entered: 03/06/2020)
03/18/2020	55	RESPONSE to 44 MOTION to Lift Stay , filed by USA.**Reply due by 3/25/2020.** (Laufgraben, Eric) (Entered: 03/18/2020)
03/19/2020	56	ORDER granting 44 Motion Lifting Stay. Plaintiffs to FILE, by no later than Thursday, March 26, 2020: (1) a one−page overview following the template attached as Exhibit 1 and (2) a supplemental brief of no more than five pages. Defendant to FILE a supplemental response brief, not to exceed six pages, by no later than Thursday, April 9, 2020. Signed by Chief Judge Margaret M. Sweeney. (Attachments: # 1 Exhibit 1) (jb2) Service on parties made. (Entered: 03/19/2020)
03/26/2020	57	SUPPLEMENTAL BRIEF re: 56 Order on Motion Lifting Stay, , filed by All Plaintiffs. (Attachments: # 1 Exhibit One−Page Overview)(Rosenberg, Lawrence) (Entered: 03/26/2020)

04/07/2020	58	Notice of Filing of Certified Transcript for proceedings held on March 5, 2020 in Washington, D.C. (ew) (Entered: 04/07/2020)
04/07/2020	59	TRANSCRIPT of proceedings held on March 5, 2020 before Chief Judge Margaret M. Sweeney. Total No. of Pages: 1−77. Procedures Re: Electronic Transcripts and Redactions. To order a copy of the transcript, click HERE. Notice of Intent to Redact due 4/14/2020. Redacted Transcript Deadline set for 5/5/2020. Release of Transcript Restriction set for 7/6/2020. (ew) (Entered: 04/07/2020)
04/09/2020	60	RESPONSE to 57 Supplemental Brief , filed by USA. (Laufgraben, Eric) (Entered: 04/09/2020)
04/14/2020	61	Unopposed MOTION to Amend/Correct 60 Response to Supplemental Brief , filed by USA.**Response due by 4/28/2020.** (Attachments: # 1 Exhibit Proposed Corrected Response to Plaintiffs' Supplemental Brief)(Laufgraben, Eric) (Entered: 04/14/2020)
04/14/2020	62	ORDER granting 61 Motion to Amend/Correct. **Defendant's corrected supplemental response brief due by 4/16/2020.** Signed by Chief Judge Margaret M. Sweeney. (jb2) Service on parties made. (Entered: 04/14/2020)
04/16/2020	63	RESPONSE to *Supplemental Brief (Corrected)*, filed by USA. (Laufgraben, Eric) (Entered: 04/16/2020)
06/08/2020	64	REPORTED OPINION denying 45 Motion to Amend Pleadings − Rule 15(b); granting 21 Motion to Dismiss − Rule 12(b)(1) and (6). The Clerk is directed to enter judgment. Signed by Chief Judge Margaret M. Sweeney. (jb2) Service on parties made. (Entered: 06/08/2020)
06/08/2020	65	JUDGMENT entered, pursuant to Rule 58, dismissing plaintiffs' complaint for lack of jurisdiction to entertain their fiduciary duty and implied−in−fact−contract claims and plaintiffs lack of standing to pursue any of their claims. No costs. (Service on parties made.) (dls) (Entered: 06/08/2020)
06/18/2020	66	NOTICE OF APPEAL as to 64 Order on Motion to Amend Pleadings − Rule 15(b), Order on Motion to Dismiss − Rule 12(b)(1) and (6), Reported Opinion, 65 Judgment,, filed by OWL CREEK ASIA I, L.P, OWL CREEK ASIA II, L.P., OWL CREEK ASIA MASTER FUND, LTD., OWL CREEK CREDIT OPPORTUNITIES MASTER FUND, L.P., OWL CREEK I, L.P., OWL CREEK II, L.P., OWL CREEK OVERSEAS MASTER FUND, LTD., OWL CREEK SRI MASTER FUND, LTD.. Filing fee $ 505, receipt number AUSFCC−6253104. Copy to CAFC. (Rosenberg, Lawrence) (Entered: 06/18/2020)
06/19/2020		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals for the Federal Circuit re 66 Notice of Appeal. (ac7) (Entered: 06/19/2020)
06/29/2020		CAFC Case Number 2020−1934 for 66 Notice of Appeal,, filed by OWL CREEK ASIA MASTER FUND, LTD., OWL CREEK I, L.P., OWL CREEK CREDIT OPPORTUNITIES MASTER FUND, L.P., OWL CREEK ASIA II, L.P., OWL CREEK ASIA I, L.P, OWL CREEK II, L.P., OWL CREEK OVERSEAS MASTER FUND, LTD., OWL CREEK SRI MASTER FUND, LTD.. (ac7) (Entered: 06/29/2020)
09/30/2020	67	NOTICE of Appearance by Elizabeth Marie Hosford for USA . (Hosford, Elizabeth) (Entered: 09/30/2020)

APPEAL,CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:18−cv−00529−MMS

MASON CAPITAL L.P. et al v. USA
Assigned to: Senior Judge Margaret M. Sweeney
Case in other court: 20−01936
Cause: 28:1491 Tucker Act

Date Filed: 04/11/2018
Date Terminated: 06/08/2020
Jury Demand: None
Nature of Suit: 514 Taking − Other
Jurisdiction: U.S. Government Defendant

Plaintiff

MASON CAPITAL L.P.
and

represented by **Lawrence David Rosenberg**
Jones Day (DC)
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Fax: (202) 626−1700
Email: ldrosenberg@jonesday.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

MASON CAPITAL MASTER FUND L.P.

represented by **Lawrence David Rosenberg**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

USA

represented by **Elizabeth Marie Hosford**
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Ben Franklin Station
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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Fax: (202) 514−8624
Email: kenneth.dintzer@usdoj.gov
TERMINATED: 09/30/2020

Date Filed	#	Docket Text
04/11/2018	1	COMPLAINT against USA (TRE) (Filing fee $400, Receipt number 9998−4598215) (Copy Served Electronically on Department of Justice), filed by MASON CAPITAL L.P., MASON CAPITAL MASTER FUND L.P..**Answer due by 6/11/2018.** (Attachments: # 1 Civil Cover Sheet)(ac7) (Entered: 04/11/2018)
04/11/2018	2	NOTICE of Directly Related Case(s) [13−385, 13−465, 13−698, 13−466, 13−496, 13−542,13−608, 13−672,14−740, 18−281, 18−370, 18−369, 18−371], filed by

		MASON CAPITAL L.P., MASON CAPITAL MASTER FUND L.P.. (ac7) (Entered: 04/11/2018)
04/11/2018	3	Rule 7.1 Disclosure Statement, filed by MASON CAPITAL L.P., MASON CAPITAL MASTER FUND L.P.. (ac7) (Entered: 04/11/2018)
04/11/2018	4	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 04/11/2018)
04/11/2018	5	NOTICE of Designation of Electronic Case. (ac7) (Entered: 04/11/2018)
04/23/2018	6	Unopposed MOTION to Amend Schedule *to Coordinate Cases*, filed by All Plaintiffs.**Response due by 5/7/2018.** (Attachments: # 1 Text of Proposed Order)(Rosenberg, Lawrence) (Entered: 04/23/2018)
04/24/2018	7	ORDER granting 6 Motion to coordinate cases and set briefing schedule. Case coordinated with nos. 13−385, 13−465, 13−466, 13−496, 13−542, 13−608, 13−698, and 13−672. **Motion to Dismiss due by 6/29/2018. Response due by 9/20/2018. Reply due by 12/19/2018.** Signed by Judge Margaret M. Sweeney.(jhk) (Entered: 04/24/2018)
05/10/2018		On May 9, 2018, the court received a written ex parte communication−−a letter−−from a Fannie Mae/Freddie Mac shareholder. The court did not read the letter; instead, it directed the clerk of court to return the letter to the shareholder. The court has not, and will not, entertain ex parte communications from Fannie Mae/Freddie Mac shareholders. (kb1) (Entered: 05/10/2018)
05/25/2018	8	NOTICE of Appearance by Kenneth Michael Dintzer for USA . (Dintzer, Kenneth) (Entered: 05/25/2018)
06/19/2018	9	Unopposed MOTION for Extension of Time until August 1, 2018 to To Brief Defendant's Omnibus Motion To Dismiss , filed by USA.**Response due by 7/3/2018.**(Acevedo, Mariana) (Entered: 06/19/2018)
06/21/2018	10	ORDER granting 9 Motion for Extension of Time. **The motion to dismiss is due no later than 8/1/18. The response is due no later than 10/23/18. The reply is due no later than 1/22/19.** Signed by Judge Margaret M. Sweeney. (jhk) (Entered: 06/21/2018)
07/27/2018	11	Unopposed MOTION for Leave to Exceed Page Limit of Motion To Dismiss by 45 pages , filed by USA.**Response due by 8/10/2018.**(Acevedo, Mariana) (Entered: 07/27/2018)
07/30/2018	12	ORDER granting 11 Motion for Leave to File Excess Pages Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 07/30/2018)
08/01/2018	13	MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 8/29/2018.**(Acevedo, Mariana) (Entered: 08/01/2018)
08/16/2018	14	AMENDED COMPLAINT against USA, filed by All Plaintiffs. *First Amended Complaint*, filed by All Plaintiffs.Answer due by 8/30/2018. (Rosenberg, Lawrence) (Entered: 08/16/2018)
08/16/2018	15	MOTION to Amend Schedule *Regarding Defendant's Motion to Dismiss*, filed by All Plaintiffs.**Response due by 8/30/2018.**(Rosenberg, Lawrence) (Entered: 08/16/2018)
08/30/2018	16	RESPONSE to 15 MOTION to Amend Schedule *Regarding Defendant's Motion to Dismiss* , filed by USA.**Reply due by 9/6/2018.** (Acevedo, Mariana) (Entered: 08/30/2018)
09/06/2018	17	REPLY to Response to Motion re 15 MOTION to Amend Schedule *Regarding Defendant's Motion to Dismiss* , filed by All Plaintiffs. (Rosenberg, Lawrence) (Entered: 09/06/2018)
09/12/2018	18	ORDER granting 15 Motion to Amend Schedule. **Defendant shall file its motion to dismiss by no later 10/1/2018. Plaintiffs shall file their response by no later than 10/23/2018. Defendant shall file its reply by no later than 1/22/2019.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 09/12/2018)

10/01/2018	19	Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 10/29/2018.**(Acevedo, Mariana) (Entered: 10/01/2018)
10/10/2018	20	ORDER Amending Deadlines. **The response to defendant's motion to dismiss is due by no later than 11/2/2018, and the reply in support of that motion is due by no later than 2/1/2019.** Signed by Chief Judge Margaret M. Sweeney.(jhk) (Entered: 10/10/2018)
10/29/2018	21	Unopposed MOTION for Leave to Exceed Page Limit of Opposition to Defendant's Omnibus Motion to Dismiss by 20 pages , filed by All Plaintiffs.**Response due by 11/13/2018.** (Attachments: # 1 Text of Proposed Order)(Rosenberg, Lawrence) (Entered: 10/29/2018)
10/31/2018	22	ORDER granting 21 Motion for Leave to File Excess Pages. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 10/31/2018)
11/02/2018	23	**SEALED**RESPONSE to 19 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) *Combined Opposition to Defendant's Omnibus Motion to Dismiss*, filed by All Plaintiffs.**Reply due by 11/16/2018.** (Attachments: # 1 Appendix)(Rosenberg, Lawrence) (Entered: 11/02/2018)
11/19/2018	24	Unopposed MOTION to Amend/Correct 23 Response to Motion [Dispositive], , filed by All Plaintiffs.**Response due by 12/3/2018.**(Rosenberg, Lawrence) (Entered: 11/19/2018)
11/21/2018	25	ORDER granting 24 Motion to Amend/Correct Response Brief. **The brief must be filed by 11/28/2018.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/21/2018)
11/26/2018	26	**SEALED**RESPONSE to 19 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) *Corrected Combined Opposition to Defendant's Omnibus Motion to Dismiss*, filed by All Plaintiffs.**Reply due by 12/10/2018.**(Rosenberg, Lawrence) (Entered: 11/26/2018)
01/29/2019	27	Unopposed MOTION for Extension of Time until 4/29/19 to File Reply , filed by USA.**Response due by 2/12/2019.**(Acevedo, Mariana) (Entered: 01/29/2019)
01/30/2019	28	ORDER granting in part and denying in part 27 Motion for Extension of Time to File Reply. **Defendant shall file its reply by no later than 5/6/2019. Defendant may file an omnibus reply that contains no more than 100 pages. Defendant shall complete and file the attached template concerning its motion−to−dismiss arguments by no later than 3/1/2019, and then file the same with regard to its reply by no later than 5/6/2019.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/30/2019)
02/22/2019	29	REDACTED DOCUMENT, filed by All Plaintiffs redacting 26 Response to Motion [Dispositive], *Corrected Combined Opposition to Defendant's Omnibus Motion to Dismiss*. (Attachments: # 1 Appendix to Junior Preferred Plaintiffs' Combined Opposition to Omnibus Motion to Dismiss (REDACTED))(Rosenberg, Lawrence) (Entered: 02/22/2019)
03/01/2019	30	NOTICE, filed by USA (Acevedo, Mariana) (Entered: 03/01/2019)
05/06/2019	31	REPLY to Response to Motion re 19 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA. (Laufgraben, Eric) (Entered: 05/06/2019)
05/06/2019	32	NOTICE, filed by USA re 28 Order on Motion for Extension of Time to File Reply,, (Laufgraben, Eric) (Entered: 05/06/2019)
06/25/2019		**IMPORTANT NOTICE:** On ***Monday, August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Currently, many attorneys within a firm may share a single PACER account, but once NextGen is imple mented e−filing attorneys will no longer be able to use shared PACER accounts. To access the upgraded system, each e−filing attorney must have an individual upgraded PACER account. Preparing for NextGen CM/ECF is a two−step process. Step one is to upgrade your PACER account, and step two is to link your upgraded PACER account to your current CM/ECF filing account. This notice only addresses the first step

		because the second step can't be completed until on or after August 26, 2019. The first step is to check and see if your PACER account is an "Upgraded" PACER account. Many PACER accounts have already been upgraded. If either of the following statements is true, you have an upgraded PACER account and no action is required until on or after August 26, 2019: 1) you currently e−file in another NextGen court or 2) your PACER account was created after August 10, 2014. If neither of these statements is true, you must upgrade your PACER account. Additional notices will be sent at a later date on how to handle the second step in this process. If you still have questions please contact the PACER Service Center at 800−676−6856 or the Clerk's Office CM/ECF Help Desk at (202)357−6402.. (dh) (ADI) (Entered: 06/25/2019)
06/28/2019	33	MOTION for Oral Argument *on Motion to Dismiss*, filed by All Plaintiffs.**Response due by 7/12/2019.**(Rosenberg, Lawrence) (Entered: 06/28/2019)
07/03/2019	34	ORDER granting 33 Motion for Oral Argument. **The court will hold oral argument on those portions of defendant's motion to dismiss that concern jurisdiction and standing. The court will provide additional information to the parties via e−mail.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 07/03/2019)
07/20/2019		**IMPORTANT NOTICE:** On ***August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Preparing for NextGen is a two−step process. Step one is to upgrade your PACER account. If you have not yet re gistered for an individual PACER account or upgraded your existing PACER account, please do so immediately. Step two is to link your upgraded PACER account to your current CM/ECF filing account. Step two cannot be completed until on or after ***August 26, 2019***. To link your upgraded PACER account ***on or after August 26, 2019***, you must know your current CM/ECF login and password. Do not rely on your login and password to be saved in your web browser, because that method will not work with the NextGen upgrade. If you do not know your login and/or password or have any additional questions, please call the court's Clerks Office CM/ECF Help Desk at (202) 357−6402. (dh) (ADI) (Entered: 07/20/2019)
08/16/2019		***IMPORTANT NOTICE:*** On ***August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://uscfc.uscourts.gov. ***Please note that the court's CM/ECF system will be unavailable from 12:00 p.m. (EDT) on Friday, August 23, 2019, until 6:00 a.m. (EDT) on Monday, August 26, 2019.*** Although the Clerk's Office will be open on August 23, 2019, it will be deemed inaccessible under Rule 6 of the Rules of the United States Court of Federal Claims for purposes of calculating deadlines. Preparing for NextGen is a two−step process. Step one is to upgrade your PACER account. You should have your individual upgraded PACER account at this time. Step two is to link your upgraded PACER account to your current CM/ECF filing account***on or after August 26, 2019***. Instructions for linking your account can be found on the court's website at http://uscfc. uscourts.gov. To link your accounts, you ***MUST*** know your CM/ECF login and password−−−do not rely on your browser to remember your login credentials. If you are unsure of your CM/ECF login and/or password, contact the Clerk's Office CM/ECF Help Desk ***immediately*** at (202) 357−6402. You may also call the Help Desk with any other questions.. (dh) (ADI) (Entered: 08/16/2019)
08/28/2019	35	ORDER Setting Oral Argument on 64 Amended Motion to Dismiss and Staying Consideration of the Amended Motion. **Oral Argument set for 11/19/2019 at 9:00 AM (EST) in the National Courts Building before Chief Judge Margaret M. Sweeney. The court is staying further consideration of defendant's amended motion to dismiss until that date.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 08/28/2019)
09/18/2019	36	NOTICE of Additional Authority, filed by All Plaintiffs. (Attachments: # 1 Exhibit 1 − Collins Opinion)(Rosenberg, Lawrence) (Entered: 09/18/2019)
10/14/2019	37	MOTION For Pro Hac Vice participation (Attorney: Bruce S. Bennett. Is attorney admitted to her/his highest state court? Yes. Name of court: California. , filed by All Plaintiffs.(Rosenberg, Lawrence) (Entered: 10/14/2019)

10/15/2019	38	ORDER granting 37 Motion for Pro Hac Vice Admission. **Bruce S. Bennett may appear and participate as counsel in this case's proceedings.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 10/15/2019)
11/14/2019		NOTICE. **On 11/19/2019 at 9:00 AM, the court is holding oral argument on defendant's motion to dismiss in this case. There will be overflow seating available. Following the conclusion of the argument, an audio recording will be available for purchase on the docket.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/14/2019)
11/18/2019	39	Joint MOTION Use Of Electronic And Cellular Devices , filed by USA.**Response due by 12/2/2019.**(Acevedo, Mariana) (Entered: 11/18/2019)
11/18/2019	40	ORDER granting 39 Motion for Use of Electronic Devices During Oral Argument. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/18/2019)
12/02/2019		Minute Entry − Was the proceeding sealed to the public? No. The court heard oral argument on defendant's Motion to Dismiss in Washington, DC on November 19, 2019, before Chief Judge Margaret M. Sweeney. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. A copy of the audio recording is also available on the docket for Fairholme Funds, Inc. v. United States, 13−465. (jhk) (Entered: 12/02/2019)
01/28/2020	41	ORDER staying further consideration of 19 Motion to Dismiss pending the determination of further proceedings in Fairholme Funds, Inc. v. United States, No. 13−465C. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/28/2020)
02/19/2020	42	MOTION to Lift Stay , filed by All Plaintiffs.**Response due by 3/4/2020.**(Rosenberg, Lawrence) (Entered: 02/19/2020)
02/20/2020	43	ORDER Directing Joint Status Report. **The parties are directed to file a joint status report regarding potential stipulations by 2/25/2020.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/20/2020)
02/25/2020	44	STATUS REPORT *Joint Status Report*, filed by All Plaintiffs. (Rosenberg, Lawrence) (Entered: 02/25/2020)
02/27/2020	45	STATUS CONFERENCE ORDER. **The court will hold a status conference in this case on 3/5/2020 at 2:00 PM. The parties may appear telephonically or in person.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/27/2020)
03/04/2020	46	MOTION for Extension of Time until 3/18/2020 to File Response as to 42 MOTION to Lift Stay , filed by USA.**Response due by 3/18/2020.**(Laufgraben, Eric) (Entered: 03/04/2020)
03/06/2020	47	ORDER granting 46 Motion for Extension of Time to File Response. **Defendant shall file its response by 3/18/2020.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 03/06/2020)
03/06/2020	48	NOTICE, filed by All Plaintiffs *Of Filing Potential Order and Chart in Support*. (Rosenberg, Lawrence) (Entered: 03/06/2020)
03/06/2020		Minute Entry − Was the proceeding sealed to the public? no. Proceeding held in Washington, DC on 3/5/2020 before Chief Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. (jhk) (Entered: 03/06/2020)
03/18/2020	49	RESPONSE to 42 MOTION to Lift Stay , filed by USA.**Reply due by 3/25/2020.** (Laufgraben, Eric) (Entered: 03/18/2020)
03/19/2020	50	ORDER granting 42 Motion Lifting Stay. Plaintiffs to FILE, by no later than Thursday, March 26, 2020: (1) a one−page overview following the template attached as Exhibit 1 and (2) a supplemental brief of no more than five pages. Defendant to FILE a supplemental response brief, not to exceed six pages, by no later than Thursday, April 9, 2020. Signed by Chief Judge Margaret M. Sweeney. (Attachments: # 1 Exhibit 1) (jb2) Service on parties made. (Entered: 03/19/2020)

03/26/2020	51	SUPPLEMENTAL BRIEF re: 50 Order on Motion Lifting Stay, , filed by All Plaintiffs. (Attachments: # 1 Exhibit One−Page Overview)(Rosenberg, Lawrence) (Entered: 03/26/2020)
04/07/2020	52	Notice of Filing of Certified Transcript for proceedings held on March 5, 2020 in Washington, D.C. (ew) (Entered: 04/07/2020)
04/07/2020	53	TRANSCRIPT of proceedings held on March 5, 2020 before Chief Judge Margaret M. Sweeney. Total No. of Pages: 1−77. Procedures Re: Electronic Transcripts and Redactions. To order a copy of the transcript, click HERE. Notice of Intent to Redact due 4/14/2020. Redacted Transcript Deadline set for 5/5/2020. Release of Transcript Restriction set for 7/6/2020. (ew) (Entered: 04/07/2020)
04/09/2020	54	RESPONSE to 51 Supplemental Brief , filed by USA. (Laufgraben, Eric) (Entered: 04/09/2020)
04/14/2020	55	Unopposed MOTION to Amend/Correct 54 Response to Supplemental Brief , filed by USA.**Response due by 4/28/2020.** (Attachments: # 1 Exhibit Proposed Corrected Response to Plaintiffs' Supplemental Brief)(Laufgraben, Eric) (Entered: 04/14/2020)
04/14/2020	56	ORDER granting 55 Motion to Amend/Correct. **Defendant's corrected supplemental response brief due by 4/16/2020.** Signed by Chief Judge Margaret M. Sweeney. (jb2) Service on parties made. (Entered: 04/14/2020)
04/16/2020	57	RESPONSE to *Supplemental Brief (Corrected)*, filed by USA. (Laufgraben, Eric) (Entered: 04/16/2020)
06/08/2020	58	REPORTED OPINION granting 19 Motion to Dismiss − Rule 12(b)(1) and (6). The Clerk is directed to enter judgment. Signed by Chief Judge Margaret M. Sweeney. (jb2) Service on parties made. (Entered: 06/08/2020)
06/08/2020	59	JUDGMENT entered, pursuant to Rule 58, dismissing plaintiffs' complaint for lack of jurisdiction to entertain their fiduciary duty and implied−in−fact−contract claims and plaintiffs lack of standing to pursue any of their claims. No costs. (Service on parties made.) (dls) (Entered: 06/08/2020)
06/18/2020	60	NOTICE OF APPEAL as to 59 Judgment, 58 Order on Motion to Dismiss − Rule 12(b)(1) and (6), Reported Opinion, filed by MASON CAPITAL L.P., MASON CAPITAL MASTER FUND L.P.. Filing fee $ 505, receipt number AUSFCC−6253145. Copy to CAFC. (Rosenberg, Lawrence) (Entered: 06/18/2020)
06/19/2020		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals for the Federal Circuit re 60 Notice of Appeal. (ac7) (Entered: 06/19/2020)
06/29/2020		CAFC Case Number 2020−1936 for 60 Notice of Appeal, filed by MASON CAPITAL MASTER FUND L.P., MASON CAPITAL L.P. (ac7) (Entered: 06/29/2020)
09/30/2020	61	NOTICE of Appearance by Elizabeth Marie Hosford for USA . (Hosford, Elizabeth) (Entered: 09/30/2020)

APPEAL,CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:18−cv−00369−MMS

AKANTHOS OPPORTUNITY FUND, L.P. v. USA
Assigned to: Senior Judge Margaret M. Sweeney
Case in other court: 20−01938
Cause: 28:1491 Tucker Act

Date Filed: 03/08/2018
Date Terminated: 06/08/2020
Jury Demand: None
Nature of Suit: 514 Taking − Other
Jurisdiction: U.S. Government Defendant

Plaintiff

AKANTHOS OPPORTUNITY FUND, L.P.

represented by

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LEAD ATTORNEY
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V.

Defendant

USA

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Email: kenneth.dintzer@usdoj.gov
TERMINATED: 09/30/2020

Date Filed	#	Docket Text
03/08/2018	1	COMPLAINT against USA (TRE) (Filing fee $400, Receipt number 9998−4531784) (Copy Served Electronically on Department of Justice), filed by AKANTHOS OPPORTUNITY MASTER FUND, L.P..**Answer due by 5/7/2018.** (Attachments: # 1 Civil Cover Sheet)(ac7) (Entered: 03/09/2018)
03/08/2018	2	NOTICE of Directly Related Case(s) [13−385, 13−465, 13−698, 13−466, 13−496, 13−542, 13−608, 13−672, 14−740, 18−281], filed by AKANTHOS OPPORTUNITY MASTER FUND, L.P.. (ac7) (Entered: 03/09/2018)
03/08/2018	3	Rule 7.1 Disclosure Statement, filed by AKANTHOS OPPORTUNITY MASTER FUND, L.P.. (ac7) (Entered: 03/09/2018)
03/08/2018	4	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 03/09/2018)

03/08/2018	5	NOTICE of Designation of Electronic Case. (ac7) (Entered: 03/09/2018)
03/28/2018	6	NOTICE of Appearance by Kenneth Michael Dintzer for USA . (Dintzer, Kenneth) (Entered: 03/28/2018)
04/23/2018	7	Unopposed MOTION to Amend Schedule *to Coordinate Cases*, filed by All Plaintiffs.**Response due by 5/7/2018.** (Attachments: # 1 Text of Proposed Order)(Rosenberg, Lawrence) (Entered: 04/23/2018)
04/24/2018	8	ORDER granting 7 Motion to coordinate cases and set briefing schedule. Case coordinated with nos. 13−385, 13−465, 13−466, 13−496, 13−542, 13−608, 13−698, and 13−672. **Motion to Dismiss due by 6/29/2018. Response due by 9/20/2018. Reply due by 12/19/2018.** Signed by Judge Margaret M. Sweeney.(jhk) (Entered: 04/24/2018)
05/10/2018		On May 9, 2018, the court received a written ex parte communication−−a letter−−from a Fannie Mae/Freddie Mac shareholder. The court did not read the letter; instead, it directed the clerk of court to return the letter to the shareholder. The court has not, and will not, entertain ex parte communications from Fannie Mae/Freddie Mac shareholders. (kb1) (Entered: 05/10/2018)
06/19/2018	9	Unopposed MOTION for Extension of Time to *Brief Defendant's Omnibus Motion To Dismiss*, filed by USA.**Response due by 7/3/2018.**(Acevedo, Mariana) (Entered: 06/19/2018)
06/21/2018	10	ORDER granting 9 Motion for Extension of Time. **The motion to dismiss is due no later than 8/1/18. The response is due no later than 10/23/18. The reply is due no later than 1/22/19.** Signed by Judge Margaret M. Sweeney. (jhk) (Entered: 06/21/2018)
07/27/2018	11	Unopposed MOTION for Leave to Exceed Page Limit of Motion To Dismiss by 45 pages , filed by USA.**Response due by 8/10/2018.**(Acevedo, Mariana) (Entered: 07/27/2018)
07/30/2018	12	ORDER granting 11 Motion for Leave to File Excess Pages. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 07/30/2018)
08/01/2018	13	MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 8/29/2018.**(Acevedo, Mariana) (Entered: 08/01/2018)
08/16/2018	14	AMENDED COMPLAINT against USA, filed by All Plaintiffs. *First Amended Complaint*, filed by All Plaintiffs.Answer due by 8/30/2018. (Rosenberg, Lawrence) (Entered: 08/16/2018)
08/16/2018	15	MOTION to Amend Schedule *Regarding Defendant's Motion to Dismiss*, filed by All Plaintiffs.**Response due by 8/30/2018.**(Rosenberg, Lawrence) (Entered: 08/16/2018)
08/30/2018	16	RESPONSE to 15 MOTION to Amend Schedule *Regarding Defendant's Motion to Dismiss* , filed by USA.**Reply due by 9/6/2018.** (Acevedo, Mariana) (Entered: 08/30/2018)
09/06/2018	17	REPLY to Response to Motion re 15 MOTION to Amend Schedule *Regarding Defendant's Motion to Dismiss* , filed by All Plaintiffs. (Rosenberg, Lawrence) (Entered: 09/06/2018)
09/10/2018	18	ORDER granting 15 Motion to Amend Schedule. **Defendant shall file its motion to dismiss by no later than 10/1/2018; plaintiff shall file its response by no later than 10/23/2018; and defendant shall file its reply by no later than 1/22/2019.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 09/10/2018)
10/01/2018	19	Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 10/29/2018.**(Acevedo, Mariana) (Entered: 10/01/2018)
10/10/2018	20	ORDER Amending Deadlines. **The response to defendant's motion to dismiss is due by no later than 11/2/2018, and the reply in support of that motion is due by no later than 2/1/2019.** Signed by Chief Judge Margaret M. Sweeney.(jhk) (Entered: 10/10/2018)

10/29/2018	21	Unopposed MOTION for Leave to Exceed Page Limit of Opposition to Defendant's Omnibus Motion to Dismiss by 20 pages , filed by All Plaintiffs.**Response due by 11/13/2018.** (Attachments: # 1 Text of Proposed Order)(Rosenberg, Lawrence) (Entered: 10/29/2018)
10/31/2018	22	ORDER granting 21 Motion for Leave to File Excess Pages. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 10/31/2018)
11/02/2018	23	**SEALED**RESPONSE to 19 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) *Combined Opposition to Defendant's Omnibus Motion to Dismiss*, filed by All Plaintiffs.**Reply due by 11/16/2018.** (Attachments: # 1 Appendix)(Rosenberg, Lawrence) (Entered: 11/02/2018)
11/19/2018	24	Unopposed MOTION to Amend/Correct 23 Response to Motion [Dispositive], , filed by All Plaintiffs.**Response due by 12/3/2018.**(Rosenberg, Lawrence) (Entered: 11/19/2018)
11/21/2018	25	ORDER granting 24 Motion to Amend/Correct Brief. **The brief must be filed by 11/28/2018.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/21/2018)
11/26/2018	26	**SEALED**RESPONSE to 19 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) *Corrected Combined Opposition to Defendant's Omnibus Motion to Dismiss*, filed by All Plaintiffs.**Reply due by 12/10/2018.**(Rosenberg, Lawrence) (Entered: 11/26/2018)
01/29/2019	27	Unopposed MOTION for Extension of Time until 4/29/19 to File Reply In Support Of Omnibus Motion To Dismiss , filed by USA.**Response due by 2/12/2019.**(Acevedo, Mariana) (Entered: 01/29/2019)
01/30/2019	28	ORDER granting in part and denying in part 27 Motion for Extension of Time. **Defendant shall file its reply by no later than 5/6/2019. Defendant may file an omnibus reply that contains no more than 100 pages. Defendant shall complete and file the attached template concerning its motion−to−dismiss arguments by no later than 3/1/2019, and then file the same with regard to its reply by no later than 5/6/2019.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/30/2019)
02/22/2019	29	REDACTED DOCUMENT, filed by All Plaintiffs redacting 26 Response to Motion [Dispositive], *Corrected Combined Opposition to Defendant's Omnibus Motion to Dismiss*. (Attachments: # 1 Appendix to Junior Preferred Plaintiffs' Combined Opposition to Omnibus Motion to Dismiss (REDACTED))(Rosenberg, Lawrence) (Entered: 02/22/2019)
03/01/2019	30	NOTICE, filed by USA (Acevedo, Mariana) (Entered: 03/01/2019)
05/06/2019	31	REPLY to Response to Motion re 19 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA. (Laufgraben, Eric) (Entered: 05/06/2019)
05/06/2019	32	NOTICE, filed by USA re 28 Order on Motion for Extension of Time to File,, (Laufgraben, Eric) (Entered: 05/06/2019)
06/24/2019		**IMPORTANT NOTICE:** On ***Monday, August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Currently, many attorneys within a firm may share a single PACER account, but once NextGen is imple mented e−filing attorneys will no longer be able to use shared PACER accounts. To access the upgraded system, each e−filing attorney must have an individual upgraded PACER account. Preparing for NextGen CM/ECF is a two−step process. Step one is to upgrade your PACER account, and step two is to link your upgraded PACER account to your current CM/ECF filing account. This notice only addresses the first step because the second step can't be completed until on or after August 26, 2019. The first step is to check and see if your PACER account is an "Upgraded" PACER account. Many PACER accounts have already been upgraded. If either of the following statements is true, you have an upgraded PACER account and no action is required until on or after August 26, 2019: 1) you currently e−file in another NextGen court or 2) your PACER account was created after August 10, 2014. If neither of these statements is true, you must upgrade your PACER account. Additional notices will be

		sent at a later date on how to handle the second step in this process. If you still have questions please contact the PACER Service Center at 800−676−6856 or the Clerk's Office CM/ECF Help Desk at (202)357−6402.. (dh) (ADI) (Entered: 06/24/2019)
06/28/2019	33	MOTION for Oral Argument *on Motion to Dismiss*, filed by All Plaintiffs.**Response due by 7/12/2019.**(Rosenberg, Lawrence) (Entered: 06/28/2019)
07/03/2019	34	ORDER granting 33 Motion for Oral Argument. **The court will hold oral argument on those portions of defendant's motion to dismiss that concern jurisdiction and standing. The court will provide additional information to the parties via e−mail.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 07/03/2019)
07/20/2019		**IMPORTANT NOTICE:** On ***August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Preparing for NextGen is a two−step process. Step one is to upgrade your PACER account. If you have not yet re gistered for an individual PACER account or upgraded your existing PACER account, please do so immediately. Step two is to link your upgraded PACER account to your current CM/ECF filing account. Step two cannot be completed until on or after ***August 26, 2019***. To link your upgraded PACER account ***on or after August 26, 2019***, you must know your current CM/ECF login and password. Do not rely on your login and password to be saved in your web browser, because that method will not work with the NextGen upgrade. If you do not know your login and/or password or have any additional questions, please call the court's Clerks Office CM/ECF Help Desk at (202) 357−6402. (dh) (ADI) (Entered: 07/20/2019)
08/16/2019		***IMPORTANT NOTICE:*** On ***August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://uscfc.uscourts.gov. ***Please note that the court's CM/ECF system will be unavailable from 12:00 p.m. (EDT) on Friday, August 23, 2019, until 6:00 a.m. (EDT) on Monday, August 26, 2019.*** Although the Clerk's Office will be open on August 23, 2019, it will be deemed inaccessible under Rule 6 of the Rules of the United States Court of Federal Claims for purposes of calculating deadlines. Preparing for NextGen is a two−step process. Step one is to upgrade your PACER account. You should have your individual upgraded PACER account at this time. Step two is to link your upgraded PACER account to your current CM/ECF filing account***on or after August 26, 2019***. Instructions for linking your account can be found on the court's website at http://uscfc. uscourts.gov. To link your accounts, you ***MUST*** know your CM/ECF login and password−−−do not rely on your browser to remember your login credentials. If you are unsure of your CM/ECF login and/or password, contact the Clerk's Office CM/ECF Help Desk ***immediately*** at (202) 357−6402. You may also call the Help Desk with any other questions.. (dh) (ADI) (Entered: 08/16/2019)
08/28/2019	35	ORDER Setting Oral Argument on 19 Amended Motion to Dismiss and Staying Consideration of the Amended Motion. **Oral Argument set for 11/19/2019 at 9:00 AM (EST) in the National Courts Building before Chief Judge Margaret M. Sweeney. The court is staying further consideration of defendant's amended motion to dismiss until that date.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 08/28/2019)
09/18/2019	36	NOTICE of Additional Authority, filed by All Plaintiffs. (Attachments: # 1 Exhibit 1 − Collins Opinion)(Rosenberg, Lawrence) (Entered: 09/18/2019)
10/14/2019	37	MOTION For Pro Hac Vice participation (Attorney: Bruce S. Bennett. Is attorney admitted to her/his highest state court? Yes. Name of court: California. , filed by All Plaintiffs.(Rosenberg, Lawrence) (Entered: 10/14/2019)
10/15/2019	38	ORDER granting 37 Motion for Pro Hac Vice Admission. **Bruce S. Bennett may appear and participate as counsel in this case's proceedings.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 10/15/2019)
11/14/2019		NOTICE. **On 11/19/2019 at 9:00 AM, the court is holding oral argument on defendant's motion to dismiss in this case. There will be overflow seating available. Following the conclusion of the argument, an audio recording will be**

		available for purchase on the docket. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/14/2019)
11/18/2019	39	Joint MOTION Use Of Electronic And Cellular Devices , filed by USA.**Response due by 12/2/2019.**(Acevedo, Mariana) (Entered: 11/18/2019)
11/18/2019	40	ORDER granting 39 Motion for Use of Electronic Devices During Oral Argument. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/18/2019)
12/02/2019		Minute Entry − Was the proceeding sealed to the public? No. The court heard oral argument on defendant's Motion to Dismiss in Washington, DC on November 19, 2019, before Chief Judge Margaret M. Sweeney. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. A copy of the audio recording is also available on the docket for Fairholme Funds, Inc. v. United States, 13−465. (jhk) (Entered: 12/02/2019)
01/28/2020	41	ORDER staying further consideration of 19 Motion to Dismiss pending the determination of further proceedings in Fairholme Funds, Inc. v. United States, No. 13−465C. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/28/2020)
01/31/2020	42	MOTION to Substitute Party *Plaintiff Master Fund*, filed by AKANTHOS OPPORTUNITY MASTER FUND, L.P..**Response due by 2/14/2020.** (Attachments: # 1 Declaration of Michael Kao)(Rosenberg, Lawrence) (Entered: 01/31/2020)
02/03/2020	43	ORDER granting 42 Motion to Substitute Party. **Akanthos Opportunity Fund, L.P. is substituted as the plaintiff in place of Akanthos Opportunity Master Fund, L.P.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/03/2020)
02/19/2020	44	MOTION to Lift Stay , filed by AKANTHOS OPPORTUNITY FUND, L.P..**Response due by 3/4/2020.**(Rosenberg, Lawrence) (Entered: 02/19/2020)
02/20/2020	45	ORDER Directing Joint Status Report. **The parties are directed to file a joint status report regarding potential stipulations by 2/25/2020.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/20/2020)
02/25/2020	46	STATUS REPORT *Joint Status Report*, filed by AKANTHOS OPPORTUNITY FUND, L.P.. (Rosenberg, Lawrence) (Entered: 02/25/2020)
02/27/2020	47	STATUS CONFERENCE ORDER. **The court will hold a status conference in this case on 3/5/2020 at 2:00 PM. The parties may appear telephonically or in person.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/27/2020)
03/04/2020	48	MOTION for Extension of Time until 3/18/2020 to File Response as to 44 MOTION to Lift Stay , filed by USA.**Response due by 3/18/2020.**(Laufgraben, Eric) (Entered: 03/04/2020)
03/06/2020	49	ORDER granting 48 Motion for Extension of Time to File Response. **Defendant shall file its response by 3/18/2020.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 03/06/2020)
03/06/2020	50	NOTICE, filed by All Plaintiffs *Of Filing Potential Order and Chart in Support*. (Rosenberg, Lawrence) (Entered: 03/06/2020)
03/06/2020		Minute Entry − Was the proceeding sealed to the public? no. Proceeding held in Washington, DC on 3/5/2020 before Chief Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. (jhk) (Entered: 03/06/2020)
03/18/2020	51	RESPONSE to 44 MOTION to Lift Stay , filed by USA.**Reply due by 3/25/2020.** (Laufgraben, Eric) (Entered: 03/18/2020)
03/19/2020	52	ORDER granting 44 Motion Lifting Stay. Plaintiff to FILE, by no later than Thursday, March 26, 2020: (1) a one−page overview following the template attached as Exhibit 1 and (2) a supplemental brief of no more than five pages. Defendant to FILE a supplemental response brief, not to exceed six pages, by no later than Thursday, April 9, 2020. Signed by Chief Judge Margaret M. Sweeney. (Attachments: # 1 Exhibit 1) (jb2) Service on parties made. (Entered: 03/19/2020)

03/26/2020	53	SUPPLEMENTAL BRIEF re: 52 Order on Motion Lifting Stay, , filed by AKANTHOS OPPORTUNITY FUND, L.P.. (Attachments: # 1 Exhibit One−Page Overview)(Rosenberg, Lawrence) (Entered: 03/26/2020)
04/07/2020	54	Notice of Filing of Certified Transcript for proceedings held on March 5, 2020 in Washington, D.C. (ew) (Entered: 04/07/2020)
04/07/2020	55	TRANSCRIPT of proceedings held on March 5, 2020 before Chief Judge Margaret M. Sweeney. Total No. of Pages: 1−77. Procedures Re: Electronic Transcripts and Redactions. To order a copy of the transcript, click HERE. Notice of Intent to Redact due 4/14/2020. Redacted Transcript Deadline set for 5/5/2020. Release of Transcript Restriction set for 7/6/2020. (ew) (Entered: 04/07/2020)
04/09/2020	56	RESPONSE to 53 Supplemental Brief , filed by USA. (Laufgraben, Eric) (Entered: 04/09/2020)
04/14/2020	57	Unopposed MOTION to Amend/Correct 56 Response to Supplemental Brief , filed by USA.**Response due by 4/28/2020.** (Attachments: # 1 Exhibit Proposed Corrected Response to Plaintiff's Supplemental Brief)(Laufgraben, Eric) (Entered: 04/14/2020)
04/14/2020	58	ORDER granting 57 Motion to Amend/Correct. **Defendant's corrected supplemental response brief due by 4/16/2020.** Signed by Chief Judge Margaret M. Sweeney. (jb2) Service on parties made. (Entered: 04/14/2020)
04/16/2020	59	RESPONSE to *Supplemental Brief (Corrected)*, filed by USA. (Laufgraben, Eric) (Entered: 04/16/2020)
06/08/2020	60	REPORTED OPINION granting 19 Motion to Dismiss − Rule 12(b)(1) and (6). The Clerk is directed to enter judgment. Signed by Chief Judge Margaret M. Sweeney. (jb2) Service on parties made. (Entered: 06/08/2020)
06/08/2020	61	JUDGMENT entered, pursuant to Rule 58, dismissing plaintiff's complaint for lack of jurisdiction to entertain its fiduciary duty and implied−in−fact−contract claims and plaintiff's lack of standing to pursue any of its claims. No costs. (Service on parties made.) (dls) (Entered: 06/08/2020)
06/18/2020	62	NOTICE OF APPEAL as to 61 Judgment, 60 Order on Motion to Dismiss − Rule 12(b)(1) and (6), Reported Opinion, filed by AKANTHOS OPPORTUNITY FUND, L.P.. Filing fee $ 505, receipt number AUSFCC−6253269. Copy to CAFC. (Rosenberg, Lawrence) (Entered: 06/18/2020)
06/19/2020		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals for the Federal Circuit re 62 Notice of Appeal. (ac7) (Entered: 06/19/2020)
06/29/2020		CAFC Case Number 2020−1938 for 62 Notice of Appeal filed by AKANTHOS OPPORTUNITY FUND, L.P. (ac7) (Entered: 06/29/2020)
09/30/2020	63	NOTICE of Appearance by Elizabeth Marie Hosford for USA . (Hosford, Elizabeth) (Entered: 09/30/2020)

APPEAL,CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:18−cv−00370−MMS

APPALOOSA INVESTMENT LIMITED PARTNERSHIP I et al v. USA
Assigned to: Senior Judge Margaret M. Sweeney
Case in other court: 20−01954
Cause: 28:1491 Tucker Act

Date Filed: 03/08/2018
Date Terminated: 06/08/2020
Jury Demand: None
Nature of Suit: 514 Taking − Other
Jurisdiction: U.S. Government Defendant

Plaintiff

APPALOOSA INVESTMENT LIMITED PARTNERSHIP I	represented by	**Lawrence David Rosenberg** Jones Day (DC) 51 Louisiana Avenue, N.W. Washington, DC 20001−2113 (202) 879−7622 Fax: (202) 626−1700 Email: ldrosenberg@jonesday.com *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Plaintiff

PALOMINO MASTER LTD *and*	represented by	**Lawrence David Rosenberg** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Plaintiff

AZTECA PARTNERS LLC	represented by	**Lawrence David Rosenberg** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Plaintiff

PALOMINO FUND LTD.	represented by	**Lawrence David Rosenberg** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

V.

Defendant

USA	represented by	**Elizabeth Marie Hosford** U. S. Department of Justice − Civil Div. Post Office Box 480 Ben Franklin Station Washington, DC 20044 (202) 616−0332 Fax: (202) 305−7643 Email: elizabeth.hosford@usdoj.gov *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED* **Kenneth Michael Dintzer** U. S. Department of Justice − Civil Div. Post Office Box 480 Ben Franklin Station Washington, DC 20044 (202) 616−0385

Fax: (202) 514−8624
Email: kenneth.dintzer@usdoj.gov
TERMINATED: 09/30/2020

Date Filed	#	Docket Text
03/08/2018	1	COMPLAINT against USA (TRE) (Filing fee $400, Receipt number 9998−4531795) (Copy Served Electronically on Department of Justice), filed by APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, PALOMINO MASTER LTD, AZTECA PARTNERS LLC.**Answer due by 5/7/2018.** (Attachments: # 1 Civil Cover Sheet)(ac7) (Entered: 03/09/2018)
03/08/2018	2	NOTICE of Directly Related Case(s) [13−385, 13−465, 13−698, 13−466, 13−496, 13−542, 13−608, 13−672, 14−740, 18−281], filed by APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, AZTECA PARTNERS LLC, PALOMINO MASTER LTD. (ac7) (Entered: 03/09/2018)
03/08/2018	3	Rule 7.1 Disclosure Statement, filed by APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, AZTECA PARTNERS LLC, PALOMINO MASTER LTD. (ac7) (Entered: 03/09/2018)
03/08/2018	4	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 03/09/2018)
03/08/2018	5	NOTICE of Designation of Electronic Case. (ac7) (Entered: 03/09/2018)
03/19/2018	6	NOTICE of Appearance by Kenneth Michael Dintzer for USA . (Dintzer, Kenneth) (Entered: 03/19/2018)
04/23/2018	7	Unopposed MOTION to Amend Schedule *to Coordinate Cases*, filed by All Plaintiffs.**Response due by 5/7/2018.** (Attachments: # 1 Text of Proposed Order)(Rosenberg, Lawrence) (Entered: 04/23/2018)
04/24/2018	8	ORDER granting 7 Motion to coordinate cases and set briefing schedule. Case coordinated with nos. 13−385, 13−465, 13−466, 13−496, 13−542, 13−608, 13−698, and 13−672. **Motion to Dismiss due by 6/29/2018. Response due by 9/20/2018. Reply due by 12/19/2018.** Signed by Judge Margaret M. Sweeney.(jhk) (Entered: 04/24/2018)
05/09/2018	9	Unopposed MOTION to Amend Pleadings − Rule 15 *Motion to Amend Complaint*, filed by All Plaintiffs.**Response due by 5/23/2018.** (Attachments: # 1 Exhibit A − First Amended Complaint, # 2 Exhibit B − Redline, # 3 Exhibit C − Amended Corporate Disclosure)(Rosenberg, Lawrence) (Entered: 05/09/2018)
05/10/2018	10	ORDER granting 9 Motion to Amend Pleadings − Rule 15(b). **The amended complaint must be filed by 5/14/2018.** Signed by Judge Margaret M. Sweeney. (jhk) (Entered: 05/10/2018)
05/10/2018		On May 9, 2018, the court received a written ex parte communication−−a letter−−from a Fannie Mae/Freddie Mac shareholder. The court did not read the letter; instead, it directed the clerk of court to return the letter to the shareholder. The court has not, and will not, entertain ex parte communications from Fannie Mae/Freddie Mac shareholders. (kb1) (Entered: 05/10/2018)
05/10/2018	11	AMENDED COMPLAINT against USA, filed by All Plaintiffs. *Amended Complaint*, filed by All Plaintiffs.Answer due by 5/24/2018. (Attachments: # 1 Civil Cover Sheet, # 2 Amended Disclosure Statement)(Rosenberg, Lawrence) (Entered: 05/10/2018)
06/19/2018	12	Unopposed MOTION for Extension of Time until August 1, 2018 to To Brief Defendant's Omnibus Motion To Dismiss , filed by USA.**Response due by 7/3/2018.**(Acevedo, Mariana) (Entered: 06/19/2018)
06/21/2018	13	ORDER granting 12 Motion for Extension of Time. **The motion to dismiss is due no later than 8/1/18. The response is due no later than 10/23/18. The reply is due no later than 1/22/19.** Signed by Judge Margaret M. Sweeney. (jhk) (Entered: 06/21/2018)
07/27/2018	14	Unopposed MOTION for Leave to Exceed Page Limit of Motion To Dismiss by 45 pages , filed by USA.**Response due by 8/10/2018.**(Acevedo, Mariana) (Entered:

		07/27/2018)
07/30/2018	15	ORDER granting 14 Motion for Leave to File Excess Pages. Signed by Chief Judge Margaret M. Sweeney. (jhk) Modified on 7/31/2018 (ac7). (Entered: 07/30/2018)
08/01/2018	16	MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 8/29/2018.**(Acevedo, Mariana) (Entered: 08/01/2018)
08/16/2018	17	AMENDED COMPLAINT against USA, filed by All Plaintiffs. *Second Amended Complaint*, filed by All Plaintiffs.Answer due by 8/30/2018. (Rosenberg, Lawrence) (Entered: 08/16/2018)
08/16/2018	18	MOTION to Amend Schedule *Regarding Defendant's Motion to Dismiss*, filed by All Plaintiffs.**Response due by 8/30/2018.**(Rosenberg, Lawrence) (Entered: 08/16/2018)
08/30/2018	19	RESPONSE to 18 MOTION to Amend Schedule *Regarding Defendant's Motion to Dismiss* , filed by USA.**Reply due by 9/6/2018.** (Acevedo, Mariana) (Entered: 08/30/2018)
09/06/2018	20	REPLY to Response to Motion re 18 MOTION to Amend Schedule *Regarding Defendant's Motion to Dismiss* , filed by All Plaintiffs. (Rosenberg, Lawrence) (Entered: 09/06/2018)
09/12/2018	21	ORDER granting 18 Motion to Amend Schedule. **Defendant shall file its motion to dismiss by no later 10/1/2018. Plaintiffs shall file their response by no later than 10/23/2018. Defendant shall file its reply by no later than 1/22/2019.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 09/12/2018)
10/01/2018	22	Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 10/29/2018.**(Acevedo, Mariana) (Entered: 10/01/2018)
10/10/2018	23	ORDER Amending Deadlines. **The response to defendant's motion to dismiss is due by no later than 11/2/2018, and the reply in support of that motion is due by no later than 2/1/2019.** Signed by Chief Judge Margaret M. Sweeney.(jhk) (Entered: 10/10/2018)
10/29/2018	24	Unopposed MOTION for Leave to Exceed Page Limit of Opposition to Defendant's Omnibus Motion to Dismiss by 20 pages , filed by All Plaintiffs.**Response due by 11/13/2018.** (Attachments: # 1 Text of Proposed Order)(Rosenberg, Lawrence) (Entered: 10/29/2018)
10/31/2018	25	ORDER granting 24 Motion for Leave to File Excess Pages. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 10/31/2018)
11/02/2018	26	**SEALED**RESPONSE to 22 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) *Combined Opposition to Defendant's Omnibus Motion to Dismiss*, filed by All Plaintiffs.**Reply due by 11/16/2018.** (Attachments: # 1 Appendix)(Rosenberg, Lawrence) (Entered: 11/02/2018)
11/19/2018	27	Unopposed MOTION to Amend/Correct 26 Response to Motion [Dispositive], , filed by All Plaintiffs.**Response due by 12/3/2018.**(Rosenberg, Lawrence) (Entered: 11/19/2018)
11/21/2018	28	ORDER granting 27 Motion to Amend/Correct Brief. **The brief must be filed by 11/28/2018.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/21/2018)
11/26/2018	29	**SEALED**RESPONSE to 22 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) *Corrected Combined Opposition to Defendant's Omnibus Motion to Dismiss*, filed by All Plaintiffs.**Reply due by 12/10/2018.**(Rosenberg, Lawrence) (Entered: 11/26/2018)
01/29/2019	30	Unopposed MOTION for Extension of Time until 4/29/19 to File Reply , filed by USA.**Response due by 2/12/2019.**(Acevedo, Mariana) (Entered: 01/29/2019)
01/30/2019	31	ORDER granting in part and denying in part 30 Motion for Extension of Time to File Reply. **Defendant shall file its reply by no later than 5/6/2019. Defendant may file an omnibus reply that contains no more than 100 pages. Defendant shall complete and file the attached template concerning its motion−to−dismiss arguments by no later than 3/1/2019, and then file the same with regard to its reply by no later**

		than 5/6/2019. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/30/2019)
02/22/2019	32	REDACTED DOCUMENT, filed by All Plaintiffs redacting 29 Response to Motion [Dispositive], *Corrected Combined Opposition to Defendant's Omnibus Motion to Dismiss*. (Attachments: # 1 Appendix to Junior Preferred Plaintiffs' Combined Opposition to Omnibus Motion to Dismiss (REDACTED))(Rosenberg, Lawrence) (Entered: 02/22/2019)
03/01/2019	33	NOTICE, filed by USA (Acevedo, Mariana) (Entered: 03/01/2019)
05/06/2019	34	REPLY to Response to Motion re 22 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA. (Laufgraben, Eric) (Entered: 05/06/2019)
05/06/2019	35	NOTICE, filed by USA re 31 Order on Motion for Extension of Time to File Reply,, (Laufgraben, Eric) (Entered: 05/06/2019)
06/24/2019		**IMPORTANT NOTICE:** On ***Monday, August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Currently, many attorneys within a firm may share a single PACER account, but once NextGen is imple mented e−filing attorneys will no longer be able to use shared PACER accounts. To access the upgraded system, each e−filing attorney must have an individual upgraded PACER account. Preparing for NextGen CM/ECF is a two−step process. Step one is to upgrade your PACER account, and step two is to link your upgraded PACER account to your current CM/ECF filing account. This notice only addresses the first step because the second step can't be completed until on or after August 26, 2019. The first step is to check and see if your PACER account is an "Upgraded" PACER account. Many PACER accounts have already been upgraded. If either of the following statements is true, you have an upgraded PACER account and no action is required until on or after August 26, 2019: 1) you currently e−file in another NextGen court or 2) your PACER account was created after August 10, 2014. If neither of these statements is true, you must upgrade your PACER account. Additional notices will be sent at a later date on how to handle the second step in this process. If you still have questions please contact the PACER Service Center at 800−676−6856 or the Clerk's Office CM/ECF Help Desk at (202)357−6402.. (dh) (ADI) (Entered: 06/24/2019)
06/28/2019	36	MOTION for Oral Argument *on Motion to Dismiss*, filed by All Plaintiffs.**Response due by 7/12/2019.**(Rosenberg, Lawrence) (Entered: 06/28/2019)
07/03/2019	37	ORDER granting 36 Motion for Oral Argument. **The court will hold oral argument on those portions of defendant's motion to dismiss that concern jurisdiction and standing. The court will provide additional information to the parties via e−mail.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 07/03/2019)
07/20/2019		**IMPORTANT NOTICE:** On ***August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Preparing for NextGen is a two−step process. Step one is to upgrade your PACER account. If you have not yet re gistered for an individual PACER account or upgraded your existing PACER account, please do so immediately. Step two is to link your upgraded PACER account to your current CM/ECF filing account. Step two cannot be completed until on or after ***August 26, 2019***. To link your upgraded PACER account ***on or after August 26, 2019***, you must know your current CM/ECF login and password. Do not rely on your login and password to be saved in your web browser, because that method will not work with the NextGen upgrade. If you do not know your login and/or password or have any additional questions, please call the court's Clerks Office CM/ECF Help Desk at (202) 357−6402. (dh) (ADI) (Entered: 07/20/2019)
08/16/2019		***IMPORTANT NOTICE:*** On ***August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://uscfc.uscourts.gov. ***Please note that the court's CM/ECF system will be unavailable from 12:00 p.m. (EDT) on Friday, August 23, 2019, until 6:00 a.m. (EDT) on Monday, August 26, 2019.*** Although the Clerk's

		Office will be open on August 23, 2019, it will be deemed inaccessible under Rule 6 of the Rules of the United States Court of Federal Claims for purposes of calculating deadlines. Preparing for NextGen is a two−step process. Step one is to upgrade your PACER account. You should have your individual upgraded PACER account at this time. Step two is to link your upgraded PACER account to your current CM/ECF filing account ***on or after August 26, 2019***. Instructions for linking your account can be found on the court's website at http://uscfc. uscourts.gov. To link your accounts, you ***MUST*** know your CM/ECF login and password−−−do not rely on your browser to remember your login credentials. If you are unsure of your CM/ECF login and/or password, contact the Clerk's Office CM/ECF Help Desk ***immediately*** at (202) 357−6402. You may also call the Help Desk with any other questions.. (dh) (ADI) (Entered: 08/16/2019)
08/28/2019	38	ORDER Setting Oral Argument on 22 Amended Motion to Dismiss and Staying Consideration of the Amended Motion. **Oral Argument set for 11/19/2019 at 9:00 AM (EST) in the National Courts Building before Chief Judge Margaret M. Sweeney. The court is staying further consideration of defendant's amended motion to dismiss until that date.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 08/28/2019)
09/18/2019	39	NOTICE of Additional Authority, filed by All Plaintiffs. (Attachments: # 1 Exhibit 1 − Collins Opinion)(Rosenberg, Lawrence) (Entered: 09/18/2019)
10/14/2019	40	MOTION For Pro Hac Vice participation (Attorney: Bruce S. Bennett. Is attorney admitted to her/his highest state court? Yes. Name of court: California. , filed by All Plaintiffs.(Rosenberg, Lawrence) (Entered: 10/14/2019)
10/15/2019	41	ORDER granting 40 Motion for Pro Hac Vice Admission. **Bruce S. Bennett may appear and participate as counsel in this case's proceedings.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 10/15/2019)
11/14/2019		NOTICE. **On 11/19/2019 at 9:00 AM, the court is holding oral argument on defendant's motion to dismiss in this case. There will be overflow seating available. Following the conclusion of the argument, an audio recording will be available for purchase on the docket.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/14/2019)
11/18/2019	42	Joint MOTION for Limited Admission (Response due by 12/2/2019.), MOTION Use Of Electronic And Cellular Devices , filed by USA.(Acevedo, Mariana) (Entered: 11/18/2019)
11/18/2019	43	ORDER granting 42 Motion for Use of Electronic Devices During Oral Argument. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/18/2019)
12/02/2019		Minute Entry − Was the proceeding sealed to the public? No. The court heard oral argument on defendant's Motion to Dismiss in Washington, DC on November 19, 2019, before Chief Judge Margaret M. Sweeney. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. A copy of the audio recording is also available on the docket for Fairholme Funds, Inc. v. United States, 13−465. (jhk) (Entered: 12/02/2019)
01/28/2020	44	ORDER staying further consideration of 22 Motion to Dismiss pending the determination of further proceedings in Fairholme Funds, Inc. v. United States, No. 13−465C. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/28/2020)
02/19/2020	45	MOTION to Lift Stay , filed by All Plaintiffs.**Response due by 3/4/2020.**(Rosenberg, Lawrence) (Entered: 02/19/2020)
02/20/2020	46	STATUS REPORT ORDER. **The parties are directed to file a joint status report regarding potential stipulations by 2/25/2020.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/20/2020)
02/25/2020	47	STATUS REPORT *Joint Status Report*, filed by All Plaintiffs. (Rosenberg, Lawrence) (Entered: 02/25/2020)
02/27/2020	48	STATUS CONFERENCE ORDER. **The court will hold a status conference in this case on 3/5/2020 at 2:00 PM. The parties may appear telephonically or in person.**

		Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/27/2020)
03/04/2020	49	MOTION for Extension of Time until 3/18/2020 to File Response as to 45 MOTION to Lift Stay , filed by USA.**Response due by 3/18/2020.**(Laufgraben, Eric) (Entered: 03/04/2020)
03/06/2020	50	ORDER granting 49 Motion for Extension of Time to File Response. **Defendant shall file its response by 3/18/2020.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 03/06/2020)
03/06/2020	51	NOTICE, filed by All Plaintiffs *Of Filing Potential Order and Chart in Support*. (Rosenberg, Lawrence) (Entered: 03/06/2020)
03/06/2020		Minute Entry − Was the proceeding sealed to the public? no. Proceeding held in Washington, DC on 3/5/2020 before Chief Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. (jhk) (Entered: 03/06/2020)
03/18/2020	52	RESPONSE to 45 MOTION to Lift Stay , filed by USA.**Reply due by 3/25/2020.** (Laufgraben, Eric) (Entered: 03/18/2020)
03/19/2020	53	GENERAL ORDER: Effective immediately and until further order, judges, special masters, the Clerk of Court, and counsel of record for the United States may file electronically in pro se cases using the courts Case Management/ Electronic Case Files (CM/ECF) system. Pro se litigants shall, absent extraordinary circumstances, submit all case filings via e−mail to ProSe_case_filings@cfc.uscourts.gov. Pro se litigants may, if feasible, receive notification by e−mail of all electronic filings by filing an E−Notification Consent Form, attached to the General Order. Signed by Chief Judge Margaret M. Sweeney. (dh) Service on parties made. (Entered: 03/19/2020)
03/19/2020	54	ORDER granting 45 Motion Lifting Stay. Plaintiffs to FILE, by no later than Thursday, March 26, 2020: (1) a one−page overview following the template attached as Exhibit 1 and (2) a supplemental brief of no more than five pages. Defendant to FILE a supplemental response brief, not to exceed six pages, by no later than Thursday, April 9, 2020. Signed by Chief Judge Margaret M. Sweeney. (Attachments: # 1 Exhibit 1) (jb2) Service on parties made. (Entered: 03/19/2020)
03/26/2020	55	SUPPLEMENTAL BRIEF re: 54 Order on Motion Lifting Stay, , filed by All Plaintiffs. (Attachments: # 1 Exhibit One−Page Overview)(Rosenberg, Lawrence) (Entered: 03/26/2020)
04/07/2020	56	Notice of Filing of Certified Transcript for proceedings held on March 5, 2020 in Washington, D.C. (ew) (Entered: 04/07/2020)
04/07/2020	57	TRANSCRIPT of proceedings held on March 5, 2020 before Chief Judge Margaret M. Sweeney. Total No. of Pages: 1−77. Procedures Re: Electronic Transcripts and Redactions. To order a copy of the transcript, click HERE. Notice of Intent to Redact due 4/14/2020. Redacted Transcript Deadline set for 5/5/2020. Release of Transcript Restriction set for 7/6/2020. (ew) (Entered: 04/07/2020)
04/09/2020	58	RESPONSE to 55 Supplemental Brief , filed by USA. (Laufgraben, Eric) (Entered: 04/09/2020)
04/14/2020	59	Unopposed MOTION to Amend/Correct 58 Response to Supplemental Brief , filed by USA.**Response due by 4/28/2020.** (Attachments: # 1 Exhibit Proposed Corrected Response to Plaintiffs' Supplemental Brief)(Laufgraben, Eric) (Entered: 04/14/2020)
04/14/2020	60	ORDER granting 59 Motion to Amend/Correct. **Defendant's corrected supplemental response brief due by 4/16/2020.** Signed by Chief Judge Margaret M. Sweeney. (jb2) Service on parties made. (Entered: 04/14/2020)
04/16/2020	61	RESPONSE to *Supplemental Brief (Corrected)*, filed by USA. (Laufgraben, Eric) (Entered: 04/16/2020)
06/08/2020	62	REPORTED OPINION granting 22 Motion to Dismiss − Rule 12(b)(1) and (6). The Clerk is directed to enter judgment. Signed by Chief Judge Margaret M. Sweeney. (jb2) Service on parties made. (Entered: 06/08/2020)

06/08/2020	63	JUDGMENT entered, pursuant to Rule 58, dismissing plaintiffs' complaint for lack of jurisdiction to entertain their fiduciary duty and implied−in−fact−contract claims and plaintiffs lack of standing to pursue any of their claims. No costs. (Service on parties made.) (dls) (Entered: 06/08/2020)
06/18/2020	64	NOTICE OF APPEAL as to 62 Order on Motion to Dismiss − Rule 12(b)(1) and (6), Reported Opinion, 63 Judgment,, filed by APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, AZTECA PARTNERS LLC, PALOMINO FUND LTD., PALOMINO MASTER LTD. Filing fee $ 505, receipt number AUSFCC−6253225. Copy to CAFC. (Rosenberg, Lawrence) (Entered: 06/18/2020)
06/19/2020		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals for the Federal Circuit re 64 Notice of Appeal. (ac7) (Entered: 06/19/2020)
07/01/2020		CAFC Case Number 2020−1954 for 64 Notice of Appeal, filed by PALOMINO MASTER LTD, AZTECA PARTNERS LLC, PALOMINO FUND LTD., APPALOOSA INVESTMENT LIMITED PARTNERSHIP I. (ac7) (Entered: 07/01/2020)
09/30/2020	65	NOTICE of Appearance by Elizabeth Marie Hosford for USA . (Hosford, Elizabeth) (Entered: 09/30/2020)

APPEAL,CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:18−cv−00371−MMS

CSS, LLC v. USA
Assigned to: Senior Judge Margaret M. Sweeney
Case in other court: 20−01955
Cause: 28:1491 Tucker Act

Date Filed: 03/08/2018
Date Terminated: 06/08/2020
Jury Demand: None
Nature of Suit: 514 Taking − Other
Jurisdiction: U.S. Government Defendant

Plaintiff

CSS, LLC represented by **Lawrence David Rosenberg**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

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LEAD ATTORNEY
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TERMINATED: 09/30/2020

Date Filed	#	Docket Text
03/08/2018	1	COMPLAINT against USA (TRE) (Filing fee $400, Receipt number 9998−4531843) (Copy Served Electronically on Department of Justice), filed by CSS, LLC.**Answer due by 5/7/2018.** (Attachments: # 1 Civil Cover Sheet)(ac7) (Entered: 03/09/2018)
03/08/2018	2	NOTICE of Directly Related Case(s) [13−385, 13−465, 13−698, 13−466, 13−496, 13−542, 13−608, 13−672, 14−740, 18−281], filed by CSS, LLC. (ac7) (Entered: 03/09/2018)
03/08/2018	3	Rule 7.1 Disclosure Statement, filed by CSS, LLC. (ac7) (Entered: 03/09/2018)
03/08/2018	4	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 03/09/2018)
03/08/2018	5	NOTICE of Designation of Electronic Case. (ac7) (Entered: 03/09/2018)

03/28/2018	6	NOTICE of Appearance by Kenneth Michael Dintzer for USA . (Dintzer, Kenneth) (Entered: 03/28/2018)
04/23/2018	7	Unopposed MOTION to Amend Schedule *to Coordinate Cases*, filed by All Plaintiffs.**Response due by 5/7/2018.** (Attachments: # 1 Text of Proposed Order)(Rosenberg, Lawrence) (Entered: 04/23/2018)
04/24/2018	8	ORDER granting 7 Motion to coordinate cases and set briefing schedule. Case coordinated with nos. 13−385, 13−465, 13−466, 13−496, 13−542, 13−608, 13−698, and 13−672. **Motion to Dismiss due by 6/29/2018. Response due by 9/20/2018. Reply due by 12/19/2018.** Signed by Judge Margaret M. Sweeney.(jhk) (Entered: 04/24/2018)
05/10/2018		On May 9, 2018, the court received a written ex parte communication−−a letter−−from a Fannie Mae/Freddie Mac shareholder. The court did not read the letter; instead, it directed the clerk of court to return the letter to the shareholder. The court has not, and will not, entertain ex parte communications from Fannie Mae/Freddie Mac shareholders. (kb1) (Entered: 05/10/2018)
06/19/2018	9	Unopposed MOTION for Extension of Time until August 1, 2018 to To Brief Defendant's Omnibus Motion To Dismiss , filed by USA.**Response due by 7/3/2018.**(Acevedo, Mariana) (Entered: 06/19/2018)
06/21/2018	10	ORDER granting 9 Motion for Extension of Time. **The motion to dismiss is due no later than 8/1/18. The response is due no later than 10/23/18. The reply is due no later than 1/22/19.** Signed by Judge Margaret M. Sweeney. (jhk) (Entered: 06/21/2018)
07/27/2018	11	Unopposed MOTION for Leave to Exceed Page Limit of Motion To Dismiss by 45 pages , filed by USA.**Response due by 8/10/2018.**(Acevedo, Mariana) (Entered: 07/27/2018)
07/30/2018	12	ORDER granting 11 Motion for Leave to File Excess Pages. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 07/30/2018)
08/01/2018	13	MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 8/29/2018.**(Acevedo, Mariana) (Entered: 08/01/2018)
08/16/2018	14	AMENDED COMPLAINT against USA, filed by All Plaintiffs. *First Amended Complaint*, filed by All Plaintiffs.Answer due by 8/30/2018. (Rosenberg, Lawrence) (Entered: 08/16/2018)
08/16/2018	15	MOTION to Amend Schedule *Regarding Defendant's Motion to Dismiss*, filed by All Plaintiffs.**Response due by 8/30/2018.**(Rosenberg, Lawrence) (Entered: 08/16/2018)
08/30/2018	16	RESPONSE to 15 MOTION to Amend Schedule *Regarding Defendant's Motion to Dismiss* , filed by USA.**Reply due by 9/6/2018.** (Acevedo, Mariana) (Entered: 08/30/2018)
09/06/2018	17	REPLY to Response to Motion re 15 MOTION to Amend Schedule *Regarding Defendant's Motion to Dismiss* , filed by All Plaintiffs. (Rosenberg, Lawrence) (Entered: 09/06/2018)
09/12/2018	18	ORDER granting 15 Motion to Amend Schedule. **Defendant shall file its motion to dismiss by no later 10/1/2018. Plaintiffs shall file their response by no later than 10/23/2018. Defendant shall file its reply by no later than 1/22/2019.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 09/12/2018)
10/01/2018	19	Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 10/29/2018.**(Acevedo, Mariana) (Entered: 10/01/2018)
10/10/2018	20	ORDER Amending Deadlines. **The response to defendant's motion to dismiss is due by no later than 11/2/2018, and the reply in support of that motion is due by no later than 2/1/2019.** Signed by Chief Judge Margaret M. Sweeney.(jhk) (Entered: 10/10/2018)
10/29/2018	21	Unopposed MOTION for Leave to Exceed Page Limit of Opposition to Defendant's Omnibus Motion to Dismiss by 20 pages , filed by All Plaintiffs.**Response due by 11/13/2018.** (Attachments: # 1 Text of Proposed Order)(Rosenberg, Lawrence)

		(Entered: 10/29/2018)
10/31/2018	22	ORDER granting 21 Motion for Leave to File Excess Pages. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 10/31/2018)
11/02/2018	23	**SEALED**RESPONSE to 19 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) *Combined Opposition to Defendant's Omnibus Motion to Dismiss*, filed by All Plaintiffs.**Reply due by 11/16/2018.** (Attachments: # 1 Appendix)(Rosenberg, Lawrence) (Entered: 11/02/2018)
11/19/2018	24	Unopposed MOTION to Amend/Correct 23 Response to Motion [Dispositive], , filed by All Plaintiffs.**Response due by 12/3/2018.**(Rosenberg, Lawrence) (Entered: 11/19/2018)
11/21/2018	25	ORDER granting 24 Motion to Amend/Correct Brief. **The brief must be filed by 11/28/2018.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/21/2018)
11/26/2018	26	**SEALED**RESPONSE to 19 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) *Corrected Combined Opposition to Defendant's Omnibus Motion to Dismiss*, filed by All Plaintiffs.**Reply due by 12/10/2018.**(Rosenberg, Lawrence) (Entered: 11/26/2018)
01/29/2019	27	Unopposed MOTION for Extension of Time until 4/29/19 to File Reply , filed by USA.**Response due by 2/12/2019.**(Acevedo, Mariana) (Entered: 01/29/2019)
01/30/2019	28	ORDER granting in part and denying in part 27 Motion for Extension of Time to File Reply. **Defendant shall file its reply by no later than 5/6/2019. Defendant may file an omnibus reply that contains no more than 100 pages. Defendant shall complete and file the attached template concerning its motion−to−dismiss arguments by no later than 3/1/2019, and then file the same with regard to its reply by no later than 5/6/2019.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/30/2019)
02/22/2019	29	REDACTED DOCUMENT, filed by All Plaintiffs redacting 26 Response to Motion [Dispositive], *Corrected Combined Opposition to Defendant's Omnibus Motion to Dismiss*. (Attachments: # 1 Appendix to Junior Preferred Plaintiffs' Combined Opposition to Omnibus Motion to Dismiss (REDACTED))(Rosenberg, Lawrence) (Entered: 02/22/2019)
03/01/2019	30	NOTICE, filed by USA (Acevedo, Mariana) (Entered: 03/01/2019)
05/06/2019	31	REPLY to Response to Motion re 19 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA. (Laufgraben, Eric) (Entered: 05/06/2019)
05/06/2019	32	**Docketed in Error** ~~NOTICE, filed by USA re 28 Order on Motion for Extension of Time to File Reply,, (Laufgraben, Eric)~~ Modified on 5/7/2019 − stricken per chambers request (vds). (Entered: 05/06/2019)
05/06/2019	33	NOTICE, filed by USA re 28 Order on Motion for Extension of Time to File Reply,, *Corrected* (Bezak, Reta) (Entered: 05/06/2019)
06/24/2019		**IMPORTANT NOTICE:** On ***Monday, August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Currently, many attorneys within a firm may share a single PACER account, but once NextGen is imple mented e−filing attorneys will no longer be able to use shared PACER accounts. To access the upgraded system, each e−filing attorney must have an individual upgraded PACER account. Preparing for NextGen CM/ECF is a two−step process. Step one is to upgrade your PACER account, and step two is to link your upgraded PACER account to your current CM/ECF filing account. This notice only addresses the first step because the second step can't be completed until on or after August 26, 2019. The first step is to check and see if your PACER account is an "Upgraded" PACER account. Many PACER accounts have already been upgraded. If either of the following statements is true, you have an upgraded PACER account and no action is required until on or after August 26, 2019: 1) you currently e−file in another NextGen court or 2) your PACER account was created after August 10, 2014. If neither of these statements is true, you must upgrade your PACER account. Additional notices will be

		sent at a later date on how to handle the second step in this process. If you still have questions please contact the PACER Service Center at 800−676−6856 or the Clerk's Office CM/ECF Help Desk at (202)357−6402.. (dh) (ADI) (Entered: 06/24/2019)
06/28/2019	34	MOTION for Oral Argument *on Motion to Dismiss*, filed by All Plaintiffs.**Response due by 7/12/2019.**(Rosenberg, Lawrence) (Entered: 06/28/2019)
07/03/2019	35	ORDER granting 34 Motion for Oral Argument. **The court will hold oral argument on those portions of defendant's motion to dismiss that concern jurisdiction and standing. The court will provide additional information to the parties via e−mail.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 07/03/2019)
07/20/2019		**IMPORTANT NOTICE:** On ***August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Preparing for NextGen is a two−step process. Step one is to upgrade your PACER account. If you have not yet re gistered for an individual PACER account or upgraded your existing PACER account, please do so immediately. Step two is to link your upgraded PACER account to your current CM/ECF filing account. Step two cannot be completed until on or after ***August 26, 2019***. To link your upgraded PACER account ***on or after August 26, 2019***, you must know your current CM/ECF login and password. Do not rely on your login and password to be saved in your web browser, because that method will not work with the NextGen upgrade. If you do not know your login and/or password or have any additional questions, please call the court's Clerks Office CM/ECF Help Desk at (202) 357−6402. (dh) (ADI) (Entered: 07/20/2019)
08/16/2019		***IMPORTANT NOTICE:*** On ***August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://uscfc.uscourts.gov. ***Please note that the court's CM/ECF system will be unavailable from 12:00 p.m. (EDT) on Friday, August 23, 2019, until 6:00 a.m. (EDT) on Monday, August 26, 2019.*** Although the Clerk's Office will be open on August 23, 2019, it will be deemed inaccessible under Rule 6 of the Rules of the United States Court of Federal Claims for purposes of calculating deadlines. Preparing for NextGen is a two−step process. Step one is to upgrade your PACER account. You should have your individual upgraded PACER account at this time. Step two is to link your upgraded PACER account to your current CM/ECF filing account***on or after August 26, 2019***. Instructions for linking your account can be found on the court's website at http://uscfc. uscourts.gov. To link your accounts, you ***MUST*** know your CM/ECF login and password−−−do not rely on your browser to remember your login credentials. If you are unsure of your CM/ECF login and/or password, contact the Clerk's Office CM/ECF Help Desk ***immediately*** at (202) 357−6402. You may also call the Help Desk with any other questions.. (dh) (ADI) (Entered: 08/16/2019)
08/28/2019	36	ORDER Setting Oral Argument on 19 Amended Motion to Dismiss and Staying Consideration of the Amended Motion. **Oral Argument set for 11/19/2019 at 9:00 AM (EST) in the National Courts Building before Chief Judge Margaret M. Sweeney. The court is staying further consideration of defendant's amended motion to dismiss until that date.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 08/28/2019)
09/18/2019	37	NOTICE of Additional Authority, filed by All Plaintiffs. (Attachments: # 1 Exhibit 1 − Collins Opinion)(Rosenberg, Lawrence) (Entered: 09/18/2019)
10/14/2019	38	MOTION For Pro Hac Vice participation (Attorney: Bruce S. Bennett. Is attorney admitted to her/his highest state court? Yes. Name of court: California. , filed by All Plaintiffs.(Rosenberg, Lawrence) (Entered: 10/14/2019)
10/15/2019	39	ORDER granting 38 Motion for Pro Hac Vice Admission. **Bruce S. Bennett may appear and participate as counsel in this case's proceedings.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 10/15/2019)
11/14/2019		NOTICE. **On 11/19/2019 at 9:00 AM, the court is holding oral argument on defendant's motion to dismiss in this case. There will be overflow seating available. Following the conclusion of the argument, an audio recording will be**

		available for purchase on the docket. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/14/2019)
11/18/2019	40	Joint MOTION Use Of Electronic And Cellular Devices , filed by USA.**Response due by 12/2/2019.**(Acevedo, Mariana) (Entered: 11/18/2019)
11/18/2019	41	ORDER granting 40 Motion for Use of Electronic Devices During Oral Argument. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/18/2019)
12/02/2019		Minute Entry − Was the proceeding sealed to the public? No. The court heard oral argument on defendant's Motion to Dismiss in Washington, DC on November 19, 2019, before Chief Judge Margaret M. Sweeney. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. A copy of the audio recording is also available on the docket for Fairholme Funds, Inc. v. United States, 13−465. (jhk) (Entered: 12/02/2019)
01/28/2020	42	ORDER staying further consideration of 19 Motion to Dismiss pending the determination of further proceedings in Fairholme Funds, Inc. v. United States, No. 13−465C. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/28/2020)
02/19/2020	43	MOTION to Lift Stay , filed by CSS, LLC.**Response due by 3/4/2020.**(Rosenberg, Lawrence) (Entered: 02/19/2020)
02/20/2020	44	ORDER Directing Joint Status Report. **The parties are directed to file a joint status report regarding potential stipulations by 2/25/2020.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/20/2020)
02/25/2020	45	STATUS REPORT *Joint Status Report*, filed by CSS, LLC. (Rosenberg, Lawrence) (Entered: 02/25/2020)
02/27/2020	46	STATUS CONFERENCE ORDER. **The court will hold a status conference in this case on 3/5/2020 at 2:00 PM. The parties may appear telephonically or in person.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/27/2020)
03/04/2020	47	MOTION for Extension of Time until 3/18/2020 to File Response as to 43 MOTION to Lift Stay , filed by USA.**Response due by 3/18/2020.**(Laufgraben, Eric) (Entered: 03/04/2020)
03/06/2020	48	ORDER granting 47 Motion for Extension of Time to File Response. **Defendant shall file its response by 3/18/2020.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 03/06/2020)
03/06/2020	49	NOTICE, filed by All Plaintiffs *Of Filing Potential Order and Chart in Support*. (Rosenberg, Lawrence) (Entered: 03/06/2020)
03/06/2020		Minute Entry − Was the proceeding sealed to the public? no. Proceeding held in Washington, DC on 3/5/2020 before Chief Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. (jhk) (Entered: 03/06/2020)
03/18/2020	50	RESPONSE to 43 MOTION to Lift Stay , filed by USA.**Reply due by 3/25/2020.**(Laufgraben, Eric) (Entered: 03/18/2020)
03/19/2020	51	ORDER granting 43 Motion Lifting Stay. Plaintiff to FILE, by no later than Thursday, March 26, 2020: (1) a one−page overview following the template attached as Exhibit 1 and (2) a supplemental brief of no more than five pages. Defendant to FILE a supplemental response brief, not to exceed six pages, by no later than Thursday, April 9, 2020. Signed by Chief Judge Margaret M. Sweeney. (Attachments: # 1 Exhibit 1) (jb2) Service on parties made. (Entered: 03/19/2020)
03/26/2020	52	SUPPLEMENTAL BRIEF re: 51 Order on Motion Lifting Stay, , filed by CSS, LLC. (Attachments: # 1 Exhibit One−Page Overview)(Rosenberg, Lawrence) (Entered: 03/26/2020)
04/07/2020	53	Notice of Filing of Certified Transcript for proceedings held on March 5, 2020 in Washington, D.C. (ew) (Entered: 04/07/2020)

04/07/2020	54	TRANSCRIPT of proceedings held on March 5, 2020 before Chief Judge Margaret M. Sweeney. Total No. of Pages: 1−77. Procedures Re: Electronic Transcripts and Redactions. To order a copy of the transcript, click HERE. Notice of Intent to Redact due 4/14/2020. Redacted Transcript Deadline set for 5/5/2020. Release of Transcript Restriction set for 7/6/2020. (ew) (Entered: 04/07/2020)
04/09/2020	55	RESPONSE to 52 Supplemental Brief , filed by USA. (Laufgraben, Eric) (Entered: 04/09/2020)
04/14/2020	56	Unopposed MOTION to Amend/Correct 55 Response to Supplemental Brief , filed by USA.**Response due by 4/28/2020.** (Attachments: # 1 Exhibit Proposed Corrected Response to Plaintiff's Supplemental Brief)(Laufgraben, Eric) (Entered: 04/14/2020)
04/14/2020	57	ORDER granting 56 Motion to Amend/Correct. **Defendant's corrected supplemental response brief due by 4/16/2020.** Signed by Chief Judge Margaret M. Sweeney. (jb2) Service on parties made. (Entered: 04/14/2020)
04/16/2020	58	RESPONSE to *Supplemental Brief (Corrected)*, filed by USA. (Laufgraben, Eric) (Entered: 04/16/2020)
06/08/2020	59	REPORTED OPINION granting 19 Motion to Dismiss − Rule 12(b)(1) and (6). The Clerk is directed to enter judgment. Signed by Chief Judge Margaret M. Sweeney. (jb2) Service on parties made. (Entered: 06/08/2020)
06/08/2020	60	JUDGMENT entered, pursuant to Rule 58, dismissing plaintiff's complaint for lack of jurisdiction to entertain its fiduciary duty and implied−in−fact−contract claims and plaintiff's lack of standing to pursue any of its claims. No costs. (Service on parties made.) (dls) (Entered: 06/08/2020)
06/18/2020	61	NOTICE OF APPEAL as to 59 Order on Motion to Dismiss − Rule 12(b)(1) and (6), Reported Opinion, 60 Judgment,, filed by CSS, LLC. Filing fee $ 505, receipt number AUSFCC−6253182. Copy to CAFC. (Rosenberg, Lawrence) (Entered: 06/18/2020)
06/19/2020		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals for the Federal Circuit re 61 Notice of Appeal. (ac7) (Entered: 06/19/2020)
07/01/2020		CAFC Case Number 2020−1955 for 61 Notice of Appeal filed by CSS, LLC. (ac7) (Entered: 07/01/2020)
09/30/2020	62	NOTICE of Appearance by Elizabeth Marie Hosford for USA . (Hosford, Elizabeth) (Entered: 09/30/2020)

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APPEAL,CLOSED,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:13-cv-00698-MMS

ARROWOOD INDEMNITY COMPANY et al v. USA
Assigned to: Chief Judge Margaret M. Sweeney
Demand: $42,297,000
Case: 1:13-cv-00466-MMS
Case in other court: 20-02020
Cause: 28:1491 Tucker Act

Date Filed: 09/18/2013
Date Terminated: 05/15/2020
Jury Demand: None
Nature of Suit: 514 Taking - Other
Jurisdiction: U.S. Government Defendant

Plaintiff

ARROWOOD INDEMNITY COMPANY represented by **Richard Marc Zuckerman**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Henry Barr
Dentons US LLP (NY)
1221 Avenue of the Americas
New York, NY 10020
(212) 768-6788
Fax: (212) 768-6800
Email: michael.barr@dentons.com
TERMINATED: 02/06/2020

Plaintiff

ARROWOOD SURPLUS LINES INSURANCE COMPANY
and
represented by **Richard Marc Zuckerman**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Henry Barr
(See above for address)
TERMINATED: 02/06/2020

Plaintiff

FINANCIAL STRUCTURES LIMITED represented by **Richard Marc Zuckerman**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Henry Barr
(See above for address)
TERMINATED: 02/06/2020

V.

Defendant

USA represented by **Kenneth Michael Dintzer**
U. S. Department of Justice - Civil Div.
Post Office Box 480
Ben Franklin Station
Washington, DC 20044
(202) 616-0385
Fax: (202) 514-8624
Email: kenneth.dintzer@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/18/2013	1	COMPLAINT against USA (TRE) (Filing fee $400, Receipt number 075638) (Copy Served Electronically on Department of Justice), filed by All Plaintiffs.**Answer due by 11/18/2013.** (Attachments: # 1 Civil Cover Sheet)(ac7) (Entered: 09/18/2013)
09/18/2013	2	Rule 7.1 Disclosure Statement, filed by All Plaintiffs. (ac7) (Entered: 09/18/2013)
09/18/2013	3	NOTICE of Directly Related Case(s) [13-385, 13-465, 13-466, 13-496, 13-542, 13-608, 13-672], filed by All Plaintiffs. (ac7) (Entered: 09/18/2013)
09/18/2013	4	NOTICE of Assignment to Judge Margaret M. Sweeney. (ac7) (Entered: 09/18/2013)
09/18/2013	5	NOTICE of Designation of Electronic Case. (ac7) (Entered: 09/18/2013)
09/19/2013	6	NOTICE of Appearance by Kenneth Michael Dintzer for USA . (Dintzer, Kenneth) (Entered: 09/19/2013)
10/29/2013	7	ORDER: Granting consolidation with case nos. 13-466C, 13-496C and 13-542C as well as coordinating with case nos. 13-385C, 13-608C, 13-672C, 13-465C and appointing interim co-lead counsel class counsel. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 10/29/2013)
11/08/2013	8	MOTION for Extension of Time until 02/18/2014 to respond to complaint , filed by USA.**Response due by 11/25/2013.**(Hosford, Elizabeth) (Entered: 11/08/2013)
11/11/2013	9	RESPONSE to 8 MOTION for Extension of Time until 02/18/2014 to respond to complaint , filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED.**Reply due by 11/21/2013.** (Barr, Michael) (Entered: 11/11/2013)
11/12/2013	10	ORDER granting 8 Motion for Extension of Time. Defendant's response to complaint shall be filed no later than February 18, 2014. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 11/12/2013)
02/14/2014	11	Second MOTION for Extension of Time until February 28, 2014 to File Response to Plaintiffs' Complaint , filed by USA.**Response due by 3/3/2014.**(Greene, Seth) (Entered: 02/14/2014)

02/20/2014	12	ORDER: For good cause shown, the court grants defendant's motion and defendant's response to plaintiffs' complaint is due no later than Friday, February 28, 2014. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 02/20/2014)
02/21/2014	13	Unopposed MOTION for Leave to Exceed Page Limit , filed by USA.**Response due by 3/10/2014.**(Greene, Seth) (Entered: 02/21/2014)
02/25/2014	14	ORDER granting 13 Motion for Leave to File Excess Pages. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 02/25/2014)
02/27/2014	15	Third MOTION for Extension of Time until March 14, 2014 to File Response *to Plaintiffs' Complaint*, filed by USA.**Response due by 3/17/2014.**(Greene, Seth) (Entered: 02/27/2014)
03/14/2014	16	MOTION to Stay Proceedings , filed by USA.**Response due by 3/31/2014.**(Greene, Seth) (Entered: 03/14/2014)
03/17/2014	17	RESPONSE to 16 MOTION to Stay Proceedings / *Plaintiffs' Partial Opposition to Defendant's Motion For A Stay And Plaintiffs' Proposed Order In Furtherance of This Court's Order For Coordinated Discovery, Motion Practice, And Other Pretrial Proceedings*, filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED.**Reply due by 3/27/2014.** (Attachments: # 1 [Proposed] Order)(Barr, Michael) (Entered: 03/17/2014)
03/19/2014	18	REPLY to Response to Motion re 16 MOTION to Stay Proceedings , filed by USA. (Greene, Seth) (Entered: 03/19/2014)
04/04/2014	19	ORDER denying 15 Motion for Extension of Time to File Response and 16 Motion to Stay. Defendant shall respond to the complaint **no later than Monday, June 30, 2014**. If the discovery schedule in Fairholme is extended, defendant may file the appropriate motion for additional time to respond to the complaint. If defendant files a motion to dismiss, further briefing regarding the motion shall be stayed pending the conclusion of jurisdictional discovery in Fairholme. In that event, once the parties in Fairholme file a postdiscovery joint status report, the court will issue an order in this case regarding further proceedings. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 04/04/2014)
04/09/2014	20	ORDER setting forth guidelines for various issues in the Fannie Mae/Freddie Mac cases. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 04/09/2014)
06/27/2014	21	Unopposed MOTION for Extension of Time until August 29, 2014 to File Response *to Plaintiffs' Complaint*, filed by USA.**Response due by 7/14/2014.**(Greene, Seth) (Entered: 06/27/2014)
07/01/2014	22	ORDER: Defendant's response to plaintiffs' complaint shall be filed **no later than Friday, August 29, 2014**. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/01/2014)
07/10/2014	23	ORDER Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/10/2014)
08/25/2014	24	Unopposed MOTION for Extension of Time until 60 days after close of Fairholme discovery to File Response *to Complaint*, filed by USA.**Response due by 9/11/2014.** (Greene, Seth) (Entered: 08/25/2014)
08/25/2014	25	ORDER granting 24 defendant's unopposed motion to respond to plaintiffs' complaint 60 days after jurisdictional discovery in Fairholme Funds, Inc. v. United States, 13-465, is

		completed. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 08/25/2014)
07/21/2015	26	STIPULATION *AND [PROPOSED] ORDER PERMITTING LIMITED PARTICIPATION IN JURISDICTIONAL DISCOVERY*, filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED. (Barr, Michael) (Entered: 07/21/2015)
07/21/2015	27	ORDER adopting 26 Stipulation. Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 07/21/2015)
08/06/2015	28	NOTICE, filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED (Barr, Michael) (Entered: 08/06/2015)
02/25/2016	29	Joint MOTION to Amend Schedule , filed by USA.**Response due by 3/14/2016.**(Bezak, Reta) (Entered: 02/25/2016)
02/09/2017	30	ORDER denying without prejudice 29 Motion to Amend Schedule. Signed by Judge Margaret M. Sweeney. (sp) (Entered: 02/09/2017)
01/12/2018	31	SCHEDULING ORDER: **Amended Complaint due by 2/22/2018. Motion to Dismiss due by 6/22/2018. Response due by 9/20/2018. Reply due by 12/19/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 01/12/2018)
02/21/2018	32	Unopposed MOTION for Extension of Time until 03/08/2018 to File Amended Complaint *, and Defendant's Omnibus Motion to Dismiss Deadline be Extended to 06/29/2018*, filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED.**Response due by 3/7/2018.**(Zuckerman, Richard) (Entered: 02/21/2018)
02/21/2018	33	ORDER granting 32 Motion for Extension of Time. **Amended Complaint due by 3/8/2018. Motion to Dismiss due by 6/29/2018. Response due by 9/20/2018. Reply due by 12/19/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 02/21/2018)
03/08/2018	34	AMENDED COMPLAINT against USA, filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED. Amendment to 1 Complaint, , filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED.Answer due by 3/22/2018. (Barr, Michael) (Entered: 03/08/2018)
05/10/2018		On May 9, 2018, the court received a written ex parte communication--a letter--from a Fannie Mae/Freddie Mac shareholder. The court did not read the letter; instead, it directed the clerk of court to return the letter to the shareholder. The court has not, and will not, entertain ex parte communications from Fannie Mae/Freddie Mac shareholders. (kb1) (Entered: 05/10/2018)
06/19/2018	35	Unopposed MOTION for Extension of Time until August 1, 2018 to To Brief Defendant's Motion To Dismiss , filed by USA.**Response due by 7/3/2018.**(Acevedo, Mariana) (Entered: 06/19/2018)
06/21/2018	36	ORDER granting 35 Motion for Extension of Time. **The motion to dismiss is due no later than 8/1/18. The response is due no later than 10/23/18. The reply is due no later than 1/22/19.** Signed by Judge Margaret M. Sweeney. (jhk) (Entered: 06/21/2018)
07/27/2018	37	Unopposed MOTION for Leave to Exceed Page Limit of Motion To Dismiss by 45 pages , filed by USA.**Response due by 8/10/2018.**(Acevedo, Mariana) (Entered: 07/27/2018)

07/30/2018	38	ORDER granting 37 Motion for Leave to File Excess Pages. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 07/30/2018)
08/01/2018	39	MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 8/29/2018.**(Acevedo, Mariana) (Entered: 08/01/2018)
08/28/2018	40	MOTION for Leave to File Second Amended Complaint , filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED.**Response due by 9/11/2018.** (Attachments: # 1 Exhibit A: Second Amended Complaint, # 2 Exhibit B: Redline)(Barr, Michael) (Entered: 08/28/2018)
09/11/2018	41	RESPONSE to 40 MOTION for Leave to File Second Amended Complaint , filed by USA.**Reply due by 9/18/2018.** (Acevedo, Mariana) (Entered: 09/11/2018)
09/14/2018	42	REPLY to Response to Motion re 40 MOTION for Leave to File Second Amended Complaint , filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED. (Attachments: # 1 Exhibit A- Order)(Barr, Michael) (Entered: 09/14/2018)
09/17/2018	43	ORDER granting 40 Motion for Leave to File Amended Complaint. **Plaintiffs shall file their amended complaint by no later than 9/19/2018. Defendant shall file its motion to dismiss by no later than 10/1/2018; plaintiffs shall file their response by no later than10/23/2018; and defendant shall file its reply by no later than 1/22/2019.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 09/17/2018)
09/17/2018	44	AMENDED COMPLAINT against USA, filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED. / *SECOND AMENDED COMPLAINT*, filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED.Answer due by 10/1/2018. (Barr, Michael) (Entered: 09/17/2018)
10/01/2018	45	Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 10/29/2018.**(Acevedo, Mariana) (Entered: 10/01/2018)
10/10/2018	46	ORDER Amending Deadlines. **The response to defendant's motion to dismiss is due by no later than 11/2/2018, and the reply in support of that motion is due by no later than 2/1/2019.** Signed by Chief Judge Margaret M. Sweeney.(jhk) (Entered: 10/10/2018)
10/31/2018	47	Unopposed MOTION for Leave to File Omnibus Brief and Supplemental Brief in Opposition to Motion to Dismiss and For Leave to Exceed the Page Limits , filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED.**Response due by 11/14/2018.** (Attachments: # 1 Text of Proposed Order)(Barr, Michael) (Entered: 10/31/2018)
11/01/2018	48	ORDER granting 47 Motion for Leave to File Omnibus Response Brief and Individual Opposition Brief. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/01/2018)
11/02/2018	49	RESPONSE to 45 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) / *Plaintiffs' Omnibus Response to Defendant's Motion to Dismiss*, filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED.**Reply due by 11/16/2018.** (Barr, Michael) (Entered: 11/02/2018)
11/02/2018	50	RESPONSE to 45 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) / *Supplemental Brief in Opposition to Defendants' Omnibus Motion to Dismiss*, filed by

		ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED.**Reply due by 11/16/2018.** (Barr, Michael) (Entered: 11/02/2018)
01/29/2019	51	Unopposed MOTION for Extension of Time until 4/29/19 to File Reply , filed by USA.**Response due by 2/12/2019.**(Acevedo, Mariana) (Entered: 01/29/2019)
01/30/2019	52	ORDER granting in part and denying in part 51 Motion for Extension of Time to File Reply. **Defendant shall file its reply by no later than 5/6/2019. Defendant may file an omnibus reply that contains no more than 100 pages. Defendant shall complete and file the attached template concerning its motion-to-dismiss arguments by no later than 3/1/2019, and then file the same with regard to its reply by no later than 5/6/2019.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/30/2019)
03/01/2019	53	NOTICE, filed by USA (Acevedo, Mariana) (Entered: 03/01/2019)
05/06/2019	54	REPLY to Response to Motion re 45 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA. (Acevedo, Mariana) (Entered: 05/06/2019)
05/06/2019	55	NOTICE, filed by USA re 52 Order on Motion for Extension of Time to File Reply,, (Laufgraben, Eric) (Entered: 05/06/2019)
06/25/2019		**IMPORTANT NOTICE:** On **Monday, August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Currently, many attorneys within a firm may share a single PACER account, but once NextGen is imple mented e-filing attorneys will no longer be able to use shared PACER accounts. To access the upgraded system, each e-filing attorney must have an individual upgraded PACER account. Preparing for NextGen CM/ECF is a two-step process. Step one is to upgrade your PACER account, and step two is to link your upgraded PACER account to your current CM/ECF filing account. This notice only addresses the first step because the second step can't be completed until on or after August 26, 2019. The first step is to check and see if your PACER account is an "Upgraded" PACER account. Many PACER accounts have already been upgraded. If either of the following statements is true, you have an upgraded PACER account and no action is required until on or after August 26, 2019: 1) you currently e-file in another NextGen court or 2) your PACER account was created after August 10, 2014. If neither of these statements is true, you must upgrade your PACER account. Additional notices will be sent at a later date on how to handle the second step in this process. If you still have questions please contact the PACER Service Center at 800-676-6856 or the Clerk's Office CM/ECF Help Desk at (202)357-6402.. (dh) (ADI) (Entered: 06/25/2019)
07/19/2019		**IMPORTANT NOTICE:** On **August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Preparing for NextGen is a two-step process. Step one is to upgrade your PACER account. If you have not yet re gistered for an individual PACER account or upgraded your existing PACER account, please do so immediately. Step two is to link your upgraded PACER account to your current CM/ECF filing account. Step two cannot be completed until on or after **August 26, 2019**. To link your upgraded PACER account **on or after August 26, 2019**, you must know your current CM/ECF login and password. Do not rely on your login and password to be saved in your web browser, because that method will not work with the NextGen upgrade. If you do not know your login and/or password or have any additional questions, please call the court's Clerks Office CM/ECF Help Desk at (202) 357-6402.. (dh) (ADI) (Entered: 07/19/2019)

08/15/2019		**IMPORTANT NOTICE:** On **August 26, 2019**, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://uscfc.uscourts.gov. **Please note that the court's CM/ECF system will be unavailable from 12:00 p.m. (EDT) on Friday, August 23, 2019, until 6:00 a.m. (EDT) on Monday, August 26, 2019.** Although the Clerk's Office will be open on August 23, 2019, it will be deemed inaccessible under Rule 6 of the Rules of the United States Court of Federal Claims for purposes of calculating deadlines. Preparing for NextGen is a two-step process. Step one is to upgrade your PACER account. You should have your individual upgraded PACER account at this time. Step two is to link your upgraded PACER account to your current CM/ECF filing account on or after **on or after August 26, 2019**. Instructions for linking your account can be found on the court's website at http://uscfc.uscourts.gov. To link your accounts, you **MUST** know your CM/ECF login and password---do not rely on your browser to remember your login credentials. If you are unsure of your CM/ECF login and/or password, contact the Clerk's Office CM/ECF Help Desk **immediately** at (202) 357-6402. You may also call the Help Desk with any other questions.. (dh) (ADI) (Entered: 08/15/2019)
08/28/2019	56	ORDER Setting Oral Argument on 45 Amended Motion to Dismiss and Staying Consideration of the Amended Motion. **Oral Argument set for 11/19/2019 at 9:00 AM (EST) in the National Courts Building before Chief Judge Margaret M. Sweeney. The court is staying further consideration of defendant's amended motion to dismiss until that date.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 08/28/2019)
11/14/2019		NOTICE. **On 11/19/2019 at 9:00 AM, the court is holding oral argument on defendant's motion to dismiss in this case. There will be overflow seating available. Following the conclusion of the argument, an audio recording will be available for purchase on the docket.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/14/2019)
11/18/2019	57	Joint MOTION Use Of Electronic And Cellular Devices , filed by USA.**Response due by 12/2/2019.**(Acevedo, Mariana) (Entered: 11/18/2019)
11/18/2019	58	ORDER granting 57 Motion for Use of Electronic Devices During Oral Argument. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/18/2019)
12/02/2019		Minute Entry - Was the proceeding sealed to the public? No. The court heard oral argument on defendant's Motion to Dismiss in Washington, DC on November 19, 2019, before Chief Judge Margaret M. Sweeney. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. A copy of the audio recording is also available on the docket for Fairholme Funds, Inc. v. United States, 13-465. (jhk) (Entered: 12/02/2019)
01/28/2020	59	ORDER staying further consideration of 45 Motion to Dismiss pending the determination of further proceedings in Fairholme Funds, Inc. v. United States, No. 13-465C. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/28/2020)
02/06/2020	60	MOTION to Substitute Attorney Richard Marc Zuckerman in place of Michael Henry Barr , filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED.**Response due by 2/20/2020.** (Attachments: # 1 Affidavit of Appointment of Counsel of Record) (Zuckerman, Richard) (Entered: 02/06/2020)
02/06/2020		CLERK'S NOTICE granting Motion to Substitute Attorney (Consented) pursuant to Rule 83.1(c)(4). Added attorney Richard Marc Zuckerman for ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL

		STRUCTURES LIMITED. Attorney Michael Henry Barr terminated. (ac7) (Entered: 02/06/2020)
02/20/2020	61	STATUS REPORT ORDER. **The parties are directed to file a joint status report regarding potential stipulations by 2/25/2020.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/20/2020)
02/25/2020	62	JOINT STATUS REPORT , filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED. (Zuckerman, Richard) (Entered: 02/25/2020)
02/27/2020	63	STATUS CONFERENCE ORDER. **The court will hold a status conference in this case on 3/5/2020 at 2:00 PM. The parties may appear telephonically or in person.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/27/2020)
03/06/2020		Minute Entry - Was the proceeding sealed to the public? no. Proceeding held in Washington, DC on 3/5/2020 before Chief Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. (jhk) (Entered: 03/06/2020)
03/30/2020	64	SCHEDULING ORDER:**The Clerk's Office is directed to LIFT the stay in this matter. Plaintiffs' Supplemental Brief due by 4/6/2020. Defendant's Supplemental Response Brief due by 4/20/2020.** Signed by Chief Judge Margaret M. Sweeney. (Attachments: # 1 Exhibit 1)(jb2) Service on parties made. (Entered: 03/30/2020)
04/06/2020	65	RESPONSE to 64 Scheduling Order, *Plaintiff's Supplemental Brief*, filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED. (Attachments: # 1 Text of Proposed Order Apply Fairholme Opinion to Arrowood Action)(Zuckerman, Richard) (Entered: 04/06/2020)
04/07/2020	66	Notice of Filing of Certified Transcript for proceedings held on March 5, 2020 in Washington, D.C. (ew) (Entered: 04/07/2020)
04/07/2020	67	TRANSCRIPT of proceedings held on March 5, 2020 before Chief Judge Margaret M. Sweeney. Total No. of Pages: 1-77. Procedures Re: Electronic Transcripts and Redactions. To order a copy of the transcript, click HERE. Notice of Intent to Redact due 4/14/2020. Redacted Transcript Deadline set for 5/5/2020. Release of Transcript Restriction set for 7/6/2020. (ew) (Entered: 04/07/2020)
04/20/2020	68	RESPONSE to *Supplemental Brief*, filed by USA. (Laufgraben, Eric) (Entered: 04/20/2020)
05/15/2020	69	REPORTED OPINION granting 45 Motion to Dismiss - Rule 12(b)(1) and (6). The Clerk is directed to enter judgment. Signed by Chief Judge Margaret M. Sweeney. (jb2) Service on parties made. (Entered: 05/15/2020)
05/15/2020	70	JUDGMENT entered, pursuant to Rule 58, that plaintiffs' complaint is dismissed. (Service on parties made.) (ac7) (Entered: 05/15/2020)
06/29/2020	71	NOTICE OF APPEAL as to 69 Order on Motion to Dismiss - Rule 12(b)(1) and (6), Reported Opinion, 70 Judgment, filed by ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED. Filing fee $ 505, receipt number AUSFCC-6272789. Copy to CAFC. (Zuckerman, Richard) (Entered: 06/29/2020)
06/29/2020		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals for the Federal Circuit re 71 Notice of Appeal. (ac7) (Entered: 06/29/2020)

07/22/2020		CAFC Case Number 2020-2020 for 71 Notice of Appeal, filed by ARROWOOD SURPLUS LINES INSURANCE COMPANY, ARROWOOD INDEMNITY COMPANY, FINANCIAL STRUCTURES LIMITED. (ac7) (Entered: 07/23/2020)

APPEAL,CLOSED,ECF,LEAD

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:13−cv−00466−MMS

CACCIAPALLE et al v. USA
Assigned to: Senior Judge Margaret M. Sweeney
Cases: 1:13−cv−00385−MMS
1:13−cv−00465−MMS
1:13−cv−00608−MMS
1:13−cv−00672−MMS
1:13−cv−00698−MMS
Case in other court: 20−02037
Cause: 28:1491 Tucker Act

Date Filed: 07/10/2013
Date Terminated: 06/26/2020
Jury Demand: None
Nature of Suit: 514 Taking − Other
Jurisdiction: U.S. Government Defendant

Plaintiff

JOSEPH CACCIAPALLE
and

represented by **Hamish Hume**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

MELVIN BAREISS
On Behalf of Themselves and All Others Similary Situated
TERMINATED: 07/09/2015

represented by **Hamish Hume**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

BRYNDON FISHER

represented by **BRYNDON FISHER**
PRO SE

Plaintiff

BRUCE REID

represented by **BRUCE REID**
PRO SE

Plaintiff

ERICK SHIPMON

represented by **ERICK SHIPMON**
PRO SE

V.

Consolidated Plaintiff

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V.

Defendant

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TERMINATED: 09/30/2020

Date Filed	#	Docket Text
07/10/2013	1	COMPLAINT against USA (TRE) (Filing fee $400, Receipt number 075301) (Copy Served Electronically on Department of Justice), filed by JOSEPH CACCIAPELLE, MELVIN BAREISS.**Answer due by 9/9/2013.** (Attachments: # 1 Civil Cover Sheet)(vro) (Entered: 07/11/2013)
07/10/2013	2	NOTICE of Directly Related Case(s) [13−465, 13−385], filed by MELVIN BAREISS, JOSEPH CACCIAPELLE. Service: 7/10/2013.(vro) (Entered: 07/11/2013)
07/10/2013	3	NOTICE of Assignment to Judge Margaret M. Sweeney (vro) (Entered: 07/11/2013)
07/10/2013	4	NOTICE of Designation of Electronic Case. (vro) (Entered: 07/11/2013)
07/19/2013	5	NOTICE of Appearance by Kenneth Michael Dintzer for USA . (Dintzer, Kenneth) (Entered: 07/19/2013)
07/23/2013	6	MOTION to Appoint Counsel *Washington Federal, Michael McCredy Baker and City of Austin Police Retirement System's Motion for Consolidation and Appointment of Co−Lead Counsel* (Response due by 8/9/2013.), MOTION to Consolidate Cases 13−00385, 13−00496 with this case , filed by Washington Federal, MICHAEL MCCREDY BAKER, Austin Police Retirement System.(Berman, Steve) (Entered: 07/23/2013)
07/23/2013	7	MEMORANDUM re: 6 Motion to Appoint Counsel, Motion to Consolidate Cases,,, filed by Austin Police Retirement System, MICHAEL MCCREDY BAKER, Washington Federal. (Berman, Steve) (Entered: 07/23/2013)

07/23/2013	8	DECLARATION re 7 Memorandum, 6 MOTION to Appoint Counsel *Washington Federal, Michael McCredy Baker and City of Austin Police Retirement System's Motion for Consolidation and Appointment of Co−Lead Counsel* MOTION to Consolidate Cases 13−00385, 13−00496 with this case *Declaration of Steve W. Berman in Support of Washington Federal, Michael McCredy Baker, and City of Austin Police Retirement System's Motion for Consolidation and Appointment of Co−Lead Counsel* by Austin Police Retirement System, MICHAEL MCCREDY BAKER, Washington Federal. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Berman, Steve) (Entered: 07/23/2013)
08/07/2013	9	Unopposed MOTION for Extension of Time until 08/16/2013 to File Response *to Washington Federal, Michael McCredy Baker, and City of Austin Police Retirement System's Motion for Consolidation and Appointment of Interim Co−Lead Counsel*, filed by JOSEPH CACCIAPELLE.**Response due by 8/26/2013.**(Hume, Hamish) (Entered: 08/07/2013)
08/08/2013	10	ORDER granting 9 Unopposed MOTION for Extension of Time until 08/16/2013 to File Response *to Washington Federal, Michael McCredy Baker, and City of Austin Police Retirement System's Motion for Consolidation and Appointment of Interim Co−Lead Counsel* ; **Response due by 8/16/2013. Reply due by 8/30/2013.** Signed by Judge Margaret M. Sweeney. (ps2) Copy to parties. (Entered: 08/08/2013)
08/09/2013	11	RESPONSE to 6 MOTION to Appoint Counsel *Washington Federal, Michael McCredy Baker and City of Austin Police Retirement System's Motion for Consolidation and Appointment of Co−Lead Counsel* MOTION to Consolidate Cases 13−00385, 13−00496 with this case , filed by USA.**Reply due by 8/19/2013.** (Volk, Daniel) (Entered: 08/09/2013)
08/09/2013	12	MOTION to Stay All Proceedings *and alternatively*, MOTION for Extension of Time until 12/9/2013 to File Answer re 1 Complaint, (Response due by 8/26/2013.), filed by USA.(Volk, Daniel) (Entered: 08/09/2013)
08/16/2013	13	NOTICE, filed by Austin Police Retirement System, MICHAEL MCCREDY BAKER, Washington Federal *Notice of Withdrawal of Motion for Consolidation and Appointment of Co−Lead Counsel* (Berman, Steve) (Entered: 08/16/2013)
08/16/2013	14	Joint MOTION For Consolidation, Coordination, And Appointment Of Interim Co−Lead Class Counsel , filed by JOSEPH CACCIAPELLE. **Response due by 9/3/2013.** (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Text of Proposed Order)(Hume, Hamish) (Entered: 08/16/2013)
08/26/2013	15	Unopposed MOTION for Extension of Time until 12/9/13 to File Response as to 12 MOTION to Stay All Proceedings *and alternatively* MOTION for Extension of Time until 12/9/2013 to File Answer re 1 Complaint, , filed by MELVIN BAREISS, JOSEPH CACCIAPELLE. (Hume, Hamish) (Entered: 08/26/2013)
08/26/2013	16	ORDER granting 15 Motion for Extension of Time to File Response to 12 MOTION to Stay All Proceedings.**Response due by 8/30/13.** Signed by Judge Margaret M. Sweeney. (ps2) Copy to parties. (Entered: 08/26/2013)
08/26/2013	17	**SEE 8/27/13 ORDER STRIKING THIS DOCUMET** ~~NOTICE, filed by MELVIN BAREISS, JOSEPH CACCIAPELLE *NOTICE OF JOINT MOTION FOR CONSOLIDATION, COORDINATION, AND APPOINTMENT OF INTERIM CO−LEAD CLASS COUNSEL* (Attachments: # 1 Exhibit A)(Hume, Hamish)~~ (Entered: 08/26/2013)
08/27/2013	18	ORDER Striking Notice of Joint Motion. Signed by Judge Margaret M. Sweeney. (ps2) Copy to parties. (Entered: 08/27/2013)
08/30/2013	19	RESPONSE to 12 MOTION to Stay All Proceedings *and alternatively* MOTION for Extension of Time until 12/9/2013 to File Answer re 1 Complaint, , filed by MELVIN BAREISS, JOSEPH CACCIAPELLE.**Reply due by 9/9/2013.** (Hume, Hamish) (Entered: 08/30/2013)
09/03/2013	20	RESPONSE to 14 Joint MOTION For Consolidation, Coordination, And Appointment Of Interim Co−Lead Class Counsel , filed by USA.**Reply due by 9/13/2013.** (Volk, Daniel) (Entered: 09/03/2013)

09/09/2013	21	REPLY to Response to Motion re 12 MOTION to Stay All Proceedings *and alternatively* MOTION for Extension of Time until 12/9/2013 to File Answer re 1 Complaint, , filed by USA. (Volk, Daniel) (Entered: 09/09/2013)
09/13/2013	22	Amended MOTION to Consolidate Cases 13−00385−MMS; 13−00496−MMS; 13−00542−MMS; 13−00608−MMS with this case *13−00466−MMS*, filed by MELVIN BAREISS, JOSEPH CACCIAPELLE.**Response due by 9/30/2013.** (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Text of Proposed Order, # 4 Certificate of Service)(Hume, Hamish) (Entered: 09/13/2013)
09/18/2013	23	ORDER denying 12 defendant's Motion to Stay after full briefing and careful consideration, and for the reasons set forth in plaintiffs'response in opposition. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 09/18/2013)
09/23/2013	24	MOTION for Extension of Time until 10/14/2013 to File Response as to 22 Amended MOTION to Consolidate Cases 13−00385−MMS; 13−00496−MMS; 13−00542−MMS; 13−00608−MMS with this case *13−00466−MMS ASSENTED−TO MOTION TO EXTEND TIME TO RESPOND TO JOINT MOTION FOR CONSOLIDATION, COORDINATION AND APPOINTMENT OF INTERIM CO−LEAD CLASS COUNSEL*, filed by BRYNDON FISHER.**Response due by 10/10/2013.**(Schubert, Noah) (Entered: 09/23/2013)
09/24/2013	25	ORDER granting 24 Motion for Extension of Time to File Response. On September 23, 2013, plaintiffs' filed an unopposed motion for enlargement of time to respond to the amended joint motion for consolidation, coordination and appointment of interim co−lead class counsel. For good cause shown, the motion is granted, and plaintiffs' response is due no later than Tuesday, October 15, 2013. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 09/24/2013)
09/24/2013	26	MOTION for Status Conference , filed by USA.**Response due by 10/11/2013.**(Volk, Daniel) (Entered: 09/24/2013)
09/26/2013	27	ORDER granting 26 Motion for Status Conference. After consulting with counsel, the court has scheduled a status conference for Thursday, September 26, 2013 at 11:30 a.m. EDT. The parties shall appear by telephone, and the court will contract the parties to initiate the conference call. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 09/26/2013)
09/26/2013		Minute Entry for proceeding held in Washington, DC on 9/26/2013 before Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio copy of the proceeding (click HERE)(lp1) (Entered: 09/26/2013)
09/26/2013	28	ORDER granting 12 Motion for Extension of Time to Answer until 12/9/13. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 09/26/2013)
09/30/2013	29	RESPONSE to 22 Amended MOTION to Consolidate Cases 13−00385−MMS; 13−00496−MMS; 13−00542−MMS; 13−00608−MMS with this case *13−00466−MMS* , filed by USA.**Reply due by 10/10/2013.** (Volk, Daniel) (Entered: 09/30/2013)
10/07/2013	30	Notice Of Filing Of Certified Transcript for proceedings held on September 26, 2013. (dls) (Entered: 10/07/2013)
10/07/2013	31	TRANSCRIPT of Proceedings held on September 26, 2013 before Judge Margaret M. Sweeney. Total No. of Pages: 18. Procedures Re: Electronic Transcripts and Redactions. To purchase a copy, contact the clerk's office at (202) 357−6414. Notice of Intent to Redact due 10/15/2013. Redacted Transcript Deadline set for 11/7/2013. Release of Transcript Restriction set for 1/6/2014. (dls) (dls). (Entered: 10/07/2013)
10/10/2013	32	REPLY to Response to Motion re 22 Amended MOTION to Consolidate Cases 13−00385−MMS; 13−00496−MMS; 13−00542−MMS; 13−00608−MMS with this case *13−00466−MMS* , filed by MELVIN BAREISS, JOSEPH CACCIAPELLE. (Hume, Hamish) (Entered: 10/10/2013)
10/15/2013	33	RESPONSE to 22 Amended MOTION to Consolidate Cases 13−00385−MMS; 13−00496−MMS; 13−00542−MMS; 13−00608−MMS with this case *13−00466−MMS* , filed by BRYNDON FISHER, BRUCE REID, ERICK SHIPMON.**Reply due by**

		10/25/2013. (Schubert, Noah) (Entered: 10/15/2013)
10/16/2013	34	REPLY to Response to Motion re 22 Amended MOTION to Consolidate Cases 13−00385−MMS; 13−00496−MMS; 13−00542−MMS; 13−00608−MMS with this case *13−00466−MMS on behalf of Hamish Hume*, filed by JOSEPH CACCIAPELLE. (Attachments: # 1 Exhibit Exhibit A, # 2 Certificate of Service)(Zagar, Eric) (Entered: 10/16/2013)
10/17/2013	35	NOTICE, filed by JOSEPH CACCIAPELLE re 34 Reply to Response to Motion, *Notice of Errata, on behalf of Hamish Hume* (Attachments: # 1 Exhibit A, # 2 Certificate of Service)(Zagar, Eric) (Entered: 10/17/2013)
10/29/2013	36	ORDER granting Motion to Consolidate Case with 13−496C and 13−542C and coordinating with 13−385C, 13−608C, 13−672C, 13−465C, 13−698C and appointment of interim co−lead class counsel. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 10/29/2013)
10/30/2013	37	NOTICE, filed by JOSEPH CACCIAPELLE *Notice of Errata Regarding Case Caption, on behalf of Hamish Hume* (Attachments: # 1 Certificate of Service)(Zagar, Eric) (Entered: 10/30/2013)
11/13/2013	38	NOTICE, filed by JOSEPH CACCIAPALLE re 36 Order on Motion for Miscellaneous Relief, Order on Motion to Consolidate Cases,, *Notice of Designation of Operative Complaint, on behalf of Hamish Hume* (Attachments: # 1 Certificate of Service)(Zagar, Eric) (Entered: 11/13/2013)
12/06/2013	39	MOTION for Leave to Exceed Page Limit of Motion to Dismiss by 10 pages , filed by USA.**Response due by 12/23/2013.**(Hosford, Elizabeth) (Entered: 12/06/2013)
12/06/2013	40	MOTION to Amend/Correct 39 MOTION for Leave to Exceed Page Limit of Motion to Dismiss by 10 pages , filed by USA.**Response due by 12/23/2013.** (Attachments: # 1 Exhibit corrected motion)(Hosford, Elizabeth) (Entered: 12/06/2013)
12/09/2013	41	MOTION to Dismiss pursuant to Rules 12(b)(1) and (6) , filed by USA.**Response due by 1/9/2014.**(Schwind, Gregg) (Entered: 12/09/2013)
12/11/2013	42	ORDER granting 39 Motion for Leave to File Excess Pages; granting 40 Motion to Amend/Correct. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 12/11/2013)
01/07/2014	43	First MOTION for Extension of Time to File Opposition to 41 Motion to Dismiss, filed by JOSEPH CACCIAPALLE. **Response due by 1/24/2014.** (Attachments: # 1 Certificate of Service)(Zagar, Eric) Modified on 1/8/2014−−corrected docket text (jb). (Entered: 01/07/2014)
01/08/2014	44	ORDER granting 43 Motion for Extension of Time. The court extends the deadline for plaintiffs' opposition to the government's motion to dismiss until the later of (a) February 21, 2014, or (b) any deadline that is set in Fairholme Funds, Inc. et al. v. United States, No. 13−c−00465C for an opposition to the government's motion to dismiss in that case, including any deadline set after any suspension or continuance of the briefing schedule that is ordered in that case to allow time for discovery. Signed by Judge Margaret M. Sweeney. (lp1) Copy to parties. (Entered: 01/08/2014)
04/04/2014	45	ORDER: As alluded to in the court's January 8, 2014 order, briefing regarding the motion to dismiss is stayed pending the conclusion of jurisdictional discovery in Fairholme. Once the parties in Fairholme file a postdiscovery joint status report, the court will issue an order in this case regarding further proceedings. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 04/04/2014)
04/09/2014	46	ORDER setting forth guidelines for various issues in the Fannie Mae/Freddie Mac cases. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 04/09/2014)
07/10/2014	47	ORDER Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/10/2014)
07/11/2014	48	NOTICE, filed by JOSEPH CACCIAPALLE *Plaintiffs' Statement Regarding the Proposed Protective Order in the Fairholme Funds Action* (Zagar, Eric) (Entered: 07/11/2014)

07/14/2014	49	ORDER regarding 48 plaintiffs' notice. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/14/2014)
01/30/2015	50	SUGGESTION OF DEATH Upon the Record *Statement Noting a Party's Death*, filed by JOSEPH CACCIAPALLE. (Zagar, Eric) (Entered: 01/30/2015)
05/22/2015	51	MOTION to Lift Stay , MOTION for Discovery , filed by JOSEPH CACCIAPALLE.**Response due by 6/8/2015.**(Hume, Hamish) (Entered: 05/22/2015)
05/27/2015	52	NOTICE, filed by AUSTIN POLICE RETIREMENT SYSTEM, WASHINGTON FEDERAL, MICHAEL MCCREDY BAKER re 51 MOTION to Lift Stay MOTION for Discovery *Washington Federal Plaintiffs' Partial Joinder In Plaintiffs' Motion For A Partial Lift of Stay and For Limited Discovery* (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Berman, Steve) (Entered: 05/27/2015)
06/08/2015	53	RESPONSE to 51 MOTION to Lift Stay MOTION for Discovery , filed by USA.**Reply due by 6/18/2015.** (Hosford, Elizabeth) (Entered: 06/08/2015)
06/18/2015	54	REPLY to Response to Motion re 51 MOTION to Lift Stay MOTION for Discovery *Plaintiffs' Reply in Support of Their Motion for a Partial Lift of Stay and for Limited Discovery*, filed by JOSEPH CACCIAPALLE. (Zagar, Eric) (Entered: 06/18/2015)
06/30/2015	55	ORDER: **The parties shall contact chambers to advise regarding their availability for a status conference with respect to plaintiffs' 51 motion.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 06/30/2015)
07/02/2015	56	NOTICE, filed by BRYNDON FISHER, BRUCE REID, ERICK SHIPMON re 51 MOTION to Lift Stay MOTION for Discovery *Derivative Plaintiffs' Partial Joinder in Plaintiffs' Motion for a Partial Lift of Stay and Limited Discovery* (Schubert, Robert) (Entered: 07/02/2015)
07/07/2015	57	ORDER setting status conference and requiring parties to contact chambers by 7/9/15 at 4:00 p.m. EDT. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/07/2015)
07/09/2015	58	ORDER re 50 Suggestion of Death filed by JOSEPH CACCIAPALLE. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/09/2015)
07/10/2015		Minute Entry − Was the proceeding sealed to the public? N. Proceeding held in Washington, DC on 7/10/15, ended on 7/10/15, before Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio copy of the proceeding (click HERE) (ta) (Entered: 07/10/2015)
07/10/2015	59	ORDER granting 51 motion. Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 07/10/2015)
07/15/2015	60	Notice Of Filing Of Certified Transcript for proceedings held on July 10, 2015 in Washington, D.C. (ew) (Entered: 07/15/2015)
07/15/2015	61	TRANSCRIPT of Proceedings held on July 10, 2015 before Judge Margaret M. Sweeney. Total No. of Pages: 1−21. Procedures Re: Electronic Transcripts and Redactions. To order a copy of the proceeding (click HERE) Notice of Intent to Redact due 7/22/2015. Redacted Transcript Deadline set for 8/17/2015. Release of Transcript Restriction set for 10/16/2015. (ew) (Entered: 07/15/2015)
02/26/2016	62	ORDER: **Joint status report due by 3/14/16.** Signed by Judge Margaret M. Sweeney. (ta) Copy to parties. (Entered: 02/26/2016)
03/14/2016	63	JOINT STATUS REPORT , filed by USA. (Bezak, Reta) (Entered: 03/14/2016)
01/12/2018	64	SCHEDULING ORDER: **Amended Complaint(s) due by 2/22/2018. Motion to Dismiss due by 6/22/2018. Response(s) due by 9/20/2018. Reply due by 12/19/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 01/12/2018)
02/21/2018	65	Unopposed MOTION for Extension of Time until March 8, 2018 to File Amended Complaint , filed by JOSEPH CACCIAPALLE.**Response due by 3/7/2018.**(Hume, Hamish) (Entered: 02/21/2018)

02/21/2018	66	ORDER granting 65 Motion for Extension of Time**Amended Complaint(s) due by 3/8/2018. Motion to Dismiss due by 6/29/2018. Response(s) due by 9/20/2018. Reply due by 12/19/2018.** Signed by Judge Margaret M. Sweeney. (kb1) (Entered: 02/21/2018)
03/08/2018	67	AMENDED COMPLAINT against USA, filed by JOSEPH CACCIAPALLE. , filed by JOSEPH CACCIAPALLE.Answer due by 3/22/2018. (Hume, Hamish) (Entered: 03/08/2018)
05/10/2018		On May 9, 2018, the court received a written ex parte communication−−a letter−−from a Fannie Mae/Freddie Mac shareholder. The court did not read the letter; instead, it directed the clerk of court to return the letter to the shareholder. The court has not, and will not, entertain ex parte communications from Fannie Mae/Freddie Mac shareholders. (kb1) (Entered: 05/10/2018)
06/19/2018	68	Unopposed MOTION for Extension of Time until August 1, 2018 to To Brief Defendant's Motion To Dismiss , filed by USA.**Response due by 7/3/2018.**(Acevedo, Mariana) (Entered: 06/19/2018)
06/21/2018	69	ORDER granting 68 Motion for Extension of Time. **The motion to dismiss is due no later than 8/1/18. The response is due no later than 10/23/18. The reply is due no later than 1/22/19.** Signed by Judge Margaret M. Sweeney. (jhk) (Entered: 06/21/2018)
07/27/2018	70	Unopposed MOTION for Leave to Exceed Page Limit of Motion To Dismiss by 45 pages , filed by USA.**Response due by 8/10/2018.**(Acevedo, Mariana) (Entered: 07/27/2018)
07/30/2018	71	ORDER granting 70 Motion for Leave to File Excess Pages. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 07/30/2018)
08/01/2018	72	MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 8/29/2018.**(Acevedo, Mariana) (Entered: 08/01/2018)
08/16/2018	73	MOTION to Certify Class , filed by AMERICAN EUROPEAN INSURANCE COMPANY, JOSEPH CACCIAPALLE.**Response due by 8/30/2018.** (Attachments: # 1 Brief in Support, # 2 Text of Proposed Order, # 3 Certificate of Service)(Hume, Hamish) (Entered: 08/16/2018)
08/29/2018	74	Joint MOTION to Stay Briefing Of Plaintiffs' Motion For Class Certification , filed by USA.**Response due by 9/12/2018.**(Acevedo, Mariana) (Entered: 08/29/2018)
08/30/2018	75	ORDER granting 74 Motion to Stay. **The parties shall file a joint status report suggesting further proceedings by no later than fourteen days after the court issues a decision on defendant's motion to dismiss.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 08/30/2018)
10/01/2018	76	Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA.**Response due by 10/29/2018.**(Acevedo, Mariana) (Entered: 10/01/2018)
10/04/2018	77	Unopposed MOTION for Extension of Time until 11/02/2018 to Opposition to Defendant's Motion to Dismiss , filed by JOSEPH CACCIAPALLE.**Response due by 10/18/2018.** (Attachments: # 1 Text of Proposed Order)(Hume, Hamish) (Entered: 10/04/2018)
10/10/2018	78	ORDER granting 77 Motion for Extension of Time. **The response is due by no later than 11/2/2018, and the reply is due by no later than 2/1/2019.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 10/10/2018)
10/31/2018	79	Unopposed MOTION for Leave to File Omnibus and Supplemental Opposition Briefs and to Exceed Page Limit , filed by AMERICAN EUROPEAN INSURANCE COMPANY, JOSEPH CACCIAPALLE.**Response due by 11/14/2018.**(Hume, Hamish) (Entered: 10/31/2018)
11/01/2018	80	ORDER granting 79 Motion for Leave to File Omnibus Response Brief and Individual Opposition Brief. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/01/2018)

11/02/2018	81	RESPONSE to 72 MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , 76 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by AMERICAN EUROPEAN INSURANCE COMPANY, JOSEPH CACCIAPALLE.**Reply due by 11/16/2018.** (Attachments: # 1 Class Plaintiffs' Supplemental Opposition, # 2 Certificate of Service)(Hume, Hamish) (Entered: 11/02/2018)
01/29/2019	82	Unopposed MOTION for Extension of Time until 4/29/19 to File Reply , filed by USA.**Response due by 2/12/2019.**(Acevedo, Mariana) (Entered: 01/29/2019)
01/30/2019	83	ORDER granting in part and denying in part 82 Motion for Extension of Time to File Reply. **Defendant shall file its reply by no later than 5/6/2019. Defendant may file an omnibus reply that contains no more than 100 pages. Defendant shall complete and file the attached template concerning its motion−to−dismiss arguments by no later than 3/1/2019, and then file the same with regard to its reply by no later than 5/6/2019.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/30/2019)
03/01/2019	84	NOTICE, filed by USA (Acevedo, Mariana) (Entered: 03/01/2019)
05/06/2019	85	REPLY to Response to Motion re 76 Amended MOTION to Dismiss pursuant to Rules 12 (b)(1) and (6) , filed by USA. (Acevedo, Mariana) (Entered: 05/06/2019)
05/06/2019	86	NOTICE, filed by USA (Acevedo, Mariana) (Entered: 05/06/2019)
06/25/2019		**IMPORTANT NOTICE:** On ***Monday, August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Currently, many attorneys within a firm may share a single PACER account, but once NextGen is imple mented e−filing attorneys will no longer be able to use shared PACER accounts. To access the upgraded system, each e−filing attorney must have an individual upgraded PACER account. Preparing for NextGen CM/ECF is a two−step process. Step one is to upgrade your PACER account, and step two is to link your upgraded PACER account to your current CM/ECF filing account. This notice only addresses the first step because the second step can't be completed until on or after August 26, 2019. The first step is to check and see if your PACER account is an "Upgraded" PACER account. Many PACER accounts have already been upgraded. If either of the following statements is true, you have an upgraded PACER account and no action is required until on or after August 26, 2019: 1) you currently e−file in another NextGen court or 2) your PACER account was created after August 10, 2014. If neither of these statements is true, you must upgrade your PACER account. Additional notices will be sent at a later date on how to handle the second step in this process. If you still have questions please contact the PACER Service Center at 800−676−6856 or the Clerk's Office CM/ECF Help Desk at (202)357−6402.. (dh) (ADI) (Entered: 06/25/2019)
07/19/2019		**IMPORTANT NOTICE:** On ***August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://www.uscfc.uscourts.gov. Preparing for NextGen is a two−step process. Step one is to upgrade your PACER account. If you have not yet re gistered for an individual PACER account or upgraded your existing PACER account, please do so immediately. Step two is to link your upgraded PACER account to your current CM/ECF filing account. Step two cannot be completed until on or after ***August 26, 2019***. To link your upgraded PACER account ***on or after August 26, 2019***, you must know your current CM/ECF login and password. Do not rely on your login and password to be saved in your web browser, because that method will not work with the NextGen upgrade. If you do not know your login and/or password or have any additional questions, please call the court's Clerks Office CM/ECF Help Desk at (202) 357−6402.. (dh) (ADI) (Entered: 07/19/2019)
08/15/2019		***IMPORTANT NOTICE:*** On ***August 26, 2019***, the United States Court of Federal Claims will upgrade its current CM/ECF system to the Next Generation of CM/ECF (NextGen). Complete information regarding the NextGen implementation can be found on the court's website at http://uscfc.uscourts.gov. ***Please note that the court's CM/ECF system will be unavailable from 12:00 p.m. (EDT) on Friday, August 23, 2019, until 6:00 a.m. (EDT) on Monday, August 26, 2019.*** Although the Clerk's

		Office will be open on August 23, 2019, it will be deemed inaccessible under Rule 6 of the Rules of the United States Court of Federal Claims for purposes of calculating deadlines. Preparing for NextGen is a two−step process. Step one is to upgrade your PACER account. You should have your individual upgraded PACER account at this time. Step two is to link your upgraded PACER account to your current CM/ECF filing account on or after ***on or after August 26, 2019***. Instructions for linking your account can be found on the court's website at http://uscfc.uscourts.gov. To link your accounts, you ***MUST*** know your CM/ECF login and password−−−do not rely on your browser to remember your login credentials. If you are unsure of your CM/ECF login and/or password, contact the Clerk's Office CM/ECF Help Desk ***immediately*** at (202) 357−6402. You may also call the Help Desk with any other questions.. (dh) (ADI) (Entered: 08/15/2019)
08/28/2019	87	ORDER Setting Oral Argument on 76 Amended Motion to Dismiss and Staying Consideration of the Amended Motion. **Oral Argument set for 11/19/2019 at 9:00 AM (EST) in the National Courts Building before Chief Judge Margaret M. Sweeney. The court is staying further consideration of defendant's amended motion to dismiss until that date.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 08/28/2019)
11/14/2019		NOTICE. **On 11/19/2019 at 9:00 AM, the court is holding oral argument on defendant's motion to dismiss in this case. There will be overflow seating available. Following the conclusion of the argument, an audio recording will be available for purchase on the docket.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/14/2019)
11/18/2019	88	Joint MOTION Use Of Electronic And Cellular Devices , filed by USA.**Response due by 12/2/2019.**(Acevedo, Mariana) (Entered: 11/18/2019)
11/18/2019	89	ORDER granting 88 Motion for Use of Electronic Devices During Oral Argument. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 11/18/2019)
12/02/2019		Minute Entry − Was the proceeding sealed to the public? No. The court heard oral argument on defendant's Motion to Dismiss in Washington, DC on November 19, 2019, before Chief Judge Margaret M. Sweeney. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. A copy of the audio recording is also available on the docket for Fairholme Funds, Inc. v. United States, 13−465. (jhk) (Entered: 12/02/2019)
01/28/2020	90	ORDER staying further consideration of 76 Motion to Dismiss pending the determination of further proceedings in Fairholme Funds, Inc. v. United States, No. 13−465C. Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 01/28/2020)
02/19/2020	91	MOTION to Lift Stay , filed by AMERICAN EUROPEAN INSURANCE COMPANY, JOSEPH CACCIAPALLE.**Response due by 3/4/2020.** (Attachments: # 1 Exhibit A)(Zagar, Eric) (Entered: 02/19/2020)
02/20/2020	92	STATUS REPORT ORDER. **The parties are directed to file a joint status report regarding potential stipulations by 2/25/2020.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/20/2020)
02/25/2020	93	STATUS REPORT *Joint Status Report*, filed by AMERICAN EUROPEAN INSURANCE COMPANY, JOSEPH CACCIAPALLE. (Zagar, Eric) (Entered: 02/25/2020)
02/27/2020	94	STATUS CONFERENCE ORDER. **The court will hold a status conference in this case on 3/5/2020 at 2:00 PM. The parties may appear telephonically or in person.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 02/27/2020)
03/04/2020	95	Unopposed MOTION for Extension of Time until 3/18/2020 to File Response as to 91 MOTION to Lift Stay , filed by USA.**Response due by 3/18/2020.**(Laufgraben, Eric) (Entered: 03/04/2020)
03/06/2020	96	ORDER granting 95 Motion for Extension of Time to File Response. **Defendant shall file its response by no later than Wednesday, March 18, 2020.** Signed by Chief Judge Margaret M. Sweeney. (jhk) (Entered: 03/06/2020)

03/06/2020		Minute Entry – Was the proceeding sealed to the public? no. Proceeding held in Washington, DC on 3/5/2020 before Chief Judge Margaret M. Sweeney: Status Conference. [Total number of days of proceeding: 1]. Official record of proceeding taken via electronic digital recording (EDR). To order a certified transcript or an audio recording of the proceeding, click HERE. (jhk) (Entered: 03/06/2020)
03/18/2020	97	RESPONSE to 91 MOTION to Lift Stay , filed by USA.**Reply due by 3/25/2020.** (Laufgraben, Eric) (Entered: 03/18/2020)
03/19/2020	98	GENERAL ORDER: Effective immediately and until further order, judges, special masters, the Clerk of Court, and counsel of record for the United States may file electronically in pro se cases using the courts Case Management/ Electronic Case Files (CM/ECF) system. Pro se litigants shall, absent extraordinary circumstances, submit all case filings via e–mail to ProSe_case_filings@cfc.uscourts.gov. Pro se litigants may, if feasible, receive notification by e–mail of all electronic filings by filing an E–Notification Consent Form, attached to the General Order. Signed by Chief Judge Margaret M. Sweeney. (dh) Service on parties made. (Entered: 03/19/2020)
03/19/2020	99	ORDER granting 91 Motion Lifting Stay. Plaintiffs to FILE, by no later than Thursday, March 26, 2020: (1) a one–page overview following the template attached as Exhibit 1 and (2) a supplemental brief of no more than five pages. Defendant to FILE a supplemental response brief, not to exceed six pages, by no later than Thursday, April 9, 2020. Signed by Chief Judge Margaret M. Sweeney. (Attachments: # 1 Exhibit 1) (jb2) Service on parties made. (Entered: 03/19/2020)
03/26/2020	100	MOTION to Supplement Pleadings – Rule 15(d) re: 99 Order on Motion Lifting Stay, , filed by JOSEPH CACCIAPALLE.**Response due by 4/9/2020.** (Attachments: # 1 Text of Proposed Order, # 2 Exhibit)(Hume, Hamish) (Entered: 03/26/2020)
03/30/2020	101	ORDER denying 100 Motion to Supplement Pleadings – Rule 15(d). The court DEEMS this filing to be plaintiffs' supplemental brief. Signed by Chief Judge Margaret M. Sweeney. (jb2) Service on parties made. (Entered: 03/30/2020)
04/07/2020	102	Notice of Filing of Certified Transcript for proceedings held on March 5, 2020 in Washington, D.C. (ew) (Entered: 04/07/2020)
04/07/2020	103	TRANSCRIPT of proceedings held on March 5, 2020 before Chief Judge Margaret M. Sweeney. Total No. of Pages: 1–77. Procedures Re: Electronic Transcripts and Redactions. To order a copy of the transcript, click HERE. Notice of Intent to Redact due 4/14/2020. Redacted Transcript Deadline set for 5/5/2020. Release of Transcript Restriction set for 7/6/2020. (ew) (Entered: 04/07/2020)
04/09/2020	104	RESPONSE to *Supplemental Brief*, filed by USA. (Laufgraben, Eric) (Entered: 04/09/2020)
06/26/2020	105	REPORTED OPINION finding as moot 73 Motion to Certify Class; granting 76 Motion to Dismiss – Rule 12(b)(1) and (6). The Clerk is directed to enter judgment. Signed by Chief Judge Margaret M. Sweeney. (jb2) Service on parties made. (Entered: 06/26/2020)
06/26/2020	106	JUDGMENT entered, pursuant to Rule 58, dismissing plaintiffs' claims for lack of jurisdiction or lack of standing. No costs. (Service on parties made.) (dls) (Entered: 06/26/2020)
07/17/2020	107	NOTICE OF APPEAL as to 105 Order on Motion to Certify Class, Order on Motion to Dismiss – Rule 12(b)(1) and (6), Reported Opinion, 106 Judgment, filed by JOSEPH CACCIAPALLE. Filing fee $ 505, receipt number AUSFCC–6314904. Copy to CAFC. (Zagar, Eric) (Entered: 07/17/2020)
07/17/2020		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals for the Federal Circuit re 107 Notice of Appeal. (ac7) (Entered: 07/17/2020)
07/24/2020		CAFC Case Number 2020–2037 for 107 Notice of Appeal, filed by JOSEPH CACCIAPALLE. (ac7) (Entered: 07/24/2020)
09/30/2020	108	NOTICE of Appearance by Eric Evan Laufgraben for USA . (Laufgraben, Eric) (Entered: 09/30/2020)

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UNITED STATES COURT OF FEDERAL CLAIMS

OWL CREEK ASIA I, L.P., *et al.*, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-281C (Chief Judge Sweeney)

NOTICE OF APPEAL

Notice is hereby given that plaintiffs Owl Creek Asia I, L.P., Owl Creek Asia II, L.P., Owl Creek I, L.P., Owl Creek II, L.P., Owl Creek Asia Master Fund, Ltd., Owl Creek Credit Opportunities Master Fund, L.P., Owl Creek Overseas Master Fund, Ltd., and Owl Creek SRI Master Fund, Ltd. ("Plaintiffs") in the above named case hereby appeal to the United States Court of Appeals for the Federal Circuit from the Opinion and Order [ECF 64] and Judgment [ECF 65] entered in this action on June 8, 2020, granting the defendant's motion to dismiss, including all underlying orders, decisions, rulings, and opinions that are adverse to Plaintiffs or provide reasoning cited in ECF 64.

Respectfully submitted:
June 18, 2020

By: */s/ Lawrence D. Rosenberg*

Lawrence D. Rosenberg
Counsel of Record

Of Counsel
C. Kevin Marshall

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Counsel for Plaintiffs

UNITED STATES COURT OF FEDERAL CLAIMS

MASON CAPITAL L.P., *et al.*,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 18-529C
(Chief Judge Sweeney)

NOTICE OF APPEAL

Notice is hereby given that plaintiffs Mason Capital L.P., and Mason Capital Master Fund L.P. ("Plaintiffs") in the above named case hereby appeal to the United States Court of Appeals for the Federal Circuit from the Opinion and Order [ECF 58] and Judgment [ECF 59] entered in this action on June 8, 2020, granting the defendant's motion to dismiss, including all underlying orders, decisions, rulings, and opinions that are adverse to Plaintiffs or provide reasoning cited in ECF 58.

Respectfully submitted:
June 18, 2020

By: */s/ Lawrence D. Rosenberg*

Lawrence D. Rosenberg
Counsel of Record

Of Counsel
C. Kevin Marshall

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Counsel for Plaintiffs

UNITED STATES COURT OF FEDERAL CLAIMS

AKANTHOS OPPORTUNITY FUND, L.P., Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-369C (Chief Judge Sweeney)

NOTICE OF APPEAL

Notice is hereby given that plaintiff Akanthos Opportunity Fund, L.P. ("Plaintiff") in the above named case hereby appeals to the United States Court of Appeals for the Federal Circuit from the Opinion and Order [ECF 60] and Judgment [ECF 61] entered in this action on June 8, 2020, granting the defendant's motion to dismiss, including all underlying orders, decisions, rulings, and opinions that are adverse to Plaintiff or provide reasoning cited in ECF 60.

Respectfully submitted:
June 18, 2020

By: */s/ Lawrence D. Rosenberg*

Lawrence D. Rosenberg
Counsel of Record

Of Counsel
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Counsel for Plaintiff

UNITED STATES COURT OF FEDERAL CLAIMS

APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, *et al*.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 18-370C
(Chief Judge Sweeney)

NOTICE OF APPEAL

Notice is hereby given that plaintiffs Appaloosa Investment Limited Partnership I, Palomino Fund Ltd., Palomino Master Ltd., and Azteca Partners LLC ("Plaintiffs") in the above named case hereby appeal to the United States Court of Appeals for the Federal Circuit from the Opinion and Order [ECF 62] and Judgment [ECF 63] entered in this action on June 8, 2020, granting the defendant's motion to dismiss, including all underlying orders, decisions, rulings, and opinions that are adverse to Plaintiffs or provide reasoning cited in ECF 62.

Respectfully submitted:
June 18, 2020

By: */s/ Lawrence D. Rosenberg*

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Counsel for Plaintiffs

UNITED STATES COURT OF FEDERAL CLAIMS

CSS, LLC, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-371C (Chief Judge Sweeney)

NOTICE OF APPEAL

Notice is hereby given that plaintiff CSS, LLC ("Plaintiff") in the above named case hereby appeals to the United States Court of Appeals for the Federal Circuit from the Opinion and Order [ECF 59] and Judgment [ECF 60] entered in this action on June 8, 2020, granting the defendant's motion to dismiss, including all underlying orders, decisions, rulings, and opinions that are adverse to Plaintiff or provide reasoning cited in ECF 59.

Respectfully submitted:
June 18, 2020

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UNITED STATES COURT OF FEDERAL CLAIMS

ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, and FINANCIAL STRUCTURES LIMITED, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 1:13-cv-00698 MMS

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, and Financial Structures Limited ("Plaintiffs") in the above named case hereby appeal to the United States Court of Appeals for the Federal Circuit from the Opinion and Order [ECF 69] and Judgment [ECF 70], both entered in this action on May 15, 2020, granting the defendant's motion to dismiss, including all underlying orders, decisions, rulings, and opinions that are adverse to Plaintiffs or provide reasoning cited in ECF 69.

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Respectfully submitted,

DENTONS US LLP

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Financial Structures Limited

June 29, 2020

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSEPH CACCIAPALLE, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	)))))))))	No. 13-466C (Judge Sweeney)

NOTICE OF APPEAL

Notice is hereby given that Lead Plaintiff Joseph Cacciapalle ("Plaintiff"), in the above named case, hereby appeals to the United States Court of Appeals for the Federal Circuit from the Opinion and Order [ECF No. 105] and Judgment [ECF No. 106] entered in this action on June 26, 2020, granting the defendant's motion to dismiss, including all underlying orders, decisions, rulings, and opinions that are adverse to Plaintiff or provide reasoning cited in ECF No. 105.

Dated: July 17, 2020

Respectfully Submitted,

/s/ Hamish P.M. Hume signed by /s/ Eric L. Zagar
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Redacted Version

UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., on behalf of its series The Fairholme Fund, THE FAIRHOLME FUND, a series of Fairholme Funds, Inc., BERKLEY INSURANCE COMPANY, ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, and ANDREW T. BARRETT,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant,

FEDERAL NATIONAL MORTGAGE ASSOCIATION, FEDERAL HOME LOAN MORTGAGE CORPORATION,

Nominal Defendants.

Case No. 1:13-cv-00465-MMS

PUBLIC REDACTED SECOND AMENDED COMPLAINT

Fairholme Funds, Inc., on behalf of its series The Fairholme Fund, and The Fairholme Fund, a series of Fairholme Funds, Inc. (“Fairholme”), as well as Berkley Insurance Company, Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Continental

Western Insurance Company, Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, Preferred Employers Insurance Company, and Andrew T. Barrett (collectively, "Plaintiffs") by and through the undersigned attorneys, bring this action under the Fifth Amendment to the United States Constitution and 28 U.S.C. § 1491, seeking compensation for the taking or, alternatively, the illegal exaction of Plaintiffs' property and the property of the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie") (collectively, the "Companies") and damages for breach of fiduciary duty and implied-in-fact contracts with the Government. In support of their complaint, Plaintiffs allege as follows:

NATURE AND SUMMARY OF THE ACTION

1. In August 2012, at a time when the housing market was recovering from the financial crisis and Fannie and Freddie had returned to stable profitability in a growing economy, the federal government took for itself the entire value of the rights held by Plaintiffs and Fannie's and Freddie's other private shareholders by forcing these publicly-traded, shareholder-owned Companies to turn over their **entire** net worth, less a small capital reserve, to the federal government on a quarterly basis **forever**—an action the government called the "Net Worth Sweep" and that effectively nationalizes the Companies. This action is brought by Plaintiffs, holders of non-cumulative preferred stock ("Preferred Stock") and common stock ("Common Stock") issued by Fannie and Freddie seeking just compensation for the taking of their property and the property of Fannie and Freddie by the United States of America, acting by and through, *inter alia*, the Department of the Treasury ("Treasury"), the Federal Housing Finance Administration ("FHFA"), and agents acting at their direction. Plaintiffs alternatively seek damages for themselves and the Companies for an illegal exaction in violation of the Fifth

Amendment. And Plaintiffs finally seek damages for themselves and the Companies for the Government's breach of fiduciary duty.

2. At Treasury's urging, in July 2008, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"). HERA created the Federal Housing Finance Agency (Treasury and FHFA are sometimes collectively referred to herein as the "Agencies") to replace Fannie's and Freddie's prior regulator, and it insulates FHFA from all three branches of government to an exceptional extent. HERA authorized FHFA to appoint itself as conservator or receiver of the Companies in certain statutorily specified circumstances. HERA charges FHFA as conservator to rehabilitate Fannie and Freddie by taking action to put the Companies in a sound and solvent condition while preserving and conserving their assets.

3. HERA also granted Treasury temporary authority to invest in the Companies' stock until December 31, 2009. Congress made clear that in exercising this authority Treasury was required to consider the "need to maintain [Fannie's and Freddie's] status as . . . private, shareholder-owned compan[ies]."

4. On September 6, 2008—despite prior public statements assuring investors that the Companies were in sound financial shape—FHFA, at Treasury's urging, abruptly placed Fannie and Freddie into conservatorship. Immediately after the Companies were placed into conservatorship, Treasury exercised its temporary authority under HERA to enter into agreements with FHFA to purchase securities of Fannie and Freddie ("Preferred Stock Purchase Agreements," "Purchase Agreements," or "PSPAs"). Under these PSPAs, Treasury designed an entirely new class of securities in the Companies, known as Senior Preferred Stock ("Government Stock"), which came with very favorable terms for Treasury. At the outset, Treasury received $1 billion of Government Stock (via one million shares) in each Company and

warrants to acquire 79.9% of the Common Stock of the Companies at a nominal price in return for its commitment to acquire Government Stock in the future.

5. The Government Stock entitled Treasury to collect dividends at an annualized rate of 10% if paid in cash or 12% if paid in kind—an extraordinarily generous return in an economic environment in which interest rates on government debt were near zero. The Government Stock was entitled to receive cash dividends from each Company only to the extent declared by the Board of Directors "in its sole discretion, from funds legally available therefor." If the Companies did not wish to—or legally could not—pay a cash dividend, the unpaid dividends on the Government Stock could be capitalized (or paid "in kind") by increasing the liquidation preference of the outstanding Government Stock. Therefore, the Companies were *never* required to pay cash dividends on Government Stock. There was *never* any threat that the Companies would become insolvent by virtue of making cash dividend payments. The PSPAs specifically allowed the Companies to utilize this mechanism throughout the life of the agreements, thereby foreclosing any possibility that they would exhaust Treasury's funding commitment because of a need to make a dividend payment to Treasury.

6. The Government Stock diluted, but did not eliminate, the economic interests of the Companies' private shareholders. The warrants to purchase 79.9% of the Companies' Common Stock gave Treasury "upside" via economic participation in the Companies' profitability, but this upside would be *shared* with preferred shareholders (who had to be paid before any payment could be made on common stock purchased with Treasury's warrants) and private common shareholders (who retained rights to 20.1% of the Companies' residual value). James Lockhart, the Director of FHFA, accordingly assured Congress shortly after imposition of the conservatorship that Fannie's and Freddie's "shareholders are still in place; both the

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preferred and common shareholders have an economic interest in the companies" and that "going forward there may be some value" in that interest.

7. Under FHFA's supervision, the Companies were forced to excessively write down the value of their assets, primarily due to erroneous and unjustifiable accounting decisions. By June 2012, the Agencies had forced Fannie and Freddie to issue $161 billion in Government Stock to make up for the balance-sheet deficits caused by the Agencies' unrealistic and overly pessimistic accounting decisions, even though there was no indication that the Companies' actual cash expenses could not be met by their cash receipts. The Companies were further forced to issue an additional $26 billion of Government Stock so that Fannie and Freddie would be able to pay *cash* dividends to Treasury even though, as explained above, the Companies were never required to pay cash dividends. Finally, because (i) the Companies were forced to issue Government Stock to Treasury in return for funds that they did not need to continue operations and (ii) the structure of Treasury's financial support did not permit the Companies to repay and redeem the Government Stock outstanding, the amount of the dividends owed on the Government Stock was artificially—and permanently—inflated.

8. As a result of these transactions, Treasury amassed a total of $189 billion in Government Stock—a substantial sum, albeit far less than the $5 trillion in assets held in the Companies' mortgage portfolios. But based on the Companies' performance in the second quarter of 2012, it was apparent that there was still value in the Companies' private shares. By that time, the Companies were thriving and could easily pay 10% annualized cash dividends on the Government Stock without drawing additional capital from Treasury. And based on the improving housing market and the high quality of the newer loans backed by the Companies, it was apparent that they had returned to stable profitability. Indeed, the Agencies had specific

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information from the Companies demonstrating that this return to profitability was inevitable because the Companies would soon be reversing many of the non-cash accounting losses they had incurred under FHFA's supervision. In light of that information and the broad-based recovery in the housing industry that had occurred by the middle of 2012, the Agencies fully understood that the Companies were on the precipice of generating huge profits, far in excess of the dividends owed on the Government Stock.

9. The Government was not content to benefit from its investment like an investor in any other company and did not want to share the value of the Companies with private shareholders. Instead, it was committed to ensuring that, unlike all other companies that received financial assistance from the federal government during the financial crisis, Fannie and Freddie would be operated for the exclusive benefit of the federal government. Indeed, unbeknownst to the public, Treasury had secretly resolved "to ensure existing common equity holders will not have access to any positive earnings from the [Companies] in the future." Treasury also was seeking to transform the housing finance market by eliminating Fannie and Freddie, and it and FHFA had no intention of allowing the Companies to rehabilitate and exit conservatorship. By the middle of 2012, however, it was apparent that even the large amount of Government Stock outstanding would not achieve these surreptitious policy goals.

10. Therefore, on August 17, 2012, just days after the Companies announced record-breaking quarterly earnings, the Agencies unilaterally imposed the Net Worth Sweep to expropriate for the federal government the value of Fannie and Freddie shares held by private investors and to ensure that the Companies could not begin rebuilding their capital levels. At the time, FHFA was operating under the leadership of an Acting Director who had been at the helm of the agency for three years. Treasury itself said that the Net Worth Sweep was intended to

ensure both that "every dollar of earnings that Fannie Mae and Freddie Mac generate will benefit taxpayers" and that the Companies "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." With the stroke of a pen, the Agencies had nationalized the Companies and taken all the value of the Companies for Treasury, thereby depriving the private shareholders of all their economic rights. No equivalent wipeout of private shareholder investments was imposed on other financial institutions that received assistance during the 2008 financial crisis, much less four years *after* that crisis was over.

11. The Companies received no incremental investment by Treasury or other meaningful consideration in return for the Net Worth Sweep, which restricts them to a small maximum capital level above which any profits they generate must be paid over to Treasury. This was done notwithstanding "the path laid out under HERA," which, as even Treasury acknowledged internally, was for FHFA to *rehabilitate* Fannie and Freddie, thus allowing them to "becom[e] adequately capitalized" and "exit conservatorship as private companies."

12. Despite the transparent fact that the Net Worth Sweep was designed to expropriate private property rights, the Government has claimed both in public and in prior filings in this case that the Net Worth Sweep was necessary to prevent the Companies from falling into a "death spiral" in which the Companies' increasing dividend obligations to Treasury would consume Treasury's remaining funding commitment to the Companies. This made-for-litigation defense narrative is wholly inaccurate.

13. As an initial matter, the Government did not impose the Net Worth Sweep at a time when the Companies were struggling to generate enough income to pay the dividend on Treasury's stock. Rather, the Net Worth Sweep was imposed just days after the Companies disclosed that they had returned to stable profitability and had earned several billion dollars more

than was necessary to pay the Treasury dividend in cash. And it was by then virtually inevitable, thanks to a strengthening housing market and the improving quality of loans guaranteed by the Companies, that they would soon reverse the non-cash accounting adjustments that were responsible for the great majority of the losses that they had experienced in the preceding years, thereby generating massive profits. More importantly, quite apart from the Companies' improved financial outlook, the Companies were contractually protected from a scenario in which their dividend obligation to Treasury could cause a death spiral: the Companies were entitled under the PSPAs to pay dividends to Treasury "in kind," with additional senior preferred stock, rather than in cash.

14. Materials produced in discovery further undermine the Government's death spiral narrative. Indeed, those materials reveal that the Net Worth Sweep was adopted not out of a concern that the Companies would earn too little, but rather out of concern that the Companies would make *too much* and thus would complicate the Administration's plans to keep Fannie and Freddie in perpetual conservatorship and to prevent their private shareholders from seeing any return on their investments. As a senior White House official stated in an email to a senior Treasury official on the day the Net Worth Sweep was announced, "we've closed off [the] possibility that [Fannie and Freddie] ever[ ] go (pretend) private again." That same official stated in another email that Peter Wallison of the American Enterprise Institute was "exactly right on substance and intent" when he said that "[t]he most significant issue here is whether Fannie and Freddie will come back to life because their profits will enable them to re-capitalize themselves and then it will look as though it is feasible for them to return as private companies backed by the government. . . . What the Treasury Department seems to be doing here . . . is to deprive them of all their capital so that doesn't happen." An internal Treasury document dated August

16, 2012, expressed the same sentiment: “By taking all of their profits going forward, we are making clear that [Fannie and Freddie] will not ever be allowed to return to profitable entities . . . .”

15. The Net Worth Sweep has resulted in a massive and unprecedented financial windfall for the federal government at the expense of the Companies and their private shareholders. From the fourth quarter of 2012, the first fiscal quarter subject to the Net Worth Sweep, through the fourth quarter of 2017, the most recently reported fiscal quarter, Fannie and Freddie generated $217 billion in comprehensive income. But rather than using those profits to prudently build capital reserves and prepare to exit conservatorship, Fannie and Freddie instead have been forced to pay substantially all of it as “dividends” to the federal government under the Net Worth Sweep—$124 billion more than the government would have received under the original PSPAs. Adding Net Worth Sweep dividends to the dividends Fannie and Freddie had already paid, Treasury has now recouped $87 billion *more* than it has invested in the Companies. Yet, according to the Government, these payments have not reduced Treasury’s liquidation preference by one cent, and Treasury continues to insist that it has the right to Fannie’s and Freddie’s future earnings *in perpetuity*.

16. The Net Worth Sweep has resulted in a massive and unprecedented expropriation of private property. To the extent this ongoing expropriation is authorized by law, the Fifth Amendment compels the Government to pay just compensation to Plaintiffs and the Companies for the taking. To the extent it is not authorized, the Fifth Amendment compels the Government to pay damages to Plaintiffs and the Companies for the illegal exaction. The extraordinary control exercised by FHFA as conservator over Fannie and Freddie also created a fiduciary relationship between FHFA, on the one hand, and the Companies and their shareholders, on the

other. The Net Worth Sweep violated FHFA's fiduciary duties. The Net Worth Sweep also breached implied-in-fact contracts the Government and the Companies entered into when the Companies were placed into conservatorship. Accordingly, Plaintiffs and the Companies are entitled to just compensation and damages.

17. Accordingly, through this action, Plaintiffs seek the recompense to which they and the Companies are entitled.

JURISDICTION AND VENUE

18. This Court has jurisdiction over this action and venue is proper in this Court, pursuant to 28 U.S.C. § 1491(a)(1).

THE PARTIES

19. Fairholme is a mutual fund with tens of thousands of shareholders of all economic backgrounds, with an average account size of less than $50,000. Fairholme's investment objective is long-term growth of capital for its shareholders. Fairholme owns Preferred Stock in each of Fannie and Freddie, as identified below. Fairholme is entitled to a contractually specified, non-cumulative dividend from the Companies in preference to dividends on Common Stock. Ownership of the Preferred Stock also entitles Fairholme to a contractually specified liquidation preference. The Preferred Stock is junior to Treasury's Government Stock. If valid, the Net Worth Sweep expropriates the value of Fairholme's Preferred Stock. Fairholme is a series of Fairholme Funds, Inc., a Maryland corporation headquartered in Florida. Fairholme's principal place of business is 4400 Biscayne Boulevard, Suite 900, Miami, Florida 33137.

20. W.R. Berkley Corporation owns directly or indirectly the following plaintiffs: Berkley Insurance Company, Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Continental Western Insurance Company, Midwest Employers Casualty

Insurance Company, Nautilus Insurance Company, Preferred Employers Insurance Company (collectively, the "Berkley Plaintiffs"). The Berkley Plaintiffs are insurance companies

21. Plaintiff Berkley Insurance Company is a Delaware corporation headquartered in Greenwich, Connecticut.

22. Plaintiff Acadia Insurance Company is a New Hampshire corporation headquartered in Westbrook, Maine.

23. Plaintiff Admiral Indemnity Company is a Delaware corporation headquartered in Rutherford, New Jersey.

24. Admiral Insurance Company is a Delaware corporation headquartered in Scottsdale, Arizona.

25. Berkley Regional Insurance Company is a Delaware Corporation headquartered in Urbandale, Iowa.

26. Carolina Casualty Insurance Company is an Iowa corporation headquartered in Urbandale, Iowa.

27. Continental Western Insurance Company is an Iowa corporation headquartered in Urbandale, Iowa.

28. Midwest Employers Casualty Insurance Company is a Delaware corporation headquartered in Chesterfield, Missouri.

29. Nautilus Insurance Company is an Arizona corporation headquartered in Scottsdale, AZ.

30. Preferred Employers Insurance Company is a California Corporation headquartered in San Diego, California.

31. Andrew T. Barrett has continuously owned shares of both Fannie Mae and Freddie Mac Common Stock since September 2008.

32. Defendant United States of America includes Treasury, FHFA, and agents acting at their direction.

33. Nominal party Fannie is a federally chartered, privately owned corporation with its principal executive offices located at 3900 Wisconsin Avenue, N.W., Washington, D.C. 20016. Under its bylaws, Fannie's corporate governance practices and procedures are governed by the Delaware General Corporation Law.

34. Nominal party Freddie is a federally chartered, privately owned corporation with its principal executive offices located at 8200 Jones Branch Drive, McLean, VA 22102. Under its bylaws, Freddie's corporate governance practices and procedures are governed by the Virginia Stock Corporation Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS

35. Plaintiffs' claims are founded on the Fifth Amendment to the United States Constitution, which provides in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation," and on HERA, 12 U.S.C. §§ 1455(*l*), 1719(g), 4617.

FACTUAL ALLEGATIONS

Fannie and Freddie

36. Fannie is a for-profit, stockholder-owned corporation organized and existing under the Federal National Mortgage Act. Freddie is a for-profit, stockholder-owned corporation organized and existing under the Federal Home Loan Corporation Act. The Companies' business includes purchasing and guaranteeing mortgages originated by private banks and bundling the

mortgages into mortgage-related securities that can be sold to investors. Prior to 2008, the Companies' mortgage portfolios had a combined value of $5 trillion.

37. Fannie and Freddie are owned by private shareholders and their securities are publicly traded. Fannie was chartered by Congress in 1938 and originally operated as an agency of the Federal Government. In 1968, Congress reorganized Fannie into a for-profit corporation owned by private shareholders. Freddie was established by Congress in 1970 as a wholly-owned subsidiary of the Federal Home Loan Bank System. In 1989, Congress reorganized Freddie into a for-profit corporation owned by private shareholders.

38. Before being placed into conservatorship, both Fannie and Freddie had issued Common Stock and several series of Preferred Stock that were marketed and sold to community banks, insurance companies, and countless other institutional and individual investors. The several series of Preferred Stock of the Companies are in parity with each other with respect to their claims on income (i.e., dividend payments) and claims on assets (i.e., liquidation preference or redemption price), but they have priority over the Companies' Common Stock for these purposes. The holders of Common Stock are entitled to the residual economic value of the firms. The Companies have outstanding Preferred Stock with an aggregate liquidation preference of $33 billion.

39. Fairholme's holdings include multiple series of Preferred Stock issued by the Companies. In particular, Fairholme's holdings of Preferred Stock are as follows:

Fairholme Holdings of Fannie Preferred Stock

Series	Dividend Rate	Redemption Value per Share
S	7.750%	$25.00

R	7.625%	$25.00
Q	6.750%	$25.00
P	4.500%	$25.00
O	7.000%	$50.00

Fairholme Holdings of Freddie Preferred Stock

Series	**Dividend Rate**	**Redemption Value per Share**
Z	7.875%	$25.00
Y	6.550%	$25.00
H	5.100%	$50.00
B	1.957%	$50.00

40. At all times relevant hereto, shares of Fannie and Freddie Preferred Stock have been owned by the Berkley Plaintiffs, Berkley Insurance Company, or both. Many of these Plaintiffs' shares of Fannie and Freddie Preferred Stock were acquired by the Berkley Plaintiffs prior to August 2012 but later transferred to Berkley Insurance Company. In addition to other shares acquired from the Berkley Plaintiffs, Berkley Insurance Company has continuously owned Fannie Preferred Shares in its own name since January 2005 and Freddie Preferred Shares in its own name since December 2009. Plaintiff Continental Western holds shares of Preferred Stock in both Companies that it acquired from Berkley Insurance Company in 2013.

41. Under the Certificates of Designation setting out the terms and conditions of the Preferred Stock issued by Fannie and Freddie prior to September 6, 2008, each series of Preferred Stock issued by the Companies enjoyed parity with all other issued and outstanding series of Preferred Stock as to the payment of dividends and the distribution of assets upon dissolution, liquidation, or winding up of the companies. Thus, the holders of each series of

Preferred Stock had equal contractual rights to receive their respective liquidation preferences (or their respective pro rata portions thereof) upon dissolution, liquidation, or winding up of the Companies.

42. Like holders of Preferred Stock, holders of Common Stock also have property rights associated with their shares of stock. Fannie's and Freddie's charters both contemplate that the Companies will have common stock. *See* 12 U.S.C. §§ 1453, 1718(a). Under general corporate law principles, a corporation's common shareholders have, collectively, a right to the corporation's residual value through a right to participate in the corporation's residual earnings and a right, upon dissolution, to share in any residual proceeds from the assets. Common shareholders also have the right to participate in the corporation's management by voting on the selection of directors and on other matters. Indeed, "[t]he right . . . to attend and vote at meetings for the election of directors and on other matters submitted, . . . to participate in dividends and profits and in the net assets of the corporation on dissolution, are the most material rights incident to stock ownership." *Salt Dome Oil Corp. v. Schenck*, 41 A.2d 583, 588 (Del. 1945).

43. Prior to 2007, Fannie and Freddie were consistently profitable. In fact, Fannie had not reported a full-year loss since 1985 and Freddie had not reported a full-year loss since becoming owned by private shareholders. In addition, both Companies regularly declared and paid dividends on each series of their respective Preferred Stock and their respective Common Stock.

Fannie and Freddie Are Placed into Conservatorship

44. The Companies were well-positioned to weather the decline in home prices and financial turmoil of 2007 and 2008. While banks and other financial institutions involved in the mortgage markets had heavily invested in increasingly risky mortgages in the years leading up to

the financial crisis, Fannie and Freddie had taken a more conservative approach that meant that the mortgages that they insured (primarily 30-year fixed rate conforming mortgages) were far safer than those insured by the nation's largest banks. And although both Companies recorded losses in 2007 and the first two quarters of 2008—losses that largely reflected a temporary decline in the market value of their holdings caused by declining home prices—both Companies continued to generate enough cash to easily pay their debts and retained billions of dollars of capital that could be used to cover any future losses.

45. Neither Company was in danger of insolvency in 2008. Indeed, during the summer of 2008, both Treasury Secretary Henry Paulson and Office of Federal Housing and Enterprise Oversight ("OFHEO") Director James Lockhart publicly stated that Fannie and Freddie were financially healthy. For example, on July 8, 2008, Director Lockhart told CNBC that "both of these companies are adequately capitalized, which is our highest criteria." Two days later, on July 10, Secretary Paulson testified to the House Committee on Financial Services that Fannie's and Freddie's "regulator has made clear that they are adequately capitalized." On July 13, Director Lockhart issued a statement emphasizing that "the Enterprises' $95 billion in total capital, their substantial cash and liquidity portfolios, and their experienced management serve as strong supports for the Enterprises' continued operations." In August 2008, the Companies issued their financial statements, which reflected that as of the end of June 2008, Fannie Mae's assets exceeded its debts by over $41 billion and that Freddie Mac's assets exceeded its debts by nearly $13 billion. An analysis of Freddie's financial condition in August 2008 for FHFA by BlackRock stated that Freddie's "long-term solvency does not appear endangered—we do not expect Freddie Mac to breach critical capital levels even in stress case." Furthermore, on August 22, 2008, FHFA confirmed that Fannie Mae and Freddie Mac were

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adequately capitalized, even under additional capital requirements imposed by FHFA under its risk-based capital stress test. *See* Letter from Christopher H. Dickerson, Acting Deputy Dir., FHFA, to Daniel H. Mudd, President and Chief Exec. Officer, Fannie Mae (Aug. 22, 2008); Letter from Christopher H. Dickerson, Acting Deputy Dir., FHFA, to Richard F. Syron, Chairman and Chief Exec. Officer, Freddie Mac (Aug. 22, 2008). In sum, despite arguments to the contrary by lawyers for the Agencies in litigation related to the Net Worth Sweep, the Companies were not on the precipice of failure in 2008.

46. Despite (or perhaps because of) the Companies' comparatively strong financial position amidst the crisis, Treasury initiated a long-term policy of seeking to seize control of Fannie and Freddie and operate them for the exclusive benefit of the federal government. To that end, as early as March 2008, Treasury was internally discussing "potential costs and benefits of nationalization" of the Companies. Around the same time, a Treasury official was the off-the-record source for a Barron's article that inaccurately claimed that the Companies' books overstated assets and understated liabilities.

47. The Companies' sound financial condition in the weeks leading up to imposition of the conservatorships is further illustrated by the decision by Fannie's Board of Directors to declare dividends on both its preferred and common stock in August 2008 and by FHFA's subsequent decision as conservator to direct Fannie to pay those dividends out of cash available for distribution in late September 2008. It is a fundamental principle of corporate law that a company may not declare dividends when it is insolvent, and dividends that a company improperly declares when insolvent may not be lawfully paid. Fannie's Board thus could not have lawfully declared dividends in August 2008 unless the Company was solvent at that time, and the Board's decision to declare those dividends showed its confidence that Fannie was financially healthy. Furthermore, it is evident that both FHFA and Treasury agreed that Fannie was solvent when it declared dividends in August

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2008 because, rather than halting or voiding the dividends that the outgoing Fannie Board had declared, both Agencies publicly took the position that Fannie was legally obligated to pay them even *after* conservatorship was imposed in early September 2008.

48. Also during the summer of 2008, Treasury pressed Congress to pass what became HERA. HERA created FHFA (which succeeded to the regulatory authority over Fannie and Freddie previously held by OFHEO).

49. From 1992 until 2008, the Companies were regulated by OFHEO—an office within the Department of Housing and Urban Development. OFHEO was not an independent agency; its Director could be removed from office by the President for any reason. *See* Housing and Community Development Act of 1992, Pub. L. No. 102-550 § 1312, 106 Stat. 3672 (1992). To fund OFHEO's operations, Congress permitted the office to impose annual assessments on the Companies "to the extent provided in appropriation Acts." *Id*. § 1316(a). By statute, OFHEO's annual spending plans had to be included in the President's budget. *Id.* § 1316(g)(3). The President's control over OFHEO's Director and the fact that OFHEO was subject to the congressional appropriations process ensured that the office remained accountable to the People through their democratically elected representatives.

50. Under HERA, FHFA, unlike its predecessor, is an "independent" agency, 12 U.S.C. § 4511(a); 44 U.S.C. § 3502(5), and it is headed by a Director who is only removable "for cause by the President," 12 U.S.C. § 4512(b)(2). To further insulate FHFA from presidential influence, HERA also provides that when FHFA acts as conservator it "shall not be subject to the direction or supervision of any other agency of the United States." *Id*. § 4617(a)(7). Also unlike OFHEO, FHFA is funded through assessments that are "not . . . construed to be Government or public funds or appropriated money." *Id*. § 4516(f)(2). As a result, FHFA is neither subject to presidential control nor constrained by the congressional appropriations process.

51. Unlike almost all other independent agencies in our Nation's history, FHFA is headed by a single individual rather than a multi-member board or commission. This highly unusual feature of FHFA's structure violates the separation of powers. In the absence of direct control by the democratically elected President, the usual multi-member leadership structure of independent agencies acts as a substitute check on the excesses of any individual leader of an independent agency. The traditional multi-member structure guards against arbitrary decision making and protects individual liberty by preventing the concentration of power in the hands of any one person. Independent agencies headed by multi-member boards are forced to account for multiple viewpoints, adopt compromises that result in less extreme decisions, and better resist capture by interest groups. FHFA's unusual structure prevents those affected by its decisions from enjoying the benefits of multi-member leadership, and as a result FHFA has undertaken a series of arbitrary actions that have significantly harmed the Companies' private shareholders.

52. The fact that FHFA is headed by a single individual also means that the President has less influence over its decisions than the decisions made by independent agencies headed by multi-member commissions. When an independent agency is run by a commission with multiple members who serve staggered terms and with a chairperson who the President designates, the President can influence agency actions by appointing one or more commission members and selecting the chairperson. Many statutes that create multi-member commissions also require bipartisan membership, thus guaranteeing that at least some members will belong to the President's political party. FHFA's Director, in contrast, serves a five-year term and may remain in office indefinitely if the Senate fails to confirm a successor. 12 U.S.C. § 4512(b)(2), (4). As a result, FHFA's Director could remain in office during the entire four-year term of a President from a different political party, all the while pursuing policies directly at odds with those of the

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incumbent President. As a result of FHFA's unusual structure, it is more insulated from presidential influence than virtually any other independent federal agency.

53. FHFA's status as an independent agency headed by a single Director makes it different from almost every other independent agency in our Nation's history. Indeed, Plaintiffs are aware of only two agencies that were similarly structured when FHFA was created in 2008: the Office of Special Counsel and the Social Security Administration. The structure of both agencies has been constitutionally contested by the Executive Branch. Furthermore, both agencies are subject to the annual congressional appropriations process, which subjects them to a significant measure of congressional oversight that does not apply to FHFA. The appropriations process also increases presidential oversight because the President can veto budgets and generally plays an important role in the budgeting process.

54. Two years after HERA established FHFA, Congress created the Consumer Financial Protection Bureau ("CFPB"), which is also an independent agency headed by a single Director. The Executive Branch has taken the position that the CFPB's structure violates the separation of powers.

55. It is not constitutional for any independent federal agency to operate under the direction of a single individual, but this structure is especially problematic in FHFA's case because it has vast authority over a critical sector of the United States economy. FHFA's current Director has said that his agency is "charged with directing the largest conservatorships in U.S. history in support of the Nation's multi-trillion-dollar mortgage finance system." As FHFA's former longtime Acting Director has written, "the entire housing system . . . rel[ies] almost entirely on [FHFA's] decisions." Michael Bright & Ed DeMarco, Why Housing Reform Still Matters, Milken Institute Center for Financial Markets 3 (June 2016).

56. HERA authorized FHFA, under certain statutorily prescribed and circumscribed conditions, to place the Companies into either conservatorship or receivership. In authorizing FHFA to act as conservator under specified circumstances, Congress took FHFA's conservatorship mission verbatim from the Federal Deposit Insurance Act ("FDIA"), *see* 12 U.S.C. § 1821(d)(2)(D), which itself incorporated a long history of financial supervision and rehabilitation of troubled entities under common law. HERA and the FDIA, as well as the common law concept on which both statutes draw, treat conservatorship as a process designed to stabilize a troubled institution with the objective of returning it to normal business operations. Like any conservator, when FHFA acts as a conservator under HERA it has a fiduciary duty to safeguard the interests of the Companies and their shareholders.

57. HERA restricts the availability of judicial review of FHFA's actions as conservator. Most significantly, HERA specifies that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator." 12 U.S.C. § 4617(f). A number of other provisions of HERA impose additional limitations on judicial review of FHFA's actions as conservator, receiver, or regulator. *See id.* § 4617(b)(2)(A)(i); *id.* § 4617(b)(5)(E); *id.* § 4617(b)(11)(D); *id.* § 4623(d). While none of these provisions bars claims like those raised in this suit, HERA's restrictions on judicial review further insulate FHFA from the mechanisms the Constitution creates to protect individual rights from arbitrary decisions by the federal government.

58. According to HERA, FHFA "may, as conservator, take such action as may be— (i) necessary to put the regulated entity in a sound and solvent condition, and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D). FHFA has acknowledged that "[t]he purpose of

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conservatorship is to preserve and conserve each company's assets and property and to put the companies in a sound and solvent condition," and "[t]o fulfill the statutory mandate of conservator, FHFA must follow governance and risk management practices associated with private-sector disciplines." FHFA, REPORT TO CONGRESS: 2009 at i, 99 (May 25, 2010).

59. FHFA has repeatedly stated publicly that HERA *requires* and *mandates* FHFA as conservator to preserve and conserve Fannie's and Freddie's assets and to restore them to a sound and solvent condition. The following are just a few examples:

- The provisions of 12 U.S.C. § 4617(b)(2)(D) are "statutory mandates" and as conservator FHFA "must follow the mandates assigned to it by statute." FHFA, STRATEGIC PLAN: FISCAL YEARS 2018-2022 at 3–4 (Jan. 29, 2018), https://goo.gl/yDZmir.
- FHFA has "statutory obligations to operate the [Companies] in a safe and sound manner." Prepared Remarks of Melvin L. Watt, Dir., FHFA, at American Mortgage Conference (May 18, 2017), https://goo.gl/rT3f6C.
- FHFA's "statutory mandates obligate" it to "[c]onserve and preserve the assets of the Enterprises while they are in conservatorship." Statement of Melvin L. Watt, Dir., FHFA, Before the U.S. Senate Comm. on Banking, Housing, and Urban Affairs (May 11, 2017), https://goo.gl/h44qRf.
- FHFA has a " 'preserve and conserve' mandate." A FHFA STRATEGIC PLAN FOR ENTERPRISE CONSERVATORSHIP: THE NEXT CHAPTER IN A STORY THAT NEEDS AN ENDING at 7 (Feb. 21, 2012), http://goo.gl/uXreKX ("A STRATEGIC PLAN FOR ENTERPRISE CONSERVATORSHIP").

- "By law, the conservatorships are intended to rehabilitate [Fannie and Freddie] as private firms." Letter from Edward DeMarco, Acting Director, FHFA to Senators at 1 (Nov. 10, 2011), http://goo.gl/hbBe25.
- "The statutory role of FHFA as conservator requires FHFA to take actions to preserve and conserve the assets of the Enterprises and restore them to safety and soundness." FHFA, REPORT TO CONGRESS: 2009 at 99 (May 25, 2010), http://goo.gl/YOOgzC.
- "As the conservator, FHFA's most important goal is to preserve the assets of Fannie Mae and Freddie Mac over the conservatorship period. That is our statutory responsibility." *The Present Condition and Future Status of Fannie Mae and Freddie Mac: Hearing Before the Subcomm. of Capital Markets, Ins. & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 111th Cong. 136 (2009) (statement of James B. Lockhart III, Dir., FHFA).
- FHFA as conservator "preserves and conserves the assets and property of the Enterprises . . . and facilitates their financial stability and emergence from conservatorship." FHFA, STRATEGIC PLAN: 2009-2014 at 33, http://goo.gl/UjCxf6. "The conservatorship of Fannie Mae and Freddie Mac allows the FHFA to preserve the assets of the [Companies], ensure they focus on their housing mission and are positioned to emerge from conservatorship as financially strong . . . ." *Id.* at 20.

60. The Agencies similarly acknowledged FHFA's mandates as conservator in internal documents produced in discovery. Treasury, for example, acknowledged that "FHFA as conservator is required to preserve assets" and that one of the "[l]egal [c]onstraints" imposed

upon FHFA is its "mandate[ ] to 'conserve assets.' " FHFA recognized that it "has a responsibility to take such actions as may be necessary to put the Enterprises in a sound and solvent condition and to preserve and conserve their assets and property."

61. Under HERA, conservatorship is a status distinct from receivership, with very different purposes, responsibilities, and restrictions. When acting as a receiver, but *not* when acting as a conservator, FHFA is authorized and obliged to "place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity." *Id*. § 4617(b)(2)(E). The only "post-conservatorship outcome[] . . . that FHFA may implement today under existing law," by contrast, "is to reconstitute [Fannie and Freddie] under their current charters." Letter from Edward J. DeMarco, Acting Director, FHFA, to Chairmen and Ranking Members of the Senate Committee on Banking, Housing, and Urban Affairs and to the House Committee on Financial Services 7 (Feb. 2, 2010). In other words, receivership is aimed at winding down a company's affairs and liquidating its assets, while conservatorship aims to rehabilitate it and return it to normal operation. This distinction between the purposes and authorities of a receiver and a conservator is a well-established tenet of financial regulation and common law. In our nation's history, there has *never* been an example of a regulator forcing a healthy, profitable company to remain captive in a perpetual conservatorship (in this instance, going on ten years) while facilitating the looting and plundering of the company's assets by another federal agency *and* simultaneously avoiding the organized claims process of a receivership.

62. In promulgating regulations governing its operations as conservator versus receiver of the Companies, FHFA specifically acknowledged the distinctions in its statutory responsibilities as conservator and as receiver: "A conservator's goal is to continue the operations of a regulated entity, rehabilitate it and return it to a safe, sound and solvent

condition." 76 Fed. Reg. 35,724, 35,730. In contrast, when FHFA acts as a receiver, the regulation specifically provides that "[t]he Agency, as receiver, *shall* place the regulated entity in liquidation . . . ." 12 C.F.R. § 1237.3(b) (emphasis added). Consistent with this interpretation of HERA, a FHFA Advisory Bulletin describes "the conservator's or receiver's powers and responsibilities" as including "in the case of a conservator, to put the regulated entity in a sound and solvent condition, and to carry on its business and preserve and conserve its assets, and in the case of a receiver, to liquidate the regulated entity."

63. During conservatorship FHFA has dual and potentially conflicting roles as the Companies' conservator and regulator. As conservator, FHFA's mission is to preserve and conserve the Companies' assets and restore them to soundness and solvency. In contrast, as regulator, FHFA is charged with the public mission of ensuring that the Companies "foster liquid, efficient, competitive, and resilient national housing finance markets (including activities relating to mortgages on housing for low- and moderate-income families involving a reasonable economic return that may be less than the return earned on other activities)" and conduct their operations in a manner "consistent with the public interest." 12 U.S.C. § 4513(a)(1)(B). The FDIC, which has similar dual roles, has in the past sought to manage this conflict by erecting a "firewall" between personnel tasked with working for the agency as conservator and other personnel tasked with working for the agency as regulator. *See Plaintiffs in All Winstar-Related Cases at Court v. United States*, 44 Fed. Cl. 3, 7 n.5 (1999). FHFA has not taken similar steps to protect the integrity of its conservatorship role and, as set forth in greater detail below, abandoned the traditional role of a conservator by disregarding the interests of the Companies when it took the actions that are the subject of this suit.

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64. On September 6, 2008, FHFA and Treasury persuaded the Companies' boards to consent to conservatorship. As Former Secretary Paulson has explained, Treasury was the driving force behind the imposition of the conservatorships: "FHFA had been balky all along [about the imposition of a conservatorship] . . . We had to convince its people that [conservatorship] was the right thing to do, while making sure to let them feel they were still in charge." HENRY M. PAULSON, JR., ON THE BRINK 6 (2010). Given that the Companies were not in financial distress and were in no danger of defaulting on their debts, the Companies' directors were confronted with a Hobson's choice: agree to conservatorship, or they would face "nasty lawsuits" and Treasury would refuse to provide the Companies with any capital if they needed it. THE FINANCIAL CRISIS INQUIRY COMMISSION REPORT 320 (Jan. 2011). The Agencies ultimately obtained the Companies' consent by threatening to seize them if they did not acquiesce and by informing them that the Agencies had already selected new CEOs and had teams ready to move in and take control. In agreeing to the FHFA takeover, both Companies' boards understood that the "conservatorship" FHFA and Treasury proposed would be like all other federal conservatorships in American history and that the Companies would be operated by their regulator acting in a fiduciary capacity for the benefit of all stakeholders, including private shareholders.

65. In publicly announcing the conservatorship, FHFA acknowledged that the Companies' stock remains outstanding during conservatorship and "continue[s] to trade," *FHFA Fact Sheet, Questions and Answers on Conservatorship* 3, https://goo.gl/DV4nAt, and Fannie's and Freddie's stockholders "continue to retain all rights in the stock's financial worth," *id.* Director Lockhart testified before Congress that Fannie's and Freddie's "shareholders are still in place; both the preferred and common shareholders have an economic interest in the companies"

and that "going forward there may be some value" in that interest. *Oversight Hearing to Examine Recent Treasury & FHFA Actions Regarding the Housing GSEs: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 29–30, 34 (2008).

66. FHFA also emphasized that the conservatorship was temporary: "Upon the Director's determination that the Conservator's plan to restore the [Companies] to a safe and solvent condition has been completed successfully, the Director will issue an order terminating the conservatorship." *FHFA Fact Sheet, Questions and Answers on Conservatorship* 2. Investors were entitled to rely on these official statements of the purposes of the conservatorship, and public trading in Fannie's and Freddie's stock was permitted to, and did, continue.

67. In short, the Companies were not in financial distress when they were placed into conservatorship. The Companies' boards acquiesced to conservatorship based on the understanding that FHFA, like any other conservator, would operate the Companies as a fiduciary with the goal of preserving and conserving their assets and managing them in a safe and solvent manner. And in publicly announcing the conservatorships, FHFA confirmed that the Companies' private shareholders continued to hold an economic interest that could have value, particularly as the Companies generated profits in the future.

FHFA and Treasury Enter into the Purchase Agreements

68. On September 7, 2008, Treasury and FHFA, acting in its capacity as conservator of Fannie and Freddie, entered into the Preferred Stock Purchase Agreements.

69. In entering into the Purchase Agreements, Treasury exercised its temporary authority under HERA to purchase securities issued by the Companies. *See* 12 U.S.C. §§ 1455(*l*), 1719(g). To exercise that authority, the Secretary of the Treasury was required to determine that purchasing the Companies' securities was "necessary to . . . provide stability to the financial

markets; . . . prevent disruptions in the availability of mortgage finance; and . . . protect the taxpayer." 12 U.S.C. §§ 1455(*l*)(1)(B), 1719(g)(1)(B). In making those determinations, the Secretary was required to consider six factors:

> (i) The need for preferences or priorities regarding payments to the Government.
> (ii) Limits on maturity or disposition of obligations or securities to be purchased.
> (iii) *The [Companies'] plan[s] for the orderly resumption of private market funding or capital market access*.
> (iv) The probability of the [Companies] fulfilling the terms of any such obligation or other security, including repayment.
> (v) *The need to maintain the [Companies'] status as . . . private shareholder-owned compan[ies]*.
> (vi) Restrictions on the use of [the Companies'] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

Id. §§ 1455(*l*)(1)(C), 1719(g)(1)(C) (emphasis added).

70. In approving the exercise of Treasury's temporary authority under HERA to purchase securities of the Companies, Treasury Secretary Paulson determined (1) "[u]nder conservatorship, Fannie Mae and Freddie Mac will continue to operate as going concerns"; (2) "Fannie Mae and Freddie Mac may emerge from conservatorship to resume independent operations"; and (3) "[c]onservatorship preserves the status and claims of the preferred and common shareholders." Action Memorandum for Secretary Paulson (Sept. 7, 2008).

71. Treasury's authority under HERA to purchase the Companies' securities expired on December 31, 2009. *See* 12 U.S.C. §§ 1455(*l*)(4), 1719(g)(4). After that date, HERA authorized Treasury only "to hold, exercise any rights received in connection with, or sell" previously purchased securities. *Id.* §§ 1455(*l*)(2)(D), 1719(g)(2)(D).

72. Treasury's PSPAs with Fannie and Freddie are materially identical. Under the original agreements, Treasury committed to provide up to $100 billion to each Company to

ensure that it maintained a positive net worth. In particular, for quarters in which either Company's liabilities exceed its assets under Generally Accepted Accounting Principles, the PSPAs authorize Fannie and Freddie to draw upon Treasury's commitment in an amount equal to the difference between its liabilities and assets.

73. In return for Treasury's funding commitment, Treasury received 1 million shares of Government Stock in each Company and warrants to purchase 79.9% of the common stock of each Company at a nominal price. Exercising these warrants would entitle Treasury to up to 79.9% of all future profits of the Companies, subject to the Companies' obligation to satisfy their dividend obligations with respect to the Government Stock and Preferred Stock and to share the remaining 20.1% of those profits with private common shareholders. As Treasury noted in entering the PSPAs, the warrants "provide potential future upside to the taxpayers." Action Memorandum for Secretary Paulson (Sept. 7, 2008).

74. Treasury's Government Stock in each Company had an initial liquidation preference of $1 billion. In other words, Treasury took an upfront fee of $1 billion from each of the Companies before either Company received *any* funding from Treasury in return. This liquidation preference increases by one dollar for each dollar the Companies receive from Treasury pursuant to the PSPAs. In the event the Companies liquidate, Treasury is entitled to recover the full liquidation value of its shares before any other shareholder may recover anything.

75. While Treasury's commitment remains outstanding, Fannie and Freddie generally are prohibited from paying down amounts added to the liquidation preference due to draws from Treasury's commitment. *See* Fannie and Freddie Government Stock Certificates § 3(a). This feature of the original PSPAs would play an important role in enabling the Government to

permanently increase the size of the dividends on the Government Stock by artificially reducing the Companies' reported net worth through the accounting manipulations discussed below.

76. In addition to the liquidation preference, the original PSPAs provided for Treasury to receive either a cumulative cash dividend equal to 10% of the value of the outstanding liquidation preference or a stock dividend. If the Companies decided not to pay the dividend in cash, the value of the dividend would be added to the liquidation preference—effectively amounting to an in-kind dividend payment of additional Government Stock. After an in-kind dividend payment, the dividend rate would increase to 12% until such time as full cumulative dividends were paid in cash, at which point the rate would return to 10%. The plain terms of the PSPAs thus make clear that Fannie and Freddie never were required to pay a cash dividend to Treasury but rather had the discretion to pay dividends in kind. In other words, the Companies were never under any obligation to pay a fixed 10% cash dividend to Treasury. Moreover, there was never any risk that payment of dividends would render the Companies insolvent since it would have been illegal under state law for either Company to pay a dividend that would render it insolvent.

77. Numerous materials prove beyond any reasonable doubt that the Agencies recognized that the PSPAs were designed, as their express terms plainly provide, to allow the payment of dividends in kind—in additional senior preferred stock—rather than in cash. In an internal October 2008 email to Mario Ugoletti—who was then a Treasury official, but later moved to FHFA and was a key point of contact with Treasury in the development of the Net Worth Sweep—another Treasury official indicated that Treasury's consultant wanted to know "whether we expect [Fannie and Freddie] to pay the preferred stock dividends in cash or to just accrue the payments." Mr. Ugoletti did not forget about this feature of the PSPAs when he

moved to FHFA. Indeed, he acknowledged the option to pay dividends "in kind" in an email that he sent the very day the Net Worth Sweep was announced. In a similar vein, a document attached to a September 16, 2008, email between FHFA officials expressly states that PSPA dividends may be "paid in-kind." In an October 2008 email to Treasury and FHFA officials, a Treasury consultant sought to clarify whether Fannie and Freddie "intend[ed] to pay cash at 10 percent or accrue at 12 percent as a matter of policy." An internal Treasury document says that the dividend rate "may increase to the rate of 12 percent if, in any quarter, the dividends are not paid in cash." And an internal FHFA document says that Treasury's senior stock pays "10 percent cash dividend (12 percent payment-in-kind)."

78. Documents that the Agencies placed in the public domain also support this understanding of the payment-in-kind option. Upon entering the PSPAs Treasury released a fact sheet stating that, "[t]he senior preferred stock shall accrue dividends at 10% per year. The rate shall increase to 12% if, in any quarter, the dividends are not paid in cash . . . ." U.S. TREASURY DEP'T OFFICE OF PUB. AFFAIRS, FACT SHEET: TREASURY SENIOR PREFERRED STOCK PURCHASE AGREEMENT (Sept. 7, 2008), https://goo.gl/ynb3TC. And a presentation Treasury included in the administrative record in a case in the District of the District of Columbia acknowledges that the dividend rate of the PSPAs would be 12% "if elected to be paid in kind." Treasury Presentation to SEC, GSE Preferred Stock Purchase Agreements (PSPA), Overview and Key Considerations at 9, June 13, 2012.

79. The Companies shared this understanding of the terms of their agreements with Treasury. Fannie's and Freddie's Chief Financial Officers ("CFOs") have testified that they were aware of the payment-in-kind option. Various Freddie documents say that "[t]he dividend becomes 12% if Freddie Mac is unable to pay the dividend through organic income," that "[t]he

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senior preferred stock will pay quarterly cumulative dividends at a rate of 10% per year or 12% in any quarter in which dividends are not paid in cash," that Treasury's stock "[p]ays quarterly cumulative dividend rate at 10% per year, or 12% in any quarter in which dividends are not paid in cash," and that Treasury's stock "will pay quarterly cumulative dividends at a rate of 10% per year, or 12% in any quarter in which dividends are not paid in cash." Similarly, Fannie documents say that "Treasury's preferred stock "has an annual dividend rate of 10%, which could increase to 12% if not paid in cash," and that "[i]f at any time . . . the Company does not pay the cash dividends in a timely manner, . . . the annual dividend rate will be 12%."

80. An in-kind dividend payment would not decrease Treasury's funding commitment because only when the Companies receive "funding under the Commitment" does its size decrease. Fannie and Freddie Amended and Restated Senior Preferred Stock Purchase Agreements ("PSPA") § 1. Jeff Foster, one of the architects of the Net Worth Sweep at Treasury, accordingly has testified in a deposition that he could not identify any "problems of the circularity [in dividend payments that] would have remained had the [payment-in-kind] option been adopted." Thus, as the Congressional Research Service has acknowledged, under the PSPAs' original terms the Companies could "pay a 12% annual senior preferred stock dividend indefinitely." N. ERIC WEISS, CONG. RESEARCH SERV., RL34661, FANNIE MAE'S AND FREDDIE MAC'S FINANCIAL PROBLEMS (Aug. 10, 2012). In other words, because of the payment-in-kind option, there was no risk—none whatsoever—that the PSPAs would force Fannie and Freddie to exhaust Treasury's funding commitment to facilitate the payment of dividends.

81. The PSPAs also provided for the Companies to pay Treasury a quarterly periodic commitment fee "intended to fully compensate [Treasury] for the support provided by the ongoing Commitment." PSPA § 3.2(a). The periodic commitment fee was to be set for five-year

periods by agreement of the Companies and Treasury, but Treasury had the option to waive it for up to a year at a time. Treasury has exercised this option and has never received a periodic commitment fee under the PSPAs. Even if the fee had been charged, the Companies were always free under the express terms of the PSPAs to pay the fee in-kind with additional senior preferred stock rather than in cash. *See* PSPA § 3.2(c) ("At the election of Seller, the Periodic Commitment Fee may be paid in cash or by adding the amount thereof ratably to the liquidation preference of each outstanding share of Senior Preferred Stock . . . ."). This is a fact that Freddie's auditor recognized in a document produced in this case.

82. Finally, the PSPAs also grant Treasury substantial control over FHFA's operation of Fannie and Freddie and the conservatorships. In particular, from their inception through the adoption of the Net Worth Sweep the PSPAs provided as follows:

> From the Effective Date until such time as the Senior Preferred Stock shall have been repaid or redeemed in full in accordance with its terms:
>
> 5.1. *Restricted Payments.* Seller shall not, and shall not permit any of its subsidiaries to, in each case without the prior written consent of Purchaser, declare or pay any dividend (preferred or otherwise) or make any other distribution (by reduction of capital or otherwise), whether in cash, property, securities or a combination thereof, with respect to any of Seller's Equity Interests (other than with respect to the Senior Preferred Stock or the Warrant) or directly or indirectly redeem, purchase, retire or otherwise acquire for value any of Seller's Equity Interests (other than the Senior Preferred Stock or the Warrant), or set aside any amount for any such purpose.
>
> 5.2. *Issuance of Capital Stock*. Seller shall not, and shall not permit any of its subsidiaries to, in each case without the prior written consent of Purchaser, sell or issue Equity Interests of Seller or any of its subsidiaries of any kind or nature, in any amount, other than the sale and issuance of the Senior Preferred Stock and Warrant on the Effective Date and the common stock subject to the Warrant upon exercise thereof, and other than as required by (and pursuant to) the terms of any binding agreement as in effect on the date hereof.
>
> 5.3. *Conservatorship*. Seller shall not (and Conservator, by its signature below, agrees that it shall not), without the prior written consent of Purchaser, terminate, seek termination of or permit to be terminated the conservatorship of Seller

pursuant to Section 1367 of the FHE Act, other than in connection with a receivership pursuant to Section 1367 of the FHE Act.

5.4. *Transfer of Assets*. Seller shall not, and shall not permit any of its subsidiaries to, in each case without the prior written consent of Purchaser, sell, transfer, lease or otherwise dispose of (in one transaction or a series of related transactions) all or any portion of its assets (including Equity Interests in other persons, including subsidiaries), whether now owned or hereafter acquired (any such sale, transfer, lease or disposition, a "<u>Disposition</u>"), other than Dispositions for fair market value:

(a) to a limited life regulated entity ("<u>LLRE</u>") pursuant to Section 1367(i) of the FHE Act;

(b) of assets and properties in the ordinary course of business, consistent with past practice;

(c) in connection with a liquidation of Seller by a receiver appointed pursuant to Section 1367(a) of the FHE Act;

(d) of cash or cash equivalents for cash or cash equivalents; or

(e) to the extent necessary to comply with the covenant set forth in Section 5.7 below.[1]

5.5. *Indebtedness*. Seller shall not, and shall not permit any of its subsidiaries to, in each case without the prior written consent of Purchaser, incur, assume or otherwise become liable for (a) any indebtedness if, after giving effect to the incurrence thereof, the aggregate Indebtedness of Seller and its subsidiaries on a consolidated basis would exceed 110.0% of the aggregate Indebtedness of Seller and its subsidiaries on a consolidated basis as of June 30, 2008 or (b) any Indebtedness if such Indebtedness is subordinated by its terms to any other Indebtedness of Seller or the applicable subsidiary. For purposes of this covenant the acquisition of a subsidiary with Indebtedness will be deemed to be the incurrence of such Indebtedness at the time of such acquisition.

5.6. *Fundamental Changes*. Seller shall not, and shall not permit any of its subsidiaries to, in each case without the prior written consent of Purchaser, (i) merge into or consolidate or amalgamate with any other Person, or permit any other Person to merge into or consolidate or amalgamate with it, (ii) effect a reorganization or recapitalization involving the common stock of Seller, a reclassification of the common stock of Seller or similar corporate transaction or

[1] The Third Amendment, discussed below, added a provision to Section 5.4 permitting the Companies to sell up to $250,000,000 in assets in a single transaction without Treasury's consent.

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> event or (iii) purchase, lease or otherwise acquire (in one transaction or a series of transactions) all or substantially all of the assets of any other Person or any division, unit or business of any Person.
>
> . . .
>
> 5.8. *Transactions with Affiliates*. Seller shall not, and shall not permit any of its subsidiaries to, without the prior written consent of Purchaser, engage in any transaction of any kind or nature with an Affiliate of Seller unless such transaction is (i) Pursuant to this Agreement, the Senior Preferred Stock or the Warrant, (ii) upon terms no less favorable to Seller than would be obtained in a comparable arm's-length transaction with a Person that is not an Affiliate of Seller or (iii) a transaction undertaken in the ordinary course or pursuant to a contractual obligation or customary employment arrangement in existence as of the date hereof.
>
> PSPAs at 8–10.

83. As Freddie has observed, these covenants "restrict [the Companies'] business activities" and prevent them from taking certain actions even at the direction of FHFA "without prior written consent of Treasury."

84. On May 6, 2009, FHFA and Treasury amended the PSPAs to increase Treasury's funding commitment to each Company from $100 billion to $200 billion. On December 24, 2009—one week before Treasury's temporary statutory authority to purchase the Companies' securities expired—the agencies again amended the terms of Treasury's funding commitment. Instead of resetting the commitment at a specific dollar amount, the second amendment established a formula to allow Treasury's total commitment to each Company to exceed (but not fall below) $200 billion depending upon any net worth deficiencies experienced in 2010, 2011, and 2012, and any surplus existing as of December 31, 2012. In an action memorandum explaining the second of these two amendments, Treasury stated that the increased funding commitment was "a strong statement that the U.S. Government will make sure that the institutions continue to function" and that it was not expected that the Companies would require

any additional increase because "[i]t is unlikely that either [Company] will reach the $200 billion existing cap unless the housing market worsens sharply from here." As Treasury acknowledged in the same document, expiration of its authority to purchase the Companies' shares at the end of 2009 meant that its "ability to make further changes to the PSPAs . . . [was] constrained." Action Memorandum for Secretary Geithner at 3, 4 (Dec. 22, 2009).

The Agencies Force Accounting Changes To Increase
<u>the Companies' Draws From Treasury</u>

85. Beginning in the third quarter of 2008—when FHFA took control of the Companies as conservator—the Companies began to make wildly pessimistic and obviously unrealistic assumptions about their future financial prospects. Indeed, these assumptions would have only been accurate if the United States had suffered a catastrophic, multi-decade depression that no company, irrespective of its financial health, could have survived. These false assumptions triggered adjustments to the Companies' balance sheets, most notably write-downs of significant tax assets and the establishment of large loan loss reserves, which caused the Companies to report non-cash losses. Although reflecting nothing more than unjustifiable accounting assumptions about the Companies' future prospects and having no effect on the cash flow the Companies were generating, these non-cash losses temporarily and misleadingly decreased the Companies' reported net worth by in excess of a hundred billion dollars. For example, in the first year and a half after imposition of the conservatorship, Fannie reported $127 billion in losses, but only $16 billion of that amount reflected actual credit-related losses. These excessive non-cash losses resulted in excessive purchases of Government Stock by Treasury. Had the Companies' net worth been properly calculated under Generally Accepted Accounting Principles, their liabilities would never have exceeded their assets. In 2010, during the period when these improper accounting adjustments were being made, FHFA also decided to order the

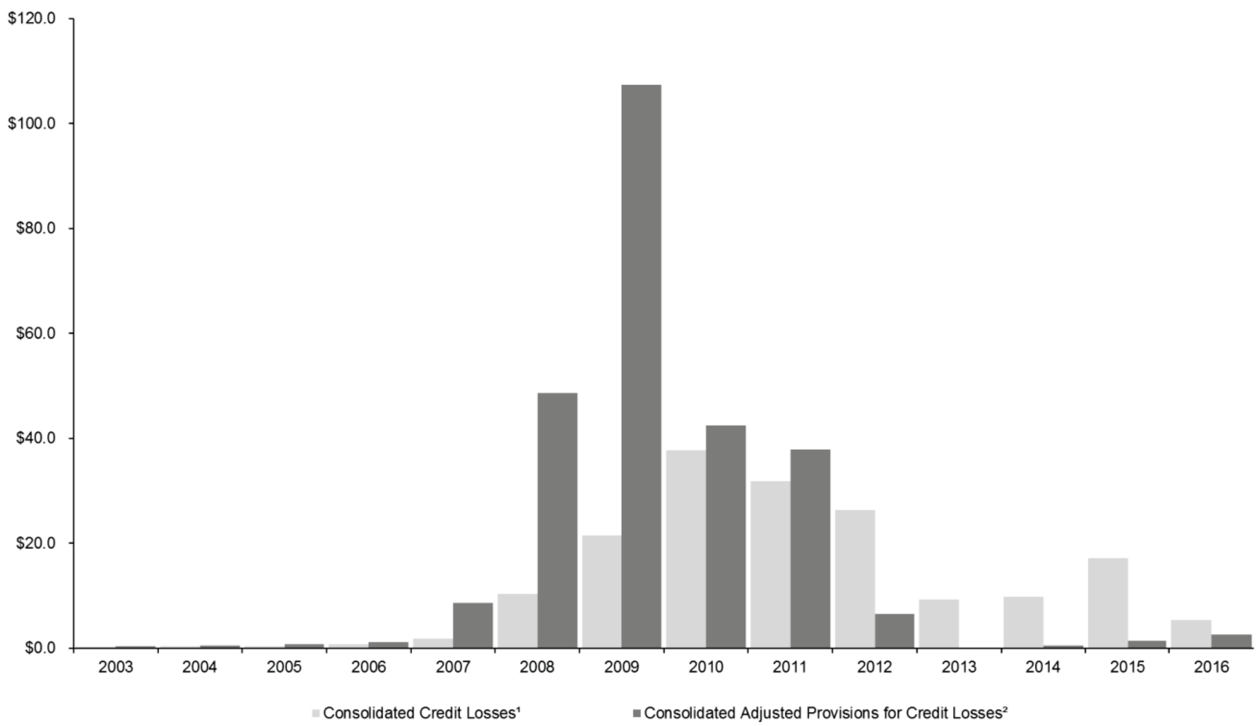
Companies to de-list their shares from the New York Stock Exchange, a decision that had no effect on the stock's underlying economic value but caused a precipitous decline in its market price.

86. By the end of 2011, the Companies' reported net worth had fallen by $100 billion as a result of the decision made shortly after imposition of the conservatorship to write down the value of their deferred tax assets. A deferred tax asset is an asset that may be used to offset future tax liability. Under Generally Accepted Accounting Principles, if a company determines that it is unlikely that some or all of a deferred tax asset will be used, the company must establish a "valuation allowance" in the amount that is unlikely to be used. In other words, a company must write down a deferred tax asset if it is unlikely to be used to offset future taxable profits. Shortly after FHFA took control of the Companies, FHFA made the implausible assumption that the Companies would *never again* generate taxable income and that their deferred tax assets were therefore worthless. That incomprehensibly flawed decision dramatically reduced the Companies' reported net worth.

87. The decision to designate excessive loan loss reserves was another important factor in the artificial decline in the Companies' reported net worth during the early years of conservatorship. Loan loss reserves are an entry on the Companies' balance sheets that reduces their reported net worth to reflect anticipated losses on the mortgages they own. Beginning when FHFA took control of the Companies in the third quarter of 2008 and continuing through 2009, the Companies were forced to provision additional loan loss reserves far in excess of the credit losses they were actually experiencing. The extent to which excess loan loss reserve provisioning reduced the Companies' reported net worth is dramatically illustrated by the following chart, which compares the Companies' loan loss reserve provisioning to their actual credit losses. As

the chart shows, FHFA caused the Companies to make grossly excessive loan loss reserve provisions in 2008 and 2009. The excessive nature of these loan loss provisions was readily apparent by 2012, and the inevitable reversals would appear as income on the Companies' balance sheet.

Loan Loss Reserve Provisions vs. Credit Expenses

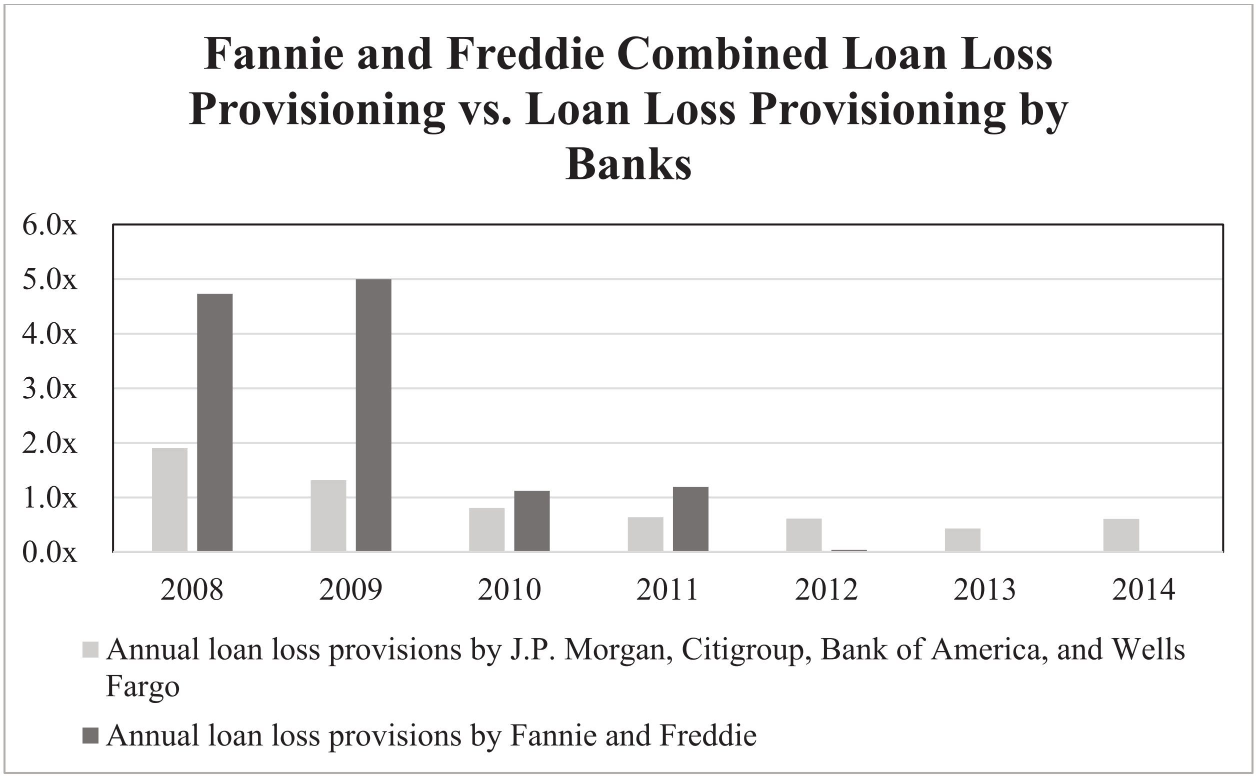


Source: Company Financials

(1) Credit losses based on net charge-offs (charge-offs less recoveries), plus foreclosed property expense. Charge-offs taken in relation to credit-impaired loans of Fannie Mae have been reversed, and replaced with ultimately realized

(2) Provisions shown include stated provisions, plus foreclosed property expense for Fannie Mae, and REO expense and Transfers for Freddie Mac. Note, stated provisions based on provisions only and excludes impact of provision reversals

88. Despite the fact that the Companies' mortgage portfolios were safer than the similar portfolios held by banks involved in the mortgage business, banks were much more accurate—and, with the consent of their regulators, far less aggressive—in reducing their net worth to reflect expected loan losses. The following chart illustrates this fact:



89. In June 2011, FHFA officials observed in an email exchange that Freddie was taking loan loss reserves in excess of what its own financial models supported but that Freddie would "face some hard questioning from FHFA" if it sought "to take down the reserves in the current clime." And in November 2011, a Treasury consultant that had reviewed Fannie financial projections previously used to justify loan loss reserve decisions observed that "actual net losses were typically lower than predicted in the optimistic and base cases . . . and far lower than forecasted in the stress cases."

90. By June of 2012, the Companies had drawn a total of $187 billion from Treasury, in large part to fill the holes in the Companies' balance sheets created by these artificial non-cash losses imposed under conservatorship. Approximately $26 billion of these combined amounts were drawn simply to pay the 10% dividend payments owed to Treasury. (In other words, FHFA requested draws to pay Treasury this $26 billion in cash that was not otherwise available rather

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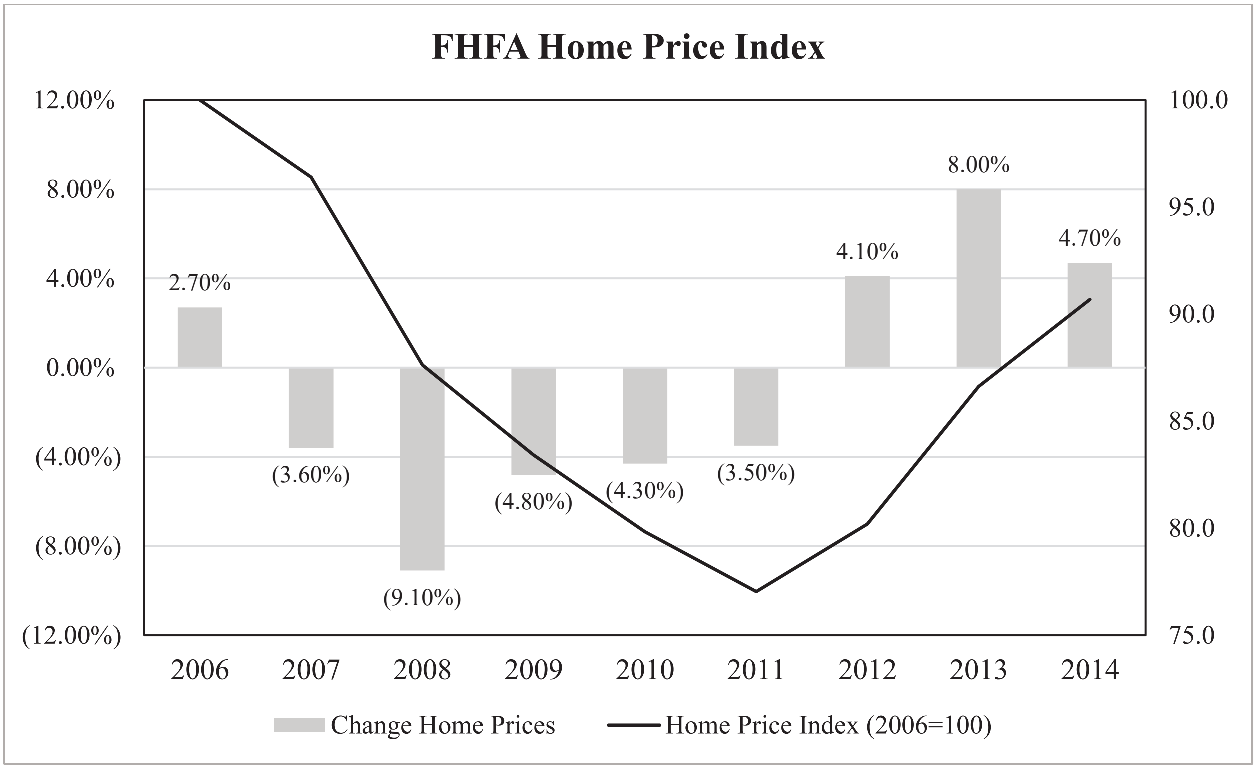
than electing to pay the dividends in kind. Had the dividends been paid in kind, FHFA would not have had to draw from—and, consequently, reduce the remaining size of—Treasury's commitment to pay them.) Thus, Treasury actually disbursed approximately $161 billion to the Companies, primarily reflecting temporary changes in the valuation estimates of assets and liabilities.

91. From the outset of the conservatorship through the imposition of the Net Worth Sweep, the Companies' net operating revenue exceeded their net operating expenses, and their actual losses were never so severe that they would have had a negative net worth but for the excessively pessimistic and unjustified treatment of deferred tax assets and loan loss reserves. In other words, despite manipulations made to the Companies' balance sheets while they were under the Government's control, they never had any difficulty paying their debts and other obligations. Over time, the Companies' cash receipts have consistently exceeded their expenses.

The Companies Return to Profitability and Stability

92. By 2012, Fannie and Freddie began generating consistent profits notwithstanding their overstated loss reserves and the write-down of their deferred tax assets. In fact, in the first two quarters of 2012, the Companies posted sizable profits totaling more than $11 billion. What is more, the Companies were well-positioned to continue generating robust profits for the foreseeable future.

93. Fannie's and Freddie's financial results are strongly influenced by home prices. And as FHFA's own Home Price Index shows, the market reached its bottom in 2011:



94. The improving housing market was coupled with stricter underwriting standards at Fannie and Freddie. As a result—and as the Agencies knew—Fannie- and Freddie-backed loans issued after 2008 had dramatically lower serious delinquency rates than loans issued between 2005 and 2008. To appreciate the significance of this point, it is useful to understand that the mortgages the Companies purchase and securitize in a given year are sometimes collectively referred to as that year's "vintage." Some vintages are more profitable than others; the Companies make more money from mortgages purchased in years when borrowers were on the whole more creditworthy and overall home prices were lower (factors that reduce the rate at which borrowers default). Although each vintage generates income for the Companies for many years (the Companies mostly purchase 30-year mortgages), it is possible to make an early assessment of how profitable a given vintage will be by examining the vintage's default rate in its first few years. In this manner, the Companies and the Agencies were able to examine the

quality of the mortgage vintages from after 2008, and by 2012 they fully understood that those newer vintages would be highly profitable.

95. The strong quality of these newer vintages of mortgages boded well for Fannie's and Freddie's future financial prospects. Indeed, as early as June 2011, a Treasury official observed that "[a]s Fannie and Freddie continue to work through their legacy book of business,"—i.e., vintages from before 2009—"the actual realized losses are expected to decline significantly." And an internal Treasury document similarly observed that the Companies' losses during the early years of conservatorship "are almost entirely attributable to loans that were originated and guaranteed before conservatorship" and that "[t]he 2006, 2007, and 2008 vintages account for over 70% of all credit losses."

96. Together, the Companies' return to robust profitability and the stable recovery of the housing market showed in early 2012 that the Companies could in time redeem Treasury's Government Stock and that value remained in their Preferred Stock and Common Stock. Indeed, a presentation sent to senior Treasury officials in February 2012 indicated that "Fannie and Freddie could have the earnings power to provide taxpayers with enough value to repay Treasury's net cash investments in the two entities." The Companies' financial performance and outlook only further improved in the ensuing months. In the weeks leading up to the Net Worth Sweep, one Treasury official observed that Freddie's second quarter 2012 results were "very positive" and a report circulated among senior FHFA officials said that the agency deserved a "high five" for the Companies' strong financial outlook.

97. As a result of Fannie's and Freddie's return to sustained profitability, it was clear that the overly pessimistic accounting decisions weighing down the Companies' balance sheets would have to be reversed. Indeed, by early August 2012, the Agencies knew that Fannie and

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Freddie were poised to generate massive profits well in excess of the Companies' dividend obligations to Treasury—profits that would make the $11 billion the Companies generated in the first half of 2012 look small by comparison.

98. By August 2012, the Agencies knew that the Companies' reserves for loan losses far exceeded their actual losses. These excess loss reserves artificially depressed the Companies' net worth, and reversing them would increase the Companies' net worth accordingly. Indeed, on July 19, 2012, a Treasury official observed that the release of loan loss reserves could "increase the [Companies'] net [worth] substantially." A Treasury document from early August 2012 likewise stated that the Companies were about to report "[r]ecord earnings" that would be "driven by [a] large credit loss reserve release." And the Agencies were focused on this issue. An internal briefing memorandum prepared for Under Secretary Miller in advance of August 9, 2012 meetings with Fannie and Freddie executives reveals that the number one question Treasury had for the Companies was "how quickly they forecast releasing credit reserves." And a handwritten note on a presentation from the August 9 meeting with Freddie says to "expect material release of loan loss reserves in the future." FHFA also knew that loan loss reserve releases would boost the Companies' profits going forward, as FHFA officials attended a meeting of Freddie's Loan Loss Reserve Governance Committee on August 8, 2012. FHFA's knowledge of the status of the Companies' loan loss reserves is also dramatically illustrated by a July 2012 FHFA presentation showing that starting in 2008 the Companies had set aside loan loss reserves far in excess of their actual losses. [redacted]

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99. Another principal driver of the outsized profits that the Companies would inevitably generate was the mandated release of the Companies' deferred tax assets valuation allowances. By mid-2012, Fannie and Freddie had combined deferred tax assets valuation allowances of nearly $100 billion. Under relevant accounting rules, those valuation allowances would have to be reversed if the Companies determined that it was more likely than not that they would generate taxable income and therefore be able to use their deferred tax assets. The Treasury Department was intimately familiar with these issues, having seen such a reversal in February 2012 in connection with its massive investment in AIG. In 2011, it was also known within Fannie that the valuation allowance would be reversed; the only question was the timing.

100. [redacted]

101. The Companies' improved prospects came into even sharper focus on August 9, 2012, when Under Secretary Miller and other senior Treasury officials had meetings with the senior executives of both Fannie and Freddie. During the meeting with Fannie's management, Treasury was presented with ten-year projections showing the Company earning an average of more than $11 billion per year from 2012 through 2022 and having over $116 billion left of

Treasury's funding commitment at the end of that time period. Those projections are reproduced below:

Annual Detail of Cumulative Dividends and SPSPA Draws

Fannie Mae

($ in Billions)	2008-2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Comprehensive Income		11.6	7.5	11.0	12.5	13.9	13.2	12.2	11.4	10.9	10.5	10.5
Preferred Dividend Payment	19.8	11.6	11.8	12.1	12.2	12.2	12.2	12.2	12.2	12.2	12.3	12.5
Residual Equity	0.0	0.0	0.0	0.0	0.2	1.8	2.8	2.7	1.9	0.5	0.0	0.0
Cumulative Dividends	19.8	31.4	43.2	55.3	67.6	79.8	92.1	104.3	116.6	128.8	141.1	153.6
Cumulative SPSPA Draws	(116.1)	(116.1)	(119.0)	(121.2)	(121.5)	(121.5)	(121.5)	(121.5)	(121.5)	(121.5)	(122.9)	(124.3)
Cumulative Dividends Less Draws	*(96.3)*	*(84.7)*	*(75.8)*	*(65.9)*	*(53.9)*	*(41.7)*	*(29.4)*	*(17.2)*	*(4.9)*	*7.3*	*18.3*	*28.8*
SPSPA Funding Cap	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9
Remaining Funding under SPSPA	124.8	124.8	122.0	119.7	119.5	119.5	119.5	119.5	119.5	119.5	118.1	116.1

Note: 2012-2016 figures from Fannie Mae July BOD corporate forecast. 2017-2022 figures are based on simplifying assumptions derived from trends observed within the 2012-2016 horizon.

Freddie Mac

($ in Billions)	2008-2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Comprehensive Income		11.6	7.5	8.2	8.6	9.0	8.7	8.3	7.7	7.1	6.7	6.5
Preferred Dividend Payment	16.3	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4
Residual Equity	0.0	0.0	0.4	1.7	3.5	5.6	6.9	7.9	8.1	7.9	7.2	6.3
Cumulative Dividends	16.3	23.7	31.1	38.4	45.8	53.2	60.6	68.0	75.4	82.8	90.2	97.6
Cumulative SPSPA Draws	(72.2)	(116.1)	(73.0)	(73.0)	(73.0)	(73.0)	(73.0)	(73.0)	(73.0)	(73.0)	(73.0)	(73.0)
Cumulative Dividends Less Draws	*(55.9)*	*(92.4)*	*(41.9)*	*(34.5)*	*(27.1)*	*(19.7)*	*(12.3)*	*(4.9)*	*2.5*	*9.9*	*17.3*	*24.7*
SPSPA Funding Cap	220.5	221.3	221.3	221.3	221.3	221.3	221.3	221.3	221.3	221.3	221.3	221.3
Remaining Funding under SPSPA	148.3	105.2	148.3	148.3	148.3	148.3	148.3	148.3	148.3	148.3	148.3	148.3

Note: 2012-2022 figures are based on simplifying assumptions derived from Fannie Mae forecast trends and observed relationships between key Fannie Mae and Freddie Mac performance metrics. Reported 2011 results re-aligned as necessary to correspond to Fannie Mae management reporting.

Note: Numbers may not foot due to rounding

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102. Furthermore, Treasury learned that Fannie's near-term earnings likely would be even higher than those in the projections due to the release of the Companies' deferred tax assets valuation allowance. During the August 9 meeting, Fannie CFO Susan McFarland informed Treasury that the criteria for reversing the deferred tax assets valuation allowance could be met

in the not-so-distant future. And when asked for more specifics by Under Secretary Miller, Ms. McFarland stated that the reversal would be probably in the $50-billion range and probably sometime mid-2013, an assessment that proved remarkably accurate.

103. Like Treasury, FHFA was in possession of information showing that the Companies would soon generate substantial profits, thus making it inevitable that they would release their deferred tax asset valuation allowances. On July 13, 2012, Bradford Martin, Principal Advisor in FHFA's Office of Conservatorship Operations, broadly circulated within FHFA minutes from a July 9, 2012 Fannie executive management meeting. The recipients of the email included Acting Director DeMarco and Mr. Ugoletti. The minutes stated that Fannie Treasurer David Benson "referred to the next 8 years as likely to be 'the golden years of GSE earnings.' " Projections substantially similar to those shared with Treasury on August 9 were attached to the email containing the following slide:

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Verification and Review in Progress

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Annual view of net "repayment" to the US Government

Fannie Mae

($ in billions)

	2008-2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Comprehensive Income		11.2	7.4	11.0	12.4	13.8	12.9	12.2	11.6	11.2	10.9	11.2
Preferred Dividend Payment	19.8	11.6	11.8	12.1	12.2	12.2	12.1	12.1	12.1	12.1	12.2	12.2
Residual Equity	0.0	0.0	0.0	0.0	0.2	1.8	2.5	2.5	2.0	1.0	0.0	0.0
Cumulative Dividends	19.8	31.4	43.2	55.3	67.6	79.8	92.0	104.1	116.3	128.4	140.6	152.8
Cumulative Infusion	(116.1)	(116.1)	(119.0)	(121.2)	(121.5)	(121.5)	(121.5)	(121.5)	(121.5)	(121.5)	(121.7)	(122.7)
Net "Repayment" to Gov't	*(96.3)*	*(84.7)*	*(75.8)*	*(65.9)*	*(53.9)*	*(41.7)*	*(29.5)*	*(17.4)*	*(5.2)*	*6.9*	*18.9*	*30.1*
SPSPA Funding Cap	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9
Remaining Funding under SPSPA	124.8	124.8	122.0	119.7	119.5	119.5	119.5	119.5	119.5	119.5	119.3	118.3

Combined GSE "repayment" could occur in 2020

Freddie Mac

($ in billions)

	2008-2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Comprehensive Income		7.3	8.1	8.9	9.4	9.8	10.2	9.8	9.4	9.1	8.9	9.0
Preferred Dividend Payment	16.3	7.2	7.2	7.2	7.2	7.2	7.2	7.2	7.2	7.2	7.2	7.2
Residual Equity	0.0	3.1	4.5	6.6	9.2	12.2	15.2	17.7	19.9	21.8	23.4	25.2
Cumulative Dividends	16.3	23.5	30.8	38.0	45.2	52.5	59.7	66.9	74.1	81.4	88.6	95.8
Cumulative Infusion	(72.2)	(72.3)	(72.3)	(72.3)	(72.3)	(72.3)	(72.3)	(72.3)	(72.3)	(72.3)	(72.3)	(72.3)
Net "Repayment" to Gov't	*(55.9)*	*(48.8)*	*(41.6)*	*(34.3)*	*(27.1)*	*(19.9)*	*(12.6)*	*(5.4)*	*1.8*	*9.1*	*16.3*	*23.5*
SPSPA Funding Cap	220.5	220.6	220.6	220.6	220.6	220.6	220.6	220.6	220.6	220.6	220.6	220.6
Remaining Funding under SPSPA	148.3	148.3	148.3	148.3	148.3	148.3	148.3	148.3	148.3	148.3	148.3	148.3

Our approach is analogous to analyses by Moody's, OMB, and Millstein.

Note: Numbers may not foot due to rounding

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104. Those projections expressly stated the assumption that Fannie would not be paying taxes because it would be using its deferred tax assets—and if Fannie was expecting to use its deferred tax assets, it would have to release the valuation allowance it had established for them. FHFA knew this; indeed, FHFA accountants were monitoring the Companies' deferred tax assets situation, and FHFA knew that the Companies' audit committees were assessing the status of the valuation allowances on a quarterly basis. Indeed, in an August 14, 2012 email, an FHFA official indicated that both Companies had discussed the issue of "re-recording certain deferred tax assets that had been written off" during their most recent Board meetings "based on the view that they were going to be profitable going forward." In addition, Ms. McFarland testified that in July 2012 she would have mentioned the potential release of the valuation allowance at a Fannie executive committee meeting attended by at least one FHFA official, and she also testified that

FHFA was on notice of the statement she made to Under Secretary Miller on August 9, 2012 regarding the potential release of the valuation allowance.

105. Rather than acknowledging the projections just discussed, the Government has instead sought to support the Net Worth Sweep by pointing to other financial projections that its own documents show were outdated and unreliable by August 2012. In other litigation, the Government has relied on a set of "June 13, 2012" projections that discovery in this case revealed were taken verbatim from projections prepared by Treasury consultant Grant Thornton in November 2011 using data from September 2011. Although not as positive as the more updated projections discussed above, the Grant Thornton analysis projected combined profits at the Companies of over $20 billion in 2014, with annual profits then gradually declining to a long-term figure of about $13.5 billion. Profits of this magnitude necessarily would have led to the reversal of the valuation allowances. And Treasury took notice. Hand-written notes on a Grant Thornton document produced by Treasury displaying Freddie's results through the first quarter of 2012 anticipate that Freddie could release its valuation allowance "probably [in] 2013, 2014." The agenda for a meeting indicates that by May 2012 Treasury and Grant Thornton were discussing "[r]eturning the deferred tax asset to the GSE balance sheets" and that Treasury planned to discuss this issue with FHFA and the Companies in early June. And a Grant Thornton document sent to Treasury on June 29, 2012 recognizes that two "key issues" for determining the value of Treasury's investment in 2012 were "whether and when the GSEs will return their deferred tax assets to their balance sheets" and "whether and when the GSEs will become taxpaying entities."

106. By August 2012, it was apparent that the Grant Thornton projections based on data from September 2011 drastically underestimated Fannie's and Freddie's earning capacity.

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The manager of Grant Thornton's valuation services to Treasury, Anne Eberhardt, admitted in a deposition that the projections based on September 2011 data were no longer valid 11 months later, and Fannie's Chief Financial Officer, the highest ranking and responsible financial expert at the Company, Susan McFarland, has testified that it was particularly important to have fresh financial forecasts at that time. Mr. Ugoletti and Ms. Eberhardt likewise have testified to the importance of using up-to-date financial information, and Mr. DeMarco testified that FHFA as conservator was "constantly responding to a changing economic environment." And as Mr. DeMarco also testified, one change that took place between September 2011 and mid-August 2012 "was strengthening in the housing market." Mr. Ugoletti also has admitted that FHFA's own projections consistently were overly pessimistic leading up to August 2012. Treasury and FHFA therefore knew that Fannie and Freddie were poised to be even more profitable than Grant Thornton had projected in 2011.

107. In other litigation, the Government has also relied on a set of financial projections sent to Secretary Geithner on June 6, 2012, that showed that starting in 2018 Fannie would report only $4.1 billion in comprehensive income per year. [redacted]

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[redacted]

108. In sum, by August 2012 the Agencies knew that Fannie and Freddie were poised to add tens of billions of dollars of deferred tax assets to their balance sheets and to reverse billions of dollars of loan loss reserves. Thanks to these inevitable accounting decisions, coupled with Fannie's and Freddie's strong earnings from their day-to-day operations, the Companies anticipated that they would be able to pay their 10% dividends to Treasury without drawing on Treasury's funding commitment in the future, and dividend payments on the Government Stock did not threaten to erode Treasury's unused funding commitment.

109. In addition to the release of loan loss reserves and deferred tax assets valuation allowances, Fannie and Freddie also had sizeable assets in the form of claims and suits brought by FHFA as conservator relating to securities law violations and fraud in the sale of private-label securities to Fannie and Freddie between 2005 and 2007. In 2013 and 2014, the Companies recovered over $18 billion from financial institutions via settlements of such claims and suits. The Companies, FHFA, and Treasury knew in August 2012 that the Companies would reap substantial profits from such settlements.

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FHFA and Treasury Amend the PSPAs To Expropriate Private Shareholders' Investment and Ensure Fannie and Freddie Cannot Exit Conservatorship

110. With Fannie's and Freddie's return to consistent and indeed record profitability, the holders of the Companies' Preferred Stock and Common Stock had reason to believe and expect that they would in time receive a return on their investment. Moreover, the Companies' return to profitability led to a reasonable expectation that they would eventually be healthy enough to redeem Treasury's Government Stock, exit conservatorship, and be "return[ed] to normal business operations," as FHFA's Director had vowed when the conservatorship was created.

111. These reasonable and realistic expectations were short-lived, however, not because of any change in the outlook for the housing market or broader economy, nor because of any change in the financial performance of Fannie or Freddie, but rather because of the Government's own self-dealing.

112. On August 17, 2012, within days after the Companies had announced their return to profitability and just as it was becoming clear that they had regained the earnings power to redeem Treasury's Government Stock and exit conservatorship, the Agencies unilaterally amended the PSPAs for a third time.

113. The centerpiece of this "Third Amendment" was the Net Worth Sweep. The Net Worth Sweep fundamentally changed the nature of Treasury's investment in the Companies. Instead of quarterly dividend payments at an annual rate of 10% (if paid in cash) or 12% (if paid in kind) of the total amount of Treasury's liquidation preference, the Net Worth Sweep entitles Treasury to *all—100%*—of the Companies' existing net worth and future profits. Beginning January 1, 2013, the Companies have been required to pay Treasury a quarterly dividend equal to their *entire net worth*, minus a capital reserve amount that starts at $3 billion and decreases to $0

by January 1, 2018. (In December 2017, FHFA and Treasury amended the PSPAs a fourth time to reset the capital reserve amount to $3 billion beginning in the first quarter of 2018. This change does not materially affect the claims in this litigation.)

114. The Companies did not receive any meaningful consideration for the imposition of the Net Worth Sweep. Because the Companies always had the option to pay dividends "in kind" at a 12% interest rate, the Net Worth Sweep did not provide the Companies with any additional flexibility or benefit.

115. To be sure, the Net Worth Sweep provides that the Companies will not have to pay a periodic commitment fee under the PSPAs while the Net Worth Sweep is in effect. But Treasury had consistently waived the periodic commitment fee before the Net Worth Sweep, and it could only set the amount of such a fee with the agreement of the Companies and at a market rate. And that rate likely would have been, at most, a small fraction of the outstanding amount of Treasury's commitment. Freddie forecasted its "sensitivity" to imposition of a periodic commitment fee as follows: "Our sensitivity to a commitment fee based on remaining commitment available beginning in 2013 of $149 billion shows that a 25 bps fee results in a $0.4 billion annual impact on Stockholders' Equity." Further, the purpose of the fee was to compensate Treasury for its ongoing support in the form of the commitment to invest in the Companies' Government Stock. By the time of the Net Worth Sweep, the 10% return on the Government Stock and the warrants for 79.9% of the common stock provided a more than adequate return on the government's stand-by commitment, and thus any additional fee would have been inappropriate. In August of 2012, the Companies had returned to stable profitability and were no longer drawing from Treasury's commitment. Given the Companies' return to profitability, the market rate for the periodic commitment fee in 2012 and after would have been

zero. Finally, even if a market-rate fee had been agreed between Treasury and FHFA and imposed pursuant to the PSPA, the Companies had sufficient market power to pass the entire amount of this fee through to their customers—as the Companies do for other operating and financing costs—without affecting profitability or the value of the Companies' equity securities.

116. The Net Worth Sweep has had far-reaching effects. These effects were intended and anticipated by FHFA and Treasury, and the Agencies adopted the Net Worth Sweep in furtherance of their policy objectives as agencies of the federal government.

117. First, the Net Worth Sweep eliminated entirely the economic interests in Fannie and Freddie held by the Companies' private shareholders. The quarterly sweep of the Companies' net worth ensures that there never will be sufficient funds for the Companies to pay a dividend to private shareholders. It also ensures that private shareholders will receive nothing in the event of liquidation, as Treasury's Government Stock entitles it to an additional dividend payment *plus* its liquidation preference in the event of liquidation. Government Stock Certificate § 8. The dividend payment will leave Fannie and Freddie with negligible capital well shy of the Government's nearly $200 billion liquidation preference, guaranteeing that there will be nothing left for private shareholders. In light of this reality, it is not surprising that, as FHFA's Mr. Ugoletti observed, "the preferred stock got hammered the day the Net Worth Sweep was announced." Similarly, after the imposition of the Net Worth Sweep, Mr. Lockhart—FHFA's former Director—told a reporter that the Companies' privately-owned stock "is worthless and should be worthless."

118. Upon its announcement, Treasury emphasized that the Net Worth Sweep would ensure that "every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers." Press Release, U.S. Dep't of the Treasury, Treasury Department Announces

Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012), https://goo.gl/NDAKhQ. The necessary corollary to this, of course, is that nothing would be left for private shareholders. Unbeknownst to the public, this was a long-term Treasury goal. Indeed, as early as December 2010, an internal Treasury memorandum acknowledged the "Administration's commitment to ensure existing common equity holders will not have access to any positive earnings from the [Companies] in the future." Action Memorandum for Secretary Geithner at 2 (Dec. 20, 2010).

119. FHFA shared Treasury's goal of advancing the Government's interests and ensuring that private shareholders would not benefit from their stock ownership. In its 2012 report to Congress, for example, FHFA explained that the Net Worth Sweep "ensures all the [Companies'] earnings are used to benefit taxpayers." FHFA, REPORT TO CONGRESS: 2012 at 1 (June 13, 2013), https://goo.gl/ocyB9J. And while FHFA had earlier resolved to operate Fannie and Freddie with a view toward "minimiz[ing] losses on behalf of taxpayers," A STRATEGIC PLAN FOR ENTERPRISE CONSERVATORSHIPS at 7, the Net Worth Sweep indicates that the agency in fact is operating them to maximize taxpayer profits at the expense of private shareholders. Director Watt summed up the situation succinctly when stating that he does not "lay awake at night worrying about what's fair to the shareholders" but rather focuses on "what is responsible for the taxpayers." C-SPAN, Newsmakers with Mel Watt, at 9:00-9:27 (May 16, 2014), http://goo.gl/s3XWqi. Consistent with this understanding of FHFA's goals, it stated that the Net Worth Sweep was intended to "fully capture financial benefits for taxpayers."

120. Second, the Net Worth Sweep not only destroyed the economic interests of Fannie's and Freddie's private shareholders but also transferred their interests to the federal government, resulting in Fannie and Freddie being wholly nationalized entities. As a Staff

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Report from the Federal Reserve Bank of New York acknowledged, the Net Worth Sweep "effectively narrows the difference between conservatorship and nationalization, by transferring essentially all profits and losses from the firms to the Treasury." W. Scott Frame, et al., *The Rescue of Fannie Mae and Freddie Mac* at 21, FED. RES. BANK OF N.Y. STAFF REP., no. 719 (Mar. 2015), https://goo.gl/DKBlQ1. Fortune similarly has reported that the Net Worth Sweep "effectively nationalized" the Companies. Indeed, the Government itself has stated in a brief in another case that an "interest in residual profits is the defining feature of an equity interest in a corporation." Reply Brief of the United States at 24, *Starr Int'l Co. v. United States*, No. 15-5103 (Fed. Cir. June 1, 2016). After the Net Worth Sweep, Treasury has the right to all residual profits, and it hence owns all the equity. All other equity interests have been eliminated.

121. Third, the nationalization effected by the Net Worth Sweep has enriched the federal government to the tune of ***$124 billion*** to date. As the Agencies anticipated, Fannie and Freddie have been extraordinarily profitable since the imposition of the Net Worth Sweep. From the third quarter of 2012 through the fourth quarter of 2017, Fannie and Freddie have reported total comprehensive income of $134 billion and $91 billion, respectively—numbers that include the release of the Companies' deferred tax assets valuation allowances, which in 2013 added over $50 billion and $20 billion to Fannie's and Freddie's earnings, respectively. The Companies' staggering net worth in 2013, 2014, and all subsequent years has been no higher than the Agencies anticipated when they imposed the Net Worth Sweep in August 2012.

122. Because of Fannie's and Freddie's tremendous profitability, the Net Worth Sweep dividend payments to Treasury have been enormous, as the following chart demonstrates:

Dividend Payments Under the Net Worth Sweep
(in billions)

		Fannie	Freddie	Combined
2013	Q1	**$4.2**	**$5.8**	**$10.0**
	Q2	**$59.4**	**$7.0**	**$66.4**
	Q3	**$10.2**	**$4.4**	**$14.6**
	Q4	**$8.6**	**$30.4**	**$39.0**
2014	Q1	**$7.2**	**$10.4**	**$17.6**
	Q2	**$5.7**	**$4.5**	**$10.2**
	Q3	**$3.7**	**$1.9**	**$5.6**
	Q4	**$4.0**	**$2.8**	**$6.8**
2015	Q1	**$1.9**	**$0.9**	**$2.8**
	Q2	**$1.8**	**$0.7**	**$2.5**
	Q3	**$4.4**	**$3.9**	**$8.3**
	Q4	**$2.2**	**$0.0**	**$2.2**
2016	Q1	**$2.9**	**$1.7**	**$4.6**
	Q2	**$0.9**	**$0.0**	**$0.9**
	Q3	**$2.9**	**$0.9**	**$3.8**
	Q4	**$3.0**	**$2.3**	**$5.3**
2017	Q1	**$5.5**	**$4.5**	**$10.0**
	Q2	**$2.8**	**$2.2**	**$5.0**
	Q3	**$3.1**	**$2.0**	**$5.1**
	Q4	**$0.7**	**$2.3**	**$3.0**
2018	Q1	**$0.0**	**$0.0**	**$0.0**
Total		**$135.1**	**$88.6**	**$223.7**

123. As the above chart shows, the Companies have paid Treasury $223.7 billion in "dividends" under the Net Worth Sweep. Had they instead been paying 10% cash dividends, they

would have paid Treasury $99.5 billion by the end of the first quarter of 2018. The Government has thus profited from the Net Worth Sweep by $124 billion.

124. The chart above also shows that the Companies' dividend obligations in the fourth quarter of 2017 and first quarter of 2018 totaled $3.0 billion. But this is not in any way a sign that the Companies are in distress or that they are no longer positioned to generate large profits. In the third quarter of 2017, the Companies generated $7.7 billion of comprehensive income, and under the Net Worth Sweep that total was the dividend due in the fourth quarter. Before that dividend was paid, however, Treasury and FHFA agreed that the Companies could each retain $2.4 billion, and, as noted above, that moving forward the capital buffer under the sweep would be $3 billion, rather than decreasing to $0 in 2018. This "Fourth Amendment" does not affect the substance of Plaintiffs' claims in this litigation. Indeed, FHFA and Treasury specified that the liquidation preference of Treasury's stock in each company would be increased by $3.0 billion, making clear that the capital buffer ultimately would benefit Treasury, not private shareholders.

125. In the fourth quarter of 2017, Fannie and Freddie were required to write down the value of their deferred tax assets to account for the recent decrease in the corporate income tax rate. This write-down decreased their comprehensive income for the quarter by $15.3 billion. Thus, instead of reporting comprehensive income of $5.3 billion, the Companies reported a comprehensive loss of $10 billion, and they announced that they will be requesting a $4 billion draw from Treasury's commitment. This one-time event does not change the Companies' underlying profitability and, in fact, moving forward the decrease in the tax rate enhances the Companies' outlook.

126. Another way to gauge the financial impact of the Net Worth Sweep is to compare it to what would have happened had the Companies instead been allowed to use their quarterly

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profits above Treasury's 10% dividend to partially retire Treasury's senior preferred stock. In that alternative scenario, Treasury's remaining investment in Freddie would have been fully redeemed in 2017. Indeed, Freddie has paid Treasury $6.3 billion *more* than the amount needed to redeem the Government Stock completely. Similarly, had Fannie been allowed to use its profits in excess of Treasury's original 10% dividend to partially redeem the Government Stock, the remaining liquidation preference on that stock would today stand at only $2.1 billion. Furthermore, given the Companies' strong financial condition when the Net Worth Sweep was announced and the very low interest rates that prevailed at the time, the Companies could have used debt and equity markets to obtain additional capital at a rate far lower than the 10% cash or 12% in kind rate mandated by the original terms of the Government Stock.

127. The Net Worth Sweep has become a major revenue source for the United States Government. Indeed, the federal government's record-breaking $53.2 billion surplus for the month of December 2013 was driven in large part by the $39 billion swept from Fannie and Freddie.

128. These massive influxes of cash began to arrive just when the government was confronting the statutory debt ceiling and accompanying political deadlock. *See* Jody Shenn & Ian Katz, *Fannie Mae Profit May Swell Treasury Coffers as Debt Limit Looms*, Bloomberg (Apr. 8, 2013), http://www.bloomberg.com/news/articles/2013-04-08/fannie-mae-profit-may-swell-treasury-coffers-as-debt-limit-looms. And because they were characterized as "dividends," and not a redemption of Treasury's Stock, the Pay It Back Act allowed the cash to be used for the government's general operating expenses rather than only for debt reduction. *See* 12 U.S.C. § 1719(g)(2); 12 U.S.C. § 1455(*l*)(2); 12 U.S.C. § 1455 note.

129. All told, Fannie has requested $119.8 billion in draws from Treasury under the PSPAs, and Treasury has recouped a total of $166.4 billion from Fannie in the form of purported "dividends." Freddie has requested $71.6 in draws from Treasury under the PSPAs, and Treasury has recouped a total of $112.4 billion from Freddie in the form of purported "dividends." Combined, Fannie and Freddie have paid Treasury approximately $87 billion more than they have received.

130. As explained above, when entering the Net Worth Sweep FHFA and Treasury knew that the Companies were poised to generate earnings well in excess of 10% dividend payments, and they therefore knew that the Net Worth Sweep would be profitable for the federal government. It is thus not surprising that a document prepared for internal Treasury consumption and dated August 16, 2012 listed the Companies' "improving operating performance" and the "potential for near-term earnings to exceed the 10% dividend" as reasons for "putting in place a better deal for taxpayers" by promptly adopting the Net Worth Sweep. Another Treasury document emphasized that the Net Worth Sweep would put the taxpayer "in a better position" because rather than having "Treasury's upside . . . capped at the 10% dividend, now the taxpayer will be the beneficiary of any future earnings produced by the GSEs." Additional Treasury communications indicate that the Agency anticipated that Treasury's receipts under the Net Worth Sweep "will likely exceed the amount that would have been paid if the 10% was still in effect" and that the Net Worth Sweep would lead to "a better outcome" for Treasury.

131. Fourth, the Net Worth Sweep guarantees that Fannie and Freddie can never be rehabilitated to a sound and solvent condition, and it positions them to be wound down and eliminated. The Net Worth Sweep makes the Companies unique in financial regulation. All other financial institutions are required to retain minimum levels of capital that ensure that they can

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withstand the vicissitudes of the economic cycle and are prohibited from paying dividends when they are not adequately capitalized. The FDIC's Risk Management Manual of Examination Policies explains why capital is critical to any financial institution: "It absorbs losses, promotes public confidence, helps restrict excessive asset growth, and provides protection to [market participants]." For this reason, in all other contexts financial regulators work to ensure that financial institutions maintain minimum capital levels.

132. The Companies, in contrast, are not allowed to retain capital but instead must pay nearly their entire net worth over to Treasury as a quarterly dividend. In other words, whereas other financial institutions are subject to *minimum* capital standards, the Net Worth Sweep makes the Companies subject to a capital *maximum*—any amount of retained capital that they hold in excess of a small capital buffer is swept to Treasury on a quarterly basis. The effect of the Net Worth Sweep is thus to force the Companies to operate in perpetuity on the brink of insolvency and to prohibit them from operating in a safe and sound manner. Indeed, HERA itself recognizes that a fundamental aspect of the Companies' soundness is the "maintenance of adequate capital." 12 U.S.C. § 4513(a)(1)(B)(i). Director Watt has expressed the same view, describing the Companies' inability to build capital reserves under the Net Worth Sweep as a "serious risk" that erodes investor confidence in the Companies because they have "no ability to weather quarterly losses." Indeed, the fact that the Companies were required to take a draw because of a tax cut demonstrates the perversity of the Government's decision to strip the Companies of their capital.

133. The timing of the Net Worth Sweep was driven by the Companies' return to profitability. [redacted]

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[redacted] Notwithstanding the Agencies' statutory duties, the Administration had decided that Fannie and Freddie would be wound down and would *not* be allowed to exit conservatorship in their current form. Allowing Fannie and Freddie to rebuild their capital levels, however, would make that political decision more difficult to explain and sustain. The Economist stated the obvious in reporting that the Net Worth Sweep "squashe[d] hopes that [Fannie and Freddie] may ever be private again." *Back to Black*, THE ECONOMIST (Aug. 25, 2012), http:goo.gl/1PHMs.

134. Treasury openly proclaimed that the Net Worth Sweep would "expedite the wind down of Fannie Mae and Freddie Mac." Press Release, U.S. Dep't of the Treasury, Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012), https://goo.gl/NDAKhQ. Indeed, Treasury emphasized that the Net Worth Sweep would ensure that the Companies "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." *Id*.

135. FHFA Acting Director Edward DeMarco similarly informed a Senate Committee that the "recent changes to the [PSPAs], replacing the 10 percent dividend with a net worth sweep, reinforce the notion that the [Companies] will not be building capital as a potential step to regaining their former corporate status." Edward J. DeMarco, Acting Director, FHFA, Statement

Before the U.S. Sen. Comm. on Banking, Housing & Urban Affairs (Apr. 18, 2013), https://goo.gl/oxdMc6. And in its 2012 report to Congress, FHFA explained that it had begun "prioritizing [its] actions to move the housing industry to a new state, one without Fannie Mae and Freddie Mac." FHFA, REPORT TO CONGRESS: 2012 at 13 (June 13, 2013), https://goo.gl/ocyB9J. The Net Worth Sweep thus "reinforces the fact that the [Companies] will not be building capital." *Id.* at 1, 13.

136. As a result of the Net Worth Sweep, it is clear that FHFA will not allow Fannie and Freddie to exit conservatorship but rather will continue to operate them essentially as wards of the state, unless and until Congress takes action. Indeed, FHFA's website states that "FHFA will continue to carry out its responsibilities as Conservator" until "Congress determines the future of Fannie Mae and Freddie Mac and the housing finance market." *FHFA as Conservator of Fannie Mae and Freddie Mac*, FHFA, http://goo.gl/PjyPZb. This is consistent with the testimony of former Acting Director DeMarco, who stated that he had no intention of returning Fannie and Freddie to private control under charters he perceived to be "flawed." Mr. Ugoletti also testified that FHFA's objective "was not for Fannie and Freddie Mac to emerge from conservatorship."

137. This understanding of the purpose of the Net Worth Sweep is further supported by the testimony of Ms. McFarland, Fannie's CFO at the time. She believed that the Agencies imposed the Net Worth Sweep in response to what she told Treasury on August 9, and she thought its purpose "was probably a desire not to allow capital to build up within the enterprises and not to allow the enterprises to recapitalize themselves." According to Ms. McFarland, Fannie "didn't believe that Treasury would be too fond of a significant amount of capital buildup inside the enterprises."

138. Communications involving White House official Jim Parrott provide further proof that the Net Worth Sweep was intended to advance the policy objectives discussed above. At the time of the Net Worth Sweep, Mr. Parrott was a senior advisor at the National Economic Council, where he led a team of advisors charged with counseling President Obama and the cabinet on housing issues. He worked closely with Treasury in the development and rollout of the Net Worth Sweep. Indeed, the day after the Net Worth Sweep was announced, he emailed Treasury officials congratulating them on achieving an important policy goal: "Team Tsy, You guys did a remarkable job on the PSPAs this week. You delivered on a policy change of enormous importance that's actually being recognized as such by the outside world . . . , and as a credit to the Secretary and the President. It was a very high risk exercise, which could have gone sideways on us any number of ways, but it didn't." What Treasury had accomplished, Mr. Parrott's emails make clear, was maximizing Treasury's profits and guaranteeing that Fannie and Freddie would be unable to rebuild capital and escape conservatorship:

- In an August 13, 2012 email, Parrott wrote that "[w]e are making sure that each of these entities pays the taxpayer back every dollar of profit that they make, not just a 10% dividend," and that "[t]he taxpayer will thus ultimately collect more money with the changes."
- In an email to a Treasury official on the day the Net Worth Sweep was announced, Mr. Parrott stated that "we've closed off [the] possibility that [Fannie and Freddie] ever[] go (pretend) private again."
- That same day, Mr. Parrott received an email from a market analyst stating that the Net Worth Sweep "should lay to rest permanently the idea that the outstanding privately held

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pref[ferred stock] will ever get turned back on." He forwarded the email to Treasury officials and commented that "all the investors will get this very quickly."

- At 8:30 a.m. on August 17, Mr. Parrott wrote an email to Alex Pollock, Peter Wallison, and Edward Pinto offering "to walk you through the changes we're announcing on the pspas today. Feel like fellow travelers at this point so I owe it to you." Pollock, Wallison, and Pinto had written a policy paper for the American Enterprise Institute in 2011 recommending that "Fannie Mae and Freddie Mac should be eliminated as government-sponsored enterprises (GSEs) over time."
- Also on August 17, Mr. Wallison was quoted in Bloomberg saying the following: "The most significant issue here is whether Fannie and Freddie will come back to life because their profits will enable them to re-capitalize themselves and then it will look as though it is feasible for them to return as private companies backed by the government. . . . What the Treasury Department seems to be doing here, and I think it's a really good idea, is to deprive them of all their capital so that doesn't happen." In an email to Wallison that evening, Mr. Parrott stated, "Good comment in Bloomberg—**you are exactly right on substance and intent.**"
- In another email to Wallison that evening, Mr. Parrott wrote that, "[d]ividend is variable, set at whatever profit for quarter is, eliminating ability to pay down principal (so they can't repay their debt and escape as it were)."
- Mr. Parrott also wrote on August 17 that, "we're not reducing their dividend but including in it every dime these guys make going forward and ensuring they can't recapitalize."

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139. Mr. Parrott, who has left the White House and is now with the Urban Institute, told The Economist that "[i]n the aftermath of the crisis there was widespread agreement that [Fannie and Freddie] needed to be replaced or overhauled." *A Funny Form of Conservation*, THE ECONOMIST (Nov. 21, 2015), http:goo.gl/gJVJrN. The Net Worth Sweep ensured that the Companies' return to profitability did not threaten this goal.

140. In short, the Government's Net Worth Sweep is designed to raise general revenue and further the policy goals of the Agencies at the expense of the Companies and their shareholders, and it thereby imposes on the Companies and their shareholders a disproportionate burden that, in all fairness, should be borne by the public as a whole.

141. The Government has advanced an alternative explanation for the Net Worth Sweep—that it was intended to stave off the risk of a "death spiral" caused by drawing from Treasury's commitment to pay Treasury's dividends. But this "death spiral" explanation is belied by the following facts, in addition to those discussed above regarding the Net Worth Sweep's true purposes.

142. First, given Fannie's and Freddie's return to profitability, there was no imminent risk that the Companies would be depleting Treasury's funding commitment—that risk was at its lowest point since the start of the conservatorships. Indeed, a memo prepared by Treasury staff indicates that on June 25, 2012, FHFA Acting Director DeMarco informed Treasury Secretary Geithner and Under Secretary Miller that he saw no "urgency of amending the PSPAs this year" because Fannie and Freddie "will be generating large revenues over the coming years, thereby enabling them to pay the 10% annual dividend well into the future." Communications within both FHFA and Treasury in the months leading up to the Net Worth Sweep indicate that the Companies' bond investors regarded Treasury's funding commitment as sufficient. And on

August 13, 2012, a Treasury official observed that an explanation that the Net Worth Sweep was needed because "the 10 percent dividend was likely to be unstable" was one that "[d]oesn't hold water."

143. Second, as explained above, the original terms of the PSPAs entitled the Companies to pay Treasury's dividends in kind with additional stock, thus avoiding the need to make draws on Treasury's funding commitment to finance cash dividends they could not otherwise afford. Furthermore, an internal Treasury memorandum from 2011 acknowledged that any threat to Treasury's funding commitment from dividend payments potentially could be addressed by "converting [Treasury's] preferred stock into common or cutting or deferring payment of the dividend (under legal review)." Memorandum from Jeffery A. Goldstein, Undersecretary, Domestic Finance, to Timothy Geithner, Secretary, United States Treasury, 3 (Jan. 4, 2011). In other words, the problem the Government was purportedly trying to solve with the Net Worth Sweep, a cash dividend too high to be serviced by earnings, could be addressed by other means already known to Treasury, such as cutting or deferring payment of the dividend. Of course, given the payment-in-kind option, the purported problem was wholly illusory. An internal Treasury document explicitly recognized this point: "To the extent that required dividend payments exceed net income, FHFA, as conservator, could consider not declaring dividends pursuant to the certificates of designation for the preferred shares, so that draws on the PSPAs are not used to pay dividends, preserving as much funding as possible to cover any unanticipated losses at Fannie Mae and Freddie Mac."

144. Third, the Agencies actually considered an alternative to the arrangement they ultimately adopted that would have had the Net Worth Sweep only kick in if Treasury's remaining funding commitment fell below $100 billion. The only plausible explanation for the

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Agencies' decision not to embrace that alternative is that they knew it would allow the Companies to rebuild capital in contravention of the Administration's commitment to wipe out private shareholders and prevent the Companies from exiting conservatorship.

145. Fourth, the structure and timing of the Net Worth Sweep—coming when the Companies were about to add tens of billions of dollars to their balance sheets—had the effect of *reducing* the amount of money available to guarantee that the Companies would maintain a positive net worth. If the Agencies were genuinely concerned about reassuring the Companies' bond investors that they would be repaid, the Agencies would have delayed imposing the Net Worth Sweep so long as the Companies maintained a substantial positive net worth. Instead, they adopted the Net Worth Sweep at a time when they knew that its near-term effect would be to transfer to Treasury massive profits that the Companies could have otherwise retained as a capital buffer and used to avoid making draws on Treasury's funding commitment in any subsequent unprofitable quarters. Indeed, FHFA has acknowledged how the Net Worth Sweep increases the chances of further draws on Treasury's funding commitment, observing that the Companies "are constrained by the PSPAs from building capital" and that the lack of retained capital combined with "mark-to-market volatility from the [Companies'] derivatives portfolio" has the effect of increasing "the likelihood of negative net worth in future quarters." Thus, even if the Agencies believed that the Companies could not generate enough profits in the long term to finance a 10% dividend on Treasury's investment, they would not have imposed the Net Worth Sweep when they did if their goal was to preserve Treasury's funding commitment. Doing so only increased the likelihood of future draws. Accordingly, the Net Worth Sweep has not ensured continued access to capital for the Companies or preserved their financial stability and solvency.

146. Fifth, the Net Worth Sweep, announced on the heels of Fannie and Freddie announcing earnings allowing them to begin rebuilding capital, was adopted when it was not because the Companies would be earning too little, but rather because they would be earning too much in light of the Agencies' policy goals of keeping Fannie and Freddie under government control and prohibiting their private shareholders from realizing any value from their investments. An internal Treasury document prepared on July 30, 2012, stated that the Net Worth Sweep should be announced shortly after August 7, when Treasury anticipated the Companies would "report very strong earnings . . . that will be in excess of the 10% dividend." On August 1, a Treasury official similarly emphasized that the Net Worth Sweep should be announced in mid-August because the Companies' "[e]arnings will be in excess of current 10% dividend." FHFA's Mr. Ugoletti reported a "renewed push" from Treasury to implement the Net Worth Sweep on August 9, 2012—the same day that Fannie's CFO told Treasury that it was likely that her company would soon be in a position to make an accounting decision that would add tens of billions of dollars to its earnings. And on August 17, 2012, Mr. Ugoletti wrote to Mr. DeMarco and other FHFA officials that "other than a transitory buffer," the Net Worth Sweep "does not allow the Enterprises to build up a retained surplus, which may give the impression that they are healthy institutions."

147. That the Net Worth Sweep was not intended to advance any legitimate interest of FHFA as conservator is further demonstrated by the fact Treasury was the driving force behind the initiative. Indeed, FHFA agreed to the Net Worth Sweep only at the insistence and under the direction and supervision of Treasury. The Net Worth Sweep was a Treasury initiative and reflected the culmination of Treasury's long-term plan to seize the Companies and see that they were operated for the exclusive benefit of the federal government. Indeed, Mr. Parrott has

testified that the Net Worth Sweep was imposed through a "Treasury-driven process." It was Treasury that informed the Companies just days before the Net Worth Sweep that it was forthcoming, and a meeting addressing the Net Worth Sweep was held at Treasury during which a senior Treasury official announced the changes. Secretary Geithner apparently believed that even before the Net Worth Sweep was imposed, "we had already effectively nationalized the GSEs . . ., and could decide how to carve up, dismember, sell or restructure those institutions." Plaintiff's Corrected Post-Trial Proposed Findings of Fact 26.2.1(a), *Starr Int'l Co. v. United States*, No. 1:11-cv-779-TCW (Fed. Cl. Mar. 2, 2015), ECF No. 430. And Treasury officials intimately involved in the development of the Net Worth Sweep testified that they could not recall Treasury making any backup or contingency plans to prepare for any possibility that FHFA would reject the Net Worth Sweep proposal. FHFA simply acquiesced to Treasury's demands regarding the Net Worth Sweep; there is no written record suggesting that FHFA ever advocated an alternative that would have been more favorable to the Companies or their shareholders. Nor is there any evidence that FHFA attempted to calculate the Companies' net worth before agreeing to transfer it to Treasury through the Net Worth Sweep.

148. The Net Worth Sweep is just one example of the significant influence Treasury has exerted over FHFA from the beginning of the conservatorship. Secretary Paulson has written that "seizing control" of Fannie and Freddie, an action that is statutorily reserved to FHFA, was an action "I took." HENRY M. PAULSON, JR., ON THE BRINK xiv (2010). Secretary Geithner, who was president of the Federal Reserve Bank of New York at the time, understood the federal takeover of Fannie and Freddie to be a "Treasury operation," and then-Chairman of the Federal Reserve Ben Bernanke has said that "Treasury took over Fannie and Freddie." Similarly, Congressional Budget Office Assistant Director for Financial Analysis Deborah Lucas told

Congress that the Companies are subject to "ownership and control by the Treasury." *Fannie Mae, Freddie Mac & FHA: Taxpayer Exposure in the Housing Markets: Hearing Before the H. Comm. on the Budget*, 112th Cong. 15 (2011). When asked whether Fannie had ever considered paying Treasury's dividends in-kind, rather than a cash dividend, Ms. McFarland testified that "in my mind, what form of payment we would make and what we were able to do was what Treasury would allow us to do." In its SEC filings, Freddie has said that it and Treasury are "related parties," as defined by Statement of Financial Accounting Standards 57.

149. The Net Worth Sweep was merely one element of a broader Treasury plan to transform the housing finance market and to eliminate Fannie and Freddie. Indeed, a housing finance reform plan drafted by Treasury in early 2012 listed "restructur[ing] the PSPAs to allow for variable dividend payment based on positive net worth"—i.e., implementing a net worth sweep—as among the first steps to take in transitioning to Treasury's desired outcome. Other elements of that plan included the development of a single securitization utility to be used by both Fannie and Freddie—and by other entities once Fannie and Freddie are eliminated. FHFA has made the development of such a utility a key initiative of the conservatorships, providing further evidence that FHFA is operating according to Treasury's playbook.

150. At the time the Net Worth Sweep was entered, FHFA's Acting Director had held that role for three years. As the Director of OFHEO when HERA became law, James Lockhart automatically became the first person to serve as FHFA's independent Director. *See* 12 U.S.C. § 4512(b)(5). Mr. Lockhart forced the Companies into conservatorship and signed the original PSPAs on their behalf in September 2008. On August 5, 2009, Mr. Lockhart publicly announced that he would resign at the end of the month.

151. HERA provides that "[i]n the event of the . . . resignation . . . of the Director, the President shall designate" one of FHFA's three Deputy Directors "to serve as acting Director until . . . the appointment of a successor" who is nominated by the President and confirmed by the Senate. *Id.* § 4512(f). Each of FHFA's Deputy Directors is appointed by FHFA's Director. *Id.* § 4512(c)–(e). In accordance with HERA, on August 25, 2009, President Obama designated Edward DeMarco to serve as FHFA's Acting Director. At the time, Mr. DeMarco was FHFA's Senior Deputy Director for Housing Mission and Goals. Mr. DeMarco had previously been appointed to that post by Mr. Lockhart.

152. Acting agency heads normally serve only temporarily, during the time necessary for the President to nominate and the Senate to confirm someone to permanently fill the position. But it was not until 15 months after Director Lockhart's resignation, on November 15, 2010, when President Obama nominated Joseph A. Smith, Jr. to be FHFA's Director. The Senate failed to confirm Smith, and on December 22, 2010, the nomination was returned to the President. President Obama did not again nominate someone to fill the vacancy created by Mr. Lockhart's resignation until May 2013, when he nominated Congressman Melvin L. Watt. After more than seven months, the Senate confirmed Mr. Watt on December 10, 2013. Mr. Watt was sworn into office on January 6, 2014.

153. From August 2009 until January 2014, Mr. DeMarco led FHFA as the independent agency's Acting Director. Mr. DeMarco's tenure was only eight months shy of the full five-year term that a Senate-confirmed FHFA Director would have served. *See* 12 U.S.C. § 4512(b)(2). And during the great majority of the time Mr. DeMarco was Acting Director, there was no pending nomination from the President to fill the important post that Mr. DeMarco occupied. It is highly unusual for an acting agency head to remain in office for even one year.

The fact that FHFA did not have a Senate-confirmed Director for over four years, during much of the time when the Nation's housing market was recovering from the 2008 financial crisis, is extraordinary.

154. During his time as Acting Director, Mr. DeMarco was responsible for an important shift in FHFA's overall approach to operating the Companies as their conservator. Whereas Mr. Lockhart publicly stated that his goal was to help the Companies rebuild capital and return to private control, Mr. DeMarco undertook a policy aimed at winding down the Companies and doing so in a manner that guaranteed their private shareholders would lose all the value of their investments. Pursuit of this policy ultimately led to the imposition of the Net Worth Sweep on August 17, 2012—three years into Mr. DeMarco's tenure as Acting Director.

155. The Obama Administration recognized that the President could not fire Mr. DeMarco due to his status as the head of an independent agency. On August 3, 2012, HUD Secretary Shaun Donovan acknowledged that "some ha[d] called for [Mr. DeMarco] to be fired" but told reporters "[t]hat is not authority that the president has." The Obama Administration reached that conclusion despite its desire for new leadership at FHFA.

156. Even if Mr. DeMarco had stepped down on his own accord, he could only have been replaced by one of FHFA's three Deputy Directors. 12 U.S.C. § 4512. Mr. DeMarco was himself one of those Deputy Directors, and the other two were appointed by Mr. DeMarco or Mr. Lockhart.

<u>Derivative and Demand Futility Allegations</u>

157. Plaintiff Barrett bring Counts II, V, VIII, and XI of this action derivatively on behalf of and for the benefit of Fannie to redress injuries suffered by Fannie as a direct and

proximate result of the wrongdoing alleged herein. Fannie is named as a nominal defendant in a derivative capacity.

158. Plaintiff Barrett is a holder of Fannie Common Stock. Barrett was a holder of Fannie Common Stock prior to and on August 17, 2012, and has been a holder of said securities continuously since then. Barrett intends to retain his Common Stock throughout the duration of this litigation.

159. Plaintiff Barrett brings Counts III, VI, IX, and XII of this action derivatively on behalf of and for the benefit of Freddie to redress injuries suffered by Freddie as a direct and proximate result of the wrongdoing alleged herein. Freddie is named as a nominal defendant in a derivative capacity.

160. Plaintiff Barrett is a holder of Freddie Common Stock. Barrett was a holder of Freddie Common Stock prior to and on August 17, 2012, and has been a holder of said securities continuously since then. Barrett intends to retain his Common Stock throughout the duration of this litigation.

161. This action is not a collusive one to confer jurisdiction that the Court would otherwise lack.

162. Plaintiff Barrett will adequately and fairly represent the interests of the Companies and their stockholders in enforcing and prosecuting their rights.

163. Plaintiff Barrett has retained competent and experienced counsel.

164. The wrongdoing and violations of law complained of herein subject, and will persist in subjecting, the Companies to continuing harm because the adverse consequences of the injurious actions are still in effect and ongoing.

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165. Plaintiff Barrett has not made a demand on FHFA or on the Boards of Fannie and Freddie because doing so would be futile. As conservator, FHFA has succeeded to the powers of the Companies' Boards. *See* 12 U.S.C. § 4617(b)(2)(A). FHFA, of course, is along with Treasury responsible for the adoption of the Net Worth Sweep agreement being challenged in this litigation, and the Net Worth Sweep was adopted to benefit the federal government and to advance FHFA's and Treasury's policy objectives as agencies of the federal government. FHFA therefore has a manifest conflict of interest, and it cannot reasonably be expected to initiate (or authorize the Companies to initiate) litigation challenging the Net Worth Sweep. Indeed, FHFA has steadfastly defended the Net Worth Sweep in the courts, and it has rebuffed other shareholders who have demanded that it or Freddie's Board commence litigation challenging the Net Worth Sweep. Furthermore, as an agency of the Federal Government that acted as a governmental entity when it approved the Net Worth Sweep, FHFA would not have standing to sue the United States. Accordingly, FHFA is incapable of pursuing the derivative claims for the wrongdoing alleged herein.

COUNT I

Just Compensation Under the Fifth Amendment for the Taking of Private Property for Public Use

(Direct Claim by all Plaintiffs)

166. Plaintiffs incorporate by reference and reallege each allegation set forth above, as though fully set forth herein.

167. The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

168. In the August 2012 Net Worth Sweep amendment to the Purchase Agreements, the Government entered into an agreement with itself to take "every dollar of earnings each firm generates . . . to benefit taxpayers." One federal agency—FHFA, supposedly acting as conservator for the Companies—struck a deal with a second federal agency—Treasury—to effectively confiscate the Common and Preferred Stock held by the Plaintiffs and other private investors in Fannie and Freddie.

169. At the outset of conservatorship, FHFA's Director confirmed that both the preferred and common shareholders of Fannie and Freddie retained an economic interest in the Companies. As equity shareholders, that economic interest took the form of a claim on the Companies' equity that could be paid out in the form of dividends or a liquidation payment. Plaintiffs had both a property interest and a reasonable, investment-backed expectation in the economic interest in the Companies they held due to their ownership of Common and Preferred Stock. The Net Worth Sweep expropriated this economic interest by assigning the right to all of Fannie's and Freddie's equity to Treasury.

170. Treasury was the driving force behind the Net Worth Sweep, and both FHFA and Treasury entered the Net Worth Sweep to advance the interests of the Government. The policy interests the Agencies sought to advance through the Net Worth Sweep included: prohibiting Fannie and Freddie from recapitalizing and positioning themselves to exit conservatorship; ensuring that Fannie and Freddie would be wound down and, eventually, eliminated; enriching the Government; and expropriating the economic interests of Fannie's and Freddie's common and preferred shareholders.

171. Plaintiffs who are holders of Preferred Stock had both a property interest and a reasonable, investment-backed expectation in their Preferred Stock and in the share of the

Companies' future earnings to which they and other holders of Preferred Stock were contractually entitled. Such Plaintiffs also had both a property interest and a reasonable, investment-backed expectation in the liquidation preference to which such Preferred Stock was contractually entitled in the event that Fannie and Freddie were dissolved or liquidated.

172. Plaintiffs who are holders of Common Stock had both a property interest and a reasonable, investment-backed expectation in their Common Stock and in the share of the Companies' future earnings to which they and other holders of Common Stock were entitled. Such Plaintiffs had both a property interest and a reasonable, investment-backed expectation in the liquidation rights to which such Common Stock was entitled in the event that Fannie and Freddie were dissolved or liquidated. In addition, owners of the Companies' Common Stock had a property interest in and a reasonable investment backed expectation based upon their voting rights as shareholders—rights that the Agencies took by entering into the Net Worth Sweep, which forces the Companies to remain in permanent conservatorship by preventing them from rebuilding capital.

173. The Government, by operation of the Net Worth Sweep, has expropriated Plaintiffs' property interests in their Common and Preferred Stock and has destroyed Plaintiffs' reasonable, investment-backed expectations without paying just compensation.

174. As a result of the Net Worth Sweep, Plaintiffs have been deprived of all economically beneficial uses of their Common and Preferred Stock in Fannie and Freddie. Plaintiffs are entitled to just compensation for the Government's taking of their property.

COUNT II

Just Compensation Under the Fifth Amendment
for the Taking of Private Property for Public Use

(Derivative Claim on Behalf of Fannie Mae by Plaintiff Barrett)

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175. Plaintiff Barrett incorporates by reference and realleges each allegation set forth above, as though fully set forth herein.

176. The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

177. In the August 2012 Net Worth Sweep amendment to the Purchase Agreements, the Government entered into an agreement with itself to take "every dollar of earnings each firm generates . . . to benefit taxpayers." One federal agency—FHFA, supposedly acting as conservator for the Companies—struck a deal with a second federal agency—Treasury—to confiscate Fannie's net worth.

178. Treasury was the driving force behind the Net Worth Sweep, and both FHFA and Treasury entered the Net Worth Sweep to advance the interests of the Government. The policy interests the Agencies sought to advance through the Net Worth Sweep included: prohibiting Fannie and Freddie from recapitalizing and positioning themselves to exit conservatorship; ensuring that Fannie and Freddie would be wound down and, eventually, eliminated; enriching the Government; and expropriating the economic interests of Fannie's and Freddie's common and preferred shareholders.

179. Fannie had both a property interest and a reasonable, investment-backed expectation in its net worth.

180. The Government, by operation of the Net Worth Sweep, has expropriated Fannie's property interest in its net worth and has destroyed Fannie's reasonable, investment-backed expectations without paying just compensation.

181. As a result of the Net Worth Sweep, Fannie has been deprived of all economically beneficial uses of the net worth swept to the Government.

182. Fannie is entitled to just compensation for the Government's taking of its property.

183. FHFA has a manifest conflict of interest with respect to the Net Worth Sweep. FHFA was a signatory to the Net Worth Sweep, it benefits from it as an agency of the Government, and it has steadfastly defended it in court.

COUNT III

Just Compensation Under the Fifth Amendment for the Taking of Private Property for Public Use

(Derivative Claim on Behalf of Freddie Mac by Plaintiff Barrett)

184. Plaintiff Barrett incorporates by reference and realleges each allegation set forth above, as though fully set forth herein.

185. The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

186. In the August 2012 Net Worth Sweep amendment to the Purchase Agreements, the Government entered into an agreement with itself to take "every dollar of earnings each firm generates . . . to benefit taxpayers." One federal agency—FHFA, supposedly acting as conservator for the Companies—struck a deal with a second federal agency—Treasury—to confiscate Freddie's net worth.

187. Treasury was the driving force behind the Net Worth Sweep, and both FHFA and Treasury entered the Net Worth Sweep to advance the interests of the Government. The policy interests the Agencies sought to advance through the Net Worth Sweep included: prohibiting

Fannie and Freddie from recapitalizing and positioning themselves to exit conservatorship; ensuring that Fannie and Freddie would be wound down and, eventually, eliminated; enriching the Government; and expropriating the economic interests of Fannie's and Freddie's common and preferred shareholders.

188. Freddie had both a property interest and a reasonable, investment-backed expectation in its net worth.

189. The Government, by operation of the Net Worth Sweep, has expropriated Freddie's property interest in its net worth and has destroyed Freddie's reasonable, investment-backed expectations without paying just compensation.

190. As a result of the Net Worth Sweep, Freddie has been deprived of all economically beneficial uses of the net worth swept to the Government.

191. Freddie is entitled to just compensation for the Government's taking of its property.

192. FHFA has a manifest conflict of interest with respect to the Net Worth Sweep. FHFA was a signatory to the Net Worth Sweep, it benefits from it as an agency of the Government, and it has steadfastly defended it in court.

COUNT IV

Illegal Exaction Under the Fifth Amendment

(Alternative Direct Claim by All Plaintiffs)

193. Plaintiffs incorporate by reference and reallege each allegation set forth above, as though fully set forth herein.

194. In the August 2012 Net Worth Sweep amendment to the Purchase Agreements, the Government entered into an agreement with itself to take "every dollar of earnings each firm

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generates . . . to benefit taxpayers." One federal agency—FHFA, supposedly acting as conservator for the Companies—struck a deal with a second federal agency—Treasury—to effectively confiscate the Common and Preferred Stock held by the Plaintiffs and other private investors in Fannie and Freddie.

195. At the outset of conservatorship, FHFA's Director confirmed that both the preferred and common shareholders of Fannie and Freddie retained an economic interest in the Companies. As equity shareholders, that economic interest took the form of a claim on the Companies' equity that could be paid out in the form of dividends or a liquidation payment. Plaintiffs had both a property interest and a reasonable, investment-backed expectation in the economic interest in the Companies they held due to their ownership of Common and Preferred Stock. The Net Worth Sweep expropriated this economic interest by assigning the right to all of Fannie's and Freddie's equity to Treasury.

196. Treasury was the driving force behind the Net Worth Sweep, and both FHFA and Treasury entered the Net Worth Sweep to advance the interests of the Government. The policy interests the Agencies sought to advance through the Net Worth Sweep included: prohibiting Fannie and Freddie from recapitalizing and positioning themselves to exit conservatorship; ensuring that Fannie and Freddie would be wound down and, eventually, eliminated; enriching the Government; and expropriating the economic interests of Fannie's and Freddie's common and preferred shareholders.

197. In agreeing to the Net Worth Sweep, FHFA purportedly acted pursuant to its authority as conservator of Fannie and Freddie under 12 U.S.C. § 4617, and Treasury purportedly acted pursuant to authority granted to it under 12 U.S.C. §§ 1455 and 1719. These

statutes, however, did not authorize either FHFA or Treasury to expropriate Plaintiffs' economic interest in Fannie and Freddie for the benefit of the Government.

198. What is more, the Net Worth Sweep agreement, and quarterly Net Worth Sweep dividends declared by FHFA as conservator and approved by FHFA as regulator, *see* 12. C.F.R. § 1237.12(a), (b), have been unauthorized because FHFA is operating in violation of constitutional separation of powers principles.

199. First, by making FHFA's head a single Director rather than a multi-member board and eliminating the President's power to remove the Director at will, HERA violates the President's constitutional removal authority.

200. Second, even if it were otherwise constitutional for an independent agency to operate under the leadership of a single individual, this feature of FHFA's structure would still violate the Constitution's structure when combined with other aspects of HERA that further insulate FHFA from oversight by *any* of the three branches of the federal government.

201. Third, when FHFA Acting Director DeMarco entered the Net Worth Sweep agreement, and for the remainder of his tenure, Mr. DeMarco was acting in violation of the Constitution's Appointment's Clause. By August 17, 2012, Mr. DeMarco had been FHFA's Acting Director for three years. This exceeded the period that was reasonable under the circumstances. Indeed, it is a per se violation of the Appointments Clause for someone to serve as an acting agency head or to otherwise fill a vacant principal office for more than two years without Senate confirmation or lawful appointment by the President under the Recess Appointments Clause.

202. FHFA and Treasury therefore have illegally exacted Plaintiffs' economic interest in Fannie and Freddie without due process.

COUNT V

Illegal Exaction Under the Fifth Amendment

(Alternative Derivative Claim on Behalf of Fannie Mae by Plaintiff Barrett)

203. Plaintiff Barrett incorporates by reference and realleges each allegation set forth above, as though fully set forth herein.

204. In the August 2012 Net Worth Sweep amendment to the Purchase Agreements, the Government entered into an agreement with itself to take "every dollar of earnings each firm generates . . . to benefit taxpayers." One federal agency—FHFA, supposedly acting as conservator for the Companies—struck a deal with a second federal agency—Treasury—to confiscate Fannie's Net Worth.

205. Treasury was the driving force behind the Net Worth Sweep, and both FHFA and Treasury entered the Net Worth Sweep to advance the interests of the Government. The policy interests the Agencies sought to advance through the Net Worth Sweep included: prohibiting Fannie and Freddie from recapitalizing and positioning themselves to exit conservatorship; that Fannie and Freddie would be wound down and, eventually, eliminated; enriching the Government; and expropriating the economic interests of Fannie's and Freddie's common and preferred shareholders.

206. In agreeing to the Net Worth Sweep, FHFA purportedly acted pursuant to its authority as conservator of Fannie and Freddie under 12 U.S.C. § 4617, and Treasury purportedly acted pursuant to authority granted to it under 12 U.S.C. §§ 1455 and 1719. These statutes, however, did not authorize either FHFA or Treasury to expropriate Fannie's net worth for the benefit of the Government.

207. What is more, the Net Worth Sweep agreement, and quarterly Net Worth Sweep dividends declared by FHFA as conservator and approved by FHFA as regulator, *see* 12. C.F.R.

§ 1237.12(a), (b), have been unauthorized because FHFA is operating in violation of constitutional separation of powers principles.

208. First, by making FHFA's head a single Director rather than a multi-member board and eliminating the President's power to remove the Director at will, HERA violates the President's constitutional removal authority.

209. Second, even if it were otherwise constitutional for an independent agency to operate under the leadership of a single individual, this feature of FHFA's structure would still violate the Constitution's structure when combined with other aspects of HERA that further insulate FHFA from oversight by *any* of the three branches of the federal government.

210. Third, when FHFA Acting Director DeMarco entered the Net Worth Sweep agreement, and for the remainder of his tenure, Mr. DeMarco was acting in violation of the Constitution's Appointment's Clause. By August 17, 2012, Mr. DeMarco had been FHFA's Acting Director for three years. This exceeded the period that was reasonable under the circumstances. Indeed, it is a per se violation of the Appointments Clause for someone to serve as an acting agency head or to otherwise fill a vacant principal office for more than two years without Senate confirmation or lawful appointment by the President under the Recess Appointments Clause.

211. FHFA and Treasury therefore have illegally exacted Fannie's net worth without due process.

212. FHFA has a manifest conflict of interest with respect to the Net Worth Sweep. FHFA was a signatory to the Net Worth Sweep, it benefits from it as an agency of the Government, and it has steadfastly defended it in court.

COUNT VI

<u>Illegal Exaction Under the Fifth Amendment</u>

(Alternative Derivative Claim on Behalf of Freddie Mac by Plaintiff Barrett)

213. Plaintiff Barrett incorporates by reference and realleges each allegation set forth above, as though fully set forth herein.

214. In the August 2012 Net Worth Sweep amendment to the Purchase Agreements, the Government entered into an agreement with itself to take "every dollar of earnings each firm generates . . . to benefit taxpayers." One federal agency—FHFA, supposedly acting as conservator for the Companies—struck a deal with a second federal agency—Treasury—to confiscate Freddie's Net Worth.

215. Treasury was the driving force behind the Net Worth Sweep, and both FHFA and Treasury entered the Net Worth Sweep to advance the interests of the Government. The policy interests the Agencies sought to advance through the Net Worth Sweep included: prohibiting Fannie and Freddie from recapitalizing and positioning themselves to exit conservatorship; ensuring that Fannie and Freddie would be wound down and, eventually, eliminated; enriching the Government; and expropriating the economic interests of Fannie's and Freddie's common and preferred shareholders.

216. In agreeing to the Net Worth Sweep, FHFA purportedly acted pursuant to its authority as conservator of Fannie and Freddie under 12 U.S.C. § 4617, and Treasury purportedly acted pursuant to authority granted to it under 12 U.S.C. §§ 1455 and 1719. These statutes, however, did not authorize either FHFA or Treasury to expropriate Freddie's net worth for the benefit of the Government.

217. What is more, the Net Worth Sweep agreement, and quarterly Net Worth Sweep dividends declared by FHFA as conservator and approved by FHFA as regulator, *see* 12. C.F.R.

§ 1237.12(a), (b), have been unauthorized because FHFA is operating in violation of constitutional separation of powers principles.

218. First, by making FHFA's head a single Director rather than a multi-member board and eliminating the President's power to remove the Director at will, HERA violates the President's constitutional removal authority.

219. Second, even if it were otherwise constitutional for an independent agency to operate under the leadership of a single individual, this feature of FHFA's structure would still violate the Constitution's structure when combined with other aspects of HERA that further insulate FHFA from oversight by *any* of the three branches of the federal government.

220. Third, when FHFA Acting Director DeMarco entered the Net Worth Sweep agreement, and for the remainder of his tenure, Mr. DeMarco was acting in violation of the Constitution's Appointment's Clause. By August 17, 2012, Mr. DeMarco had been FHFA's Acting Director for three years. This exceeded the period that was reasonable under the circumstances. Indeed, it is a per se violation of the Appointments Clause for someone to serve as an acting agency head or to otherwise fill a vacant principal office for more than two years without Senate confirmation or lawful appointment by the President under the Recess Appointments Clause.

221. FHFA and Treasury therefore have illegally exacted Freddie's net worth without due process.

222. FHFA has a manifest conflict of interest with respect to the Net Worth Sweep. FHFA was a signatory to the Net Worth Sweep, it benefits from it as an agency of the Government, and it has steadfastly defended it in court.

Count VII

Breach of Fiduciary Duty

(Direct Claim by All Plaintiffs)

223. Plaintiffs incorporate by reference and reallege each allegation set forth above, as though fully set forth herein.

224. The conservatorship provisions of HERA create a fiduciary relationship between the Government, on the one hand, and Fannie, Freddie, and the Companies' shareholders, on the other hand. *See United States v. Mitchell*, 463 U.S. 206 (1983). FHFA therefore has a fiduciary responsibility to manage the conservatorships of Fannie and Freddie for the benefit of the Companies and their shareholders.

225. As conservator, FHFA is given elaborate control over Fannie and Freddie. As conservator, the Agency is vested with "all rights, titles, powers, and privileges of [Fannie and Freddie], and of any stockholder, officer, or director of [Fannie and Freddie] with respect to [Fannie and Freddie] and [their] assets." 12 U.S.C. § 4617(b)(2)(A). As conservator, FHFA accordingly has the authority to "take over the assets of and operate [Fannie and Freddie] with all the powers of the shareholders, the directors, and the officers of [Fannie and Freddie] and conduct all business of [Fannie and Freddie]." *Id.* § 4617(b)(2)(B).

226. The term "conservator" has long been understood to denote a position of fiduciary responsibility. HERA accordingly makes clear that FHFA is to exercise its conservatorship authorities for the benefit of the Companies and their shareholders, and that the overriding purpose of the conservatorship is "rehabilitating" Fannie and Freddie. 12 U.S.C. § 4617(a)(2). For example, FHFA is authorized to "take such action as may be—(i) necessary to put [Fannie and Freddie] in a sound and solvent condition; and (ii) appropriate to carry on the business of [Fannie and Freddie] and preserve and conserve [their] assets and property." *Id.* § 4617(b)(2)(D).

And when taking any action involving the disposition of Fannie's and Freddie's assets, FHFA is required to "conduct its operations in a manner which . . . maximizes the net present value return from the sale or disposition of such assets." *Id.* § 4617(b)(2)(E)(i).

227. In promulgating regulations implementing its conservator authorities, FHFA has recognized that "[a] conservator's goal is to continue the operations of a regulated entity, rehabilitate it and return it to a safe, sound and solvent condition." 76 Fed. Reg. 35,724, 35,730.

228. Given the existence of a fiduciary relationship between FHFA and Fannie, Freddie, and the Companies' shareholders, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.

229. The Net Worth Sweep is a self-dealing transaction with a sister agency of the Government, and it improperly expropriates the economic interest in Fannie and Freddie held by holders of the Companies' Common and Preferred Stock for the benefit of the Government.

230. The Net Worth Sweep was neither entirely nor intrinsically fair.

231. The Net Worth Sweep constituted waste, gross and palpable overreaching, and a gross abuse of discretion.

232. The Net Worth Sweep did not further any valid business purpose or reasonable business objective of Fannie and Freddie, did not reflect FHFA's good faith business judgment of what was in the best interest of Fannie and Freddie, and was unfair to the Companies and their common and preferred shareholders.

233. Thus, by entering the Net Worth Sweep, FHFA violated its fiduciary duty to Plaintiffs and the other holders of Common and Preferred Stock.

Count VIII

Breach of Fiduciary Duty

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(Derivative Claim on Behalf of Fannie Mae by Plaintiff Barrett)

234. Plaintiff Barrett incorporates by reference and realleges each allegation set forth above, as though fully set forth herein.

235. The conservatorship provisions of HERA create a fiduciary relationship between the Government, on the one hand, and Fannie, Freddie, and the Companies' shareholders, on the other hand. *See United States v. Mitchell*, 463 U.S. 206 (1983). FHFA therefore has a fiduciary responsibility to manage the conservatorships of Fannie and Freddie for the benefit of the Companies and their shareholders.

236. As conservator, FHFA is given elaborate control over Fannie and Freddie. As conservator, the Agency is vested with "all rights, titles, powers, and privileges of [Fannie and Freddie], and of any stockholder, officer, or director of [Fannie and Freddie] with respect to [Fannie and Freddie] and [their] assets." 12 U.S.C. § 4617(b)(2)(A). As conservator, FHFA accordingly has the authority to "take over the assets of and operate [Fannie and Freddie] with all the powers of the shareholders, the directors, and the officers of [Fannie and Freddie] and conduct all business of [Fannie and Freddie]." *Id.* § 4617(b)(2)(B).

237. The term "conservator" has long been understood to denote a position of fiduciary responsibility. HERA accordingly makes clear that FHFA is to exercise its conservatorship authorities for the benefit of the Companies and their shareholders, and that the overriding purpose of the conservatorship is "rehabilitating" Fannie and Freddie. 12 U.S.C. § 4617(a)(2). For example, FHFA is authorized to "take such action as may be—(i) necessary to put [Fannie and Freddie] in a sound and solvent condition; and (ii) appropriate to carry on the business of [Fannie and Freddie] and preserve and conserve [their] assets and property." *Id.* § 4617(b)(2)(D). And when taking any action involving the disposition of Fannie's and Freddie's assets, FHFA is

required to "conduct its operations in a manner which . . . maximizes the net present value return from the sale or disposition of such assets." *Id*. § 4617(b)(2)(E)(i).

238. In promulgating regulations implementing its conservator authorities, FHFA has recognized that "[a] conservator's goal is to continue the operations of a regulated entity, rehabilitate it and return it to a safe, sound and solvent condition." 76 Fed. Reg. 35,724, 35,730.

239. Given the existence of a fiduciary relationship between FHFA and Fannie, Freddie, and the Companies' shareholders, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.

240. The Net Worth Sweep was a self-dealing transaction with a sister agency of the Government, and it improperly and systematically expropriates Fannie's and Freddie's net worth for the benefit of the Government. Because the Net Worth Sweep systematically strips Fannie and Freddie of their capital, the Companies cannot be rehabilitated to a sound and solvent condition.

241. The Net Worth Sweep was neither entirely nor intrinsically fair.

242. The Net Worth Sweep constituted waste, gross and palpable overreaching, and a gross abuse of discretion.

243. The Net Worth Sweep did not further any valid business purpose or reasonable business objective of Fannie and Freddie and did not reflect FHFA's good faith business judgment of what was in the best interest of Fannie and Freddie.

244. Thus, by entering the Net Worth Sweep, FHFA violated its fiduciary duty to Fannie.

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245. FHFA has a manifest conflict of interest with respect to the Net Worth Sweep. FHFA was a signatory to the Net Worth Sweep, it benefits from it as an agency of the Government, and it has steadfastly defended it in court.

Count IX

Breach of Fiduciary Duty

(Derivative Claim on Behalf of Freddie Mac by Plaintiff Barrett)

246. Plaintiff Barrett incorporates by reference and realleges each allegation set forth above, as though fully set forth herein.

247. The conservatorship provisions of HERA create a fiduciary relationship between the Government, on the one hand, and Fannie, Freddie, and the Companies' shareholders, on the other hand. *See United States v. Mitchell*, 463 U.S. 206 (1983). FHFA therefore has a fiduciary responsibility to manage the conservatorships of Fannie and Freddie for the benefit of the Companies and their shareholders.

248. As conservator, FHFA is given elaborate control over Fannie and Freddie. As conservator, the Agency is vested with "all rights, titles, powers, and privileges of [Fannie and Freddie], and of any stockholder, officer, or director of [Fannie and Freddie] with respect to [Fannie and Freddie] and [their] assets." 12 U.S.C. § 4617(b)(2)(A). As conservator, FHFA accordingly has the authority to "take over the assets of and operate [Fannie and Freddie] with all the powers of the shareholders, the directors, and the officers of [Fannie and Freddie] and conduct all business of [Fannie and Freddie]." *Id.* § 4617(b)(2)(B).

249. The term "conservator" has long been understood to denote a position of fiduciary responsibility. HERA accordingly makes clear that FHFA is to exercise its conservatorship authorities for the benefit of the Companies and their shareholders, and that the overriding

purpose of the conservatorship is "rehabilitating" Fannie and Freddie. 12 U.S.C. § 4617(a)(2). For example, FHFA is authorized to "take such action as may be—(i) necessary to put [Fannie and Freddie] in a sound and solvent condition; and (ii) appropriate to carry on the business of [Fannie and Freddie] and preserve and conserve [their] assets and property." *Id.* § 4617(b)(2)(D). And when taking any action involving the disposition of Fannie's and Freddie's assets, FHFA is required to "conduct its operations in a manner which . . . maximizes the net present value return from the sale or disposition of such assets." *Id.* § 4617(b)(2)(E)(i).

250. In promulgating regulations implementing its conservator authorities, FHFA has recognized that "[a] conservator's goal is to continue the operations of a regulated entity, rehabilitate it and return it to a safe, sound and solvent condition." 76 Fed. Reg. 35,724, 35,730.

251. Given the existence of a fiduciary relationship between FHFA and Fannie, Freddie, and the Companies' shareholders, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.

252. The Net Worth Sweep was a self-dealing transaction with a sister agency of the Government, and it improperly expropriates Fannie's and Freddie's net worth for the benefit of the Government. Because the Net Worth Sweep systematically strips Fannie and Freddie of their capital, the Companies cannot be rehabilitated to a sound and solvent condition.

253. The Net Worth Sweep was neither entirely nor intrinsically fair.

254. The Net Worth Sweep constituted waste, gross and palpable overreaching, and a gross abuse of discretion.

255. The Net Worth Sweep did not further any valid business purpose or reasonable business objective of Fannie and Freddie and did not reflect FHFA's good faith business judgment of what was in the best interest of Fannie and Freddie.

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256. Thus, by entering the Net Worth Sweep, FHFA violated its fiduciary duty to Freddie.

257. FHFA has a manifest conflict of interest with respect to the Net Worth Sweep. FHFA was a signatory to the Net Worth Sweep, it benefits from it as an agency of the Government, and it has steadfastly defended it in court.

COUNT X

Breach of Implied-in-Fact Contract Between the United States and the Companies

(Direct Claim by All Plaintiffs)

258. Plaintiffs incorporate by reference and reallege each allegation set forth above, as though fully set forth herein.

259. Prior to appointing itself conservator on September 6, 2008, FHFA, along with Treasury, unambiguously offered to place Fannie Mae and Freddie Mac into conservatorship by consent, under § 4617(a)(3)(I), with certain conditions described below, and the boards of directors of the Companies accepted this offer. The Government made no finding of insolvency, undercapitalization, or any other ground to impose conservatorship under § 4617(a)(3)(A)-(H) or (J)-(L).

260. FHFA with the urging of Treasury, offered, and the boards of Fannie Mae and Freddie Mac accepted, a conservatorship that would aim to "preserve and conserve the [Companies'] assets and property" and restore the Companies to a "sound and solvent condition." *See* § 4617(b)(2)(D). The offer was also of a conservatorship that would end when that goal was achieved. Neither of these conditions was ambiguous.

261. Underlying the offer was its promise that FHFA would not, as conservator, wind down or liquidate the Companies. When it publicly announced the conservatorship, FHFA stated that it could not, as conservator, place the Companies into liquidation. FHFA stated at the time,

and for several years into the conservatorship, that its goal was instead to "restore the [Companies'] assets and property to a sound and solvent condition," which continued course of performance constitutes evidence of the offer's original terms. The Companies' boards shared this understanding of conservatorship when they consented.

262. When consenting to the conservatorship, the boards of the Companies furnished good and valuable consideration to the Government by agreeing to forbear from a judicial or legislative challenge that the United States feared. *See* § 4617(a)(5). This forbearance was unambiguously furnished in exchange for the Agencies' promises to act to restore the Companies to a safe and solvent condition.

263. The United States and the Companies, through the acts described above, entered into an implied-in-fact contract. The terms of that contract, as relevant here, were that FHFA if made conservator would "preserve and conserve the [Companies'] assets and property," that its conservatorship would continue only until the Companies were placed in a safe and solvent condition, and that, in exchange, the boards of the Companies would consent to, and not challenge or litigate, such a course of action. Both the Government and the Companies intended that an implied contract would exist. That contract required FHFA to preserve the Companies' assets and property, and forbade it from diminishing or expropriating the Companies' assets and property. This intent was demonstrated through the offer and acceptance detailed above. The Government's offer was not ambiguous in its terms, and the boards' acceptance was manifested in its subsequent imposition of conservatorship based on the boards' consent.

264. Each Agency had actual authority, as an agency of the Government, to bind the United States.

265. The imposition of the Net Worth Sweep breached the contract by rendering it impossible for the Companies to build and retain the capital necessary to exit conservatorship and return to normal business operations.

266. Each subsequent Net Worth Sweep payment independently breaches that contract by depleting the Companies of capital (rather than "preserv[ing] and conserv[ing]" it), in a manner that FHFA has expressly recognized undermines the goals of conservatorship.

267. The Net Worth Sweep, thus, directly harmed Plaintiffs, by preventing the termination of the conservatorship; stripping the Companies of their ability to generate and retain funds to ever distribute as dividends to holders of the Preferred and Common Stock; and nullifying Plaintiffs' contractual right as shareholders to ever receive a liquidation preference upon the dissolution, liquidation, or winding up of the Companies. Plaintiffs are accordingly entitled to damages.

COUNT XI

Breach of Implied-in-Fact Contract Between the United States and the Companies

(Derivative Claim on Behalf of Fannie Mae by Plaintiff Barrett)

268. Barrett incorporates by reference and realleges each allegation set forth above, as though fully set forth herein.

269. Before Fannie was placed into conservatorship on September 6, 2008, FHFA and Treasury unambiguously offered to place Fannie into conservatorship by consent, under Section 4617(a)(3)(I), with certain conditions described below, and the board of directors accepted this offer. FHFA made no finding of insolvency, undercapitalization, or any other ground to impose conservatorship under Section 4617(a)(3)(A)-(H) or (J)-(L) without Fannie's consent.

270. FHFA and Treasury offered, and the board of Fannie accepted, a conservatorship that would aim to "preserve and conserve [Freddie's] assets and property" and restore Freddie to a "sound and solvent condition." *See* 12 U.S.C. § 4617(b)(2)(D). The offer was also of a conservatorship that would end when that goal was achieved. Neither of these conditions was ambiguous.

271. Underlying the Agencies' offer was their promise that FHFA would not, as conservator, wind down or liquidate Fannie. When it publicly announced the conservatorship, FHFA stated that it could not, as conservator, place Fannie into liquidation. It also stated at the time, and for several years into the conservatorship, that its goal was instead to "restore [Fannie's] assets and property to a sound and solvent condition," which continued course of performance constitutes evidence of the offer's original terms. Fannie's board shared this understanding of conservatorship when it consented.

272. When consenting to the conservatorship, the board of Fannie furnished good and valuable consideration to the Agencies by agreeing to forbear from a judicial or legislative challenge that the United States feared. *See id.* § 4617(a)(5). This forbearance was unambiguously furnished in exchange for promises that FHFA would act to restore Fannie to a safe and solvent condition.

273. The United States and Fannie, through the acts described above, entered into an implied-in-fact contract. The terms of that contract, as relevant here, were that FHFA if made conservator would "preserve and conserve [Fannie's] assets and property," that its conservatorship would continue only until Fannie was placed in a safe and solvent condition, and that, in exchange, the board of Fannie would consent to, and not challenge or litigate, such a course of action. Both the Government and Fannie intended that an implied contract would exist.

That contract required FHFA to preserve Fannie's assets and property, and forbade the Government from diminishing or expropriating Fannie's assets and property. This intent was demonstrated through the offer and acceptance detailed above. The Government's offer was not ambiguous in its terms, and the board's acceptance was manifested in FHFA's subsequent imposition of conservatorship based on the board's consent.

274. FHFA and Treasury had actual authority, as agencies of the Government, to bind the United States.

275. The imposition of the Net Worth Sweep breached the contract by rendering it impossible for Fannie to build and retain the capital necessary to exit conservatorship and return to normal business operations.

276. The Net Worth Sweep, thus, directly harmed Fannie by preventing the termination of the conservatorship; stripping Fannie of its ability to generate and retain capital. Fannie is accordingly entitled to damages.

277. FHFA has a manifest conflict of interest with respect to the Net Worth Sweep. FHFA was a signatory to the Net Worth Sweep, it benefits from it as an agency of the Government, and it has steadfastly defended it in court.

COUNT XII

Breach of Implied-in-Fact Contract Between the United States and the Companies

(Derivative Claim on Behalf of Freddie Mac by Plaintiff Barrett)

278. Barrett incorporates by reference and realleges each allegation set forth above, as though fully set forth herein.

279. Before Freddie was placed into conservatorship on September 6, 2008, FHFA and Treasury unambiguously offered to place Freddie into conservatorship by consent, under Section 4617(a)(3)(I), with certain conditions described below, and the board of directors

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accepted this offer. FHFA made no finding of insolvency, undercapitalization, or any other ground to impose conservatorship under Section 4617(a)(3)(A)-(H) or (J)-(L) without Freddie's consent.

280. FHFA and Treasury offered, and the board of Freddie accepted, a conservatorship that would aim to "preserve and conserve [Freddie's] assets and property" and restore Freddie to a "sound and solvent condition." *See* 12 U.S.C. § 4617(b)(2)(D). The offer was also of a conservatorship that would end when that goal was achieved. Neither of these conditions was ambiguous.

281. Underlying the Agencies' offer was their promise that FHFA would not, as conservator, wind down or liquidate Freddie. When it publicly announced the conservatorship, FHFA stated that it could not, as conservator, place Freddie into liquidation. It also stated at the time, and for several years into the conservatorship, that its goal was instead to "restore [Freddie's] assets and property to a sound and solvent condition," which continued course of performance constitutes evidence of the offer's original terms. Freddie's board shared this understanding of conservatorship when it consented.

282. When consenting to the conservatorship, the board of Freddie furnished good and valuable consideration to the Agencies by agreeing to forbear from a judicial or legislative challenge that the United States feared. *See id.* § 4617(a)(5). This forbearance was unambiguously furnished in exchange for promises that FHFA would act to restore Freddie to a safe and solvent condition.

283. The United States and Freddie, through the acts described above, entered into an implied-in-fact contract. The terms of that contract, as relevant here, were that FHFA if made conservator would "preserve and conserve [Freddie's] assets and property," that its

conservatorship would continue only until Freddie was placed in a safe and solvent condition, and that, in exchange, the board of Freddie would consent to, and not challenge or litigate, such a course of action. Both the Government and Freddie intended that an implied contract would exist. That contract required FHFA to preserve Freddie's assets and property, and forbade the Government from diminishing or expropriating Freddie's assets and property. This intent was demonstrated through the offer and acceptance detailed above. The Government's offer was not ambiguous in its terms, and the board's acceptance was manifested in FHFA's subsequent imposition of conservatorship based on the board's consent.

284. FHFA and Treasury had actual authority, as agencies of the Government, to bind the United States.

285. The imposition of the Net Worth Sweep breached the contract by rendering it impossible for Freddie to build and retain the capital necessary to exit conservatorship and return to normal business operations.

286. The Net Worth Sweep directly harmed Freddie by preventing the termination of the conservatorship; stripping Freddie of its ability to generate and retain capital. Freddie is accordingly entitled to damages.

287. FHFA has a manifest conflict of interest with respect to the Net Worth Sweep. FHFA was a signatory to the Net Worth Sweep, it benefits from it as an agency of the Government, and it has steadfastly defended it in court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs seek a judgment as follows:

A. Awarding Plaintiffs just compensation under the Fifth Amendment for the Government's taking of their property;

B. Awarding Fannie and Freddie just compensation under the Fifth Amendment for the Government's taking of their property;

C. Awarding Plaintiffs damages for the Government's illegal exaction of their stock;

D. Awarding Fannie and Freddie damages for the Government's illegal exaction of their net worth;

E. Awarding Plaintiffs damages for the Government's breach of fiduciary duty;

F. Awarding Fannie and Freddie damages for the Government's breach of fiduciary duty;

G. Awarding Plaintiffs damages for the Government's breach of implied-in-fact contract;

H. Awarding Fannie and Freddie damages for the Government's breach of implied-in-fact contract;

I. Awarding Plaintiffs pre-judgment and post-judgment interest;

J. Awarding Plaintiffs the costs and disbursements of this action, including reasonable attorneys' and experts' fees, costs and expenses; and

K. Granting such other and further relief as the Court deems just and proper.

Date: August 3, 2018

Respectfully submitted,

/s/ Charles J. Cooper
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UNITED STATES COURT OF FEDERAL CLAIMS

OWL CREEK ASIA I, L.P.; OWL CREEK ASIA II, L.P.; OWL CREEK I, L.P; OWL CREEK II, L.P.; OWL CREEK ASIA MASTER FUND, LTD.; OWL CREEK CREDIT OPPORTUNITIES MASTER FUND, L.P.; OWL CREEK OVERSEAS MASTER FUND, LTD.; AND OWL CREEK SRI MASTER FUND, LTD., Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-281 Chief Judge Sweeney

FIRST AMENDED COMPLAINT

Plaintiffs Owl Creek Asia I, L.P.; Owl Creek Asia II, L.P.; Owl Creek I, L.P; Owl Creek II, L.P.; Owl Creek Asia Master Fund, Ltd.; Owl Creek Credit Opportunities Master Fund, L.P.; Owl Creek Overseas Master Fund, Ltd.; and Owl Creek SRI Master Fund, Ltd. (collectively, "Owl Creek"), by and through the undersigned attorneys, hereby bring this action against the United States of America seeking (a) compensation for the taking of their property in violation of the Fifth Amendment to the Constitution or (b) in the alternative, the illegal exaction of their property in violation of the Fifth Amendment; (c) breach of fiduciary duty; and (d) breach of implied contract. In support, Owl Creek alleges as follows:

NATURE AND SUMMARY OF THE ACTION

1. This is an action to redress the United States' wiping out of Owl Creek's shares in the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac" and, collectively with Fannie Mae, the "Companies") by seizing for itself all earnings of the solvent Companies in perpetuity.

2. On August 17, 2012, two arms of the United States—the Department of Treasury ("Treasury") and the Federal Housing Finance Agency ("Agency" or "FHFA"), which was purportedly acting as the conservator of the Companies—agreed between themselves to a "Third Amendment to Amended and Restated Senior Preferred Stock Purchase Agreement" (the "Sweep Amendment"). Through the operation of the Sweep Amendment, the United States has expropriated hundreds of billions of dollars in net worth from the Companies, to benefit the government at the expense of the Companies' other shareholders. At the time of the Sweep Amendment, Owl Creek held several series of junior preferred stock issued by the Companies (the "Junior Preferred Stock"), with a "stated value" and/or "liquidation preference" (term varies by stock certificate) in excess of $2 billion. As a direct result of the Sweep Amendment, Owl Creek has suffered severe economic loss to its property interests in the Junior Preferred Stock.

3. The Companies are (as Congress has provided) private, for-profit, shareholder-owned corporations whose purpose is to support liquidity, stability, and affordability in the secondary mortgage market by securitizing mortgage loans originated by primary market lenders and selling the bundled loans to investors.

4. In July 2008, amid the financial crisis in the housing and mortgage markets, Congress enacted the Housing and Economic Recovery Act of 2008 (the "Recovery Act"). The Recovery Act created the Agency and granted its director the discretion, under certain circumstances, to place the Companies into conservatorship or receivership. The Recovery Act also granted to Treasury temporary emergency authority to purchase obligations or other securities of the Companies under certain circumstances.

5. On September 6, 2008, the Agency placed the Companies into conservatorship under itself. In such case, Congress in the Recovery Act expressly charged the Agency, as

conservator, to seek to return the Companies to a "sound and solvent condition" and to "preserve and conserve the assets and property" of the Companies.

6. The next day, Treasury, via the Agency, entered into Senior Preferred Stock Purchase Agreements (the "Treasury SPAs") with the Companies. Under the Treasury SPAs, Treasury committed to invest in the Companies in exchange for preferred stock that ranked senior to all series of Junior Preferred Stock (the "Treasury Senior Preferred Stock"). Treasury received for this commitment, among other things, (a) $1 billion of Treasury Senior Preferred Stock, (b) a warrant to purchase up to 79.9% of the common stock of each Company for a nominal price, (c) a liquidation preference equal to the $1 billion initial commitment fee plus the amount invested by Treasury in the applicable Company, and (d) a periodic commitment fee, in an undetermined amount, to be paid beginning in 2010. Through these and other provisions of the Treasury SPAs, Treasury acquired the ability to control the Companies.

7. Consistent with its statutory mandate under the Recovery Act, as well as historical understandings of conservatorship against which Congress had enacted it, the Agency assured the market that same day—and repeatedly for more than three years thereafter—that the goal of the conservatorship was to "return[] the entities to normal business operations"; that the conservatorship would be temporary and would terminate once the Companies had been restored "to a safe and solvent condition"; that the Junior Preferred Stock would remain outstanding and continue to trade; and that stockholders would "continue to retain all rights in the stock's financial worth, as such worth is determined by the market."

8. At least by 2011, Treasury and the Agency recognized that the Companies had stabilized and their financial performance was improving. By the first and second quarters of 2012, Fannie Mae and Freddie Mac, respectively, reported positive net worth and announced that

they would not be requesting a further draw under the Treasury SPAs. Moreover, the Companies' renewed profitability suggested that they might well soon recognize sizeable deferred tax assets.

9. On the heels of such news, Treasury and the Agency (as purported conservator of the Companies) on August 17, 2012, entered into the Sweep Amendment, which eliminated the dividend payable under the Treasury Senior Preferred Stock (10% of the outstanding amount drawn, if paid in cash) and imposed a requirement that the Companies each quarter pay to Treasury their entire net worth in perpetuity. Thus, the Sweep Amendment barred the Companies from ever realizing a profit and from ever paying down Treasury's liquidation preference. It thereby eliminated any possibility that Owl Creek could ever receive any value from the Companies based on their property interests in the Junior Preferred Stock.

10. The Sweep Amendment appropriated the Companies' net worth in perpetuity to the benefit of the United States at the expense of the Companies and their shareholders, including Owl Creek. As Treasury admitted, the purpose was to take "every dollar of earnings each firm generates . . . to benefit taxpayers," ensuring that shareholders other than the United States received *no* benefit from those earnings. The United States paid no compensation to holders of the Junior Preferred Stock for this taking of their valuable property rights for the public benefit.

11. Owl Creek purchased Junior Preferred Stock after the Agency imposed the conservatorship, but before it capitulated to Treasury's Sweep Amendment, because Owl Creek believed in the future economic prospects of the Companies, reasonably relied upon the Agency's assurances of its intention that Owl Creek and other holders of stock would retain their property rights, and expected the Companies to emerge from conservatorship as the Agency had promised repeatedly. At the time of purchase, Owl Creek had no reasonable ground to expect

that the United States instead would expropriate its investment and force shareholders into years of litigation to recoup their investments. Accordingly, through this action, Owl Creek seeks the just compensation to which it is entitled under the Fifth Amendment to the United States Constitution for the government's taking of its property, as well as remedies under other causes of action detailed below—illegal exaction, breach of fiduciary duty, and breach of implied contract.

JURISDICTION AND VENUE

12. This Court has jurisdiction under 28 U.S.C. § 1491(a)(1) because this suit asserts claims against the United States founded upon the Fifth Amendment and on a contract to which the United States is a party. Venue is proper under 28 U.S.C. § 1491(a)(1).

THE PARTIES

13. Plaintiff Owl Creek Asia I, L.P., is a Delaware limited partnership that, as of market close on August 16, 2012, held 72,697 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $1,817,425.00, and 4,073 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $101,825.00.

14. Plaintiff Owl Creek Asia II, L.P., is a Delaware limited partnership that, as of market close on August 16, 2012, held 994,763 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $24,869,075.00, and 56,071 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $1,401,775.00.

15. Plaintiff Owl Creek I, L.P., is a Delaware limited partnership that, as of market close on August 16, 2012, held 643,014 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $18,842,025.00, and 539,683 shares

of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $16,999,575.00.

16. Plaintiff Owl Creek II, L.P., is a Delaware limited partnership that, as of market close on August 16, 2012, held 8,624,934 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $252,718,150.00, and 7,240,664 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $228,089,100.00.

17. Plaintiff Owl Creek Asia Master Fund, Ltd., is a Cayman Islands exempted company that, as of market close on August 16, 2012, held 1,918,882 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $47,972,050.00 , and 108,290 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $2,707,250.00.

18. Plaintiff Owl Creek Credit Opportunities Master Fund, L.P., is a Cayman Islands limited partnership that, as of market close on August 16, 2012, held 1,375,700 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $38,582,950.00, and 170,500 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $8,525,000.00.

19. Plaintiff Owl Creek Overseas Master Fund, Ltd., is a Cayman Islands exempted company that, as of market close on August 16, 2012, held 24,449,093 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $716,374,950.00, and 20,525,278 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $646,569,825.00.

20. Plaintiff Owl Creek SRI Master Fund, Ltd., is a Cayman Islands exempted

company that, as of market close on August 16, 2012, held 1,658,875 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $48,605,875.00, and 1,392,599 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $43,865,950.00.

21. Defendant United States includes Treasury, the Agency, the Secretary and Director thereof, respectively, and agents acting at their direction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

22. Owl Creek's claims for taking (or, in the alternative, illegal exaction) are founded on the Fifth Amendment to the United States Constitution, which provides in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Owl Creek's contract claims are under 28 U.S.C. § 1491(a), which provides for claims founded on a contract with the United States.

FACTUAL ALLEGATIONS

Fannie Mae, Freddie Mac, and their Junior Preferred Stock

23. Fannie Mae is a private stockholder-owned Delaware corporation organized and existing under the Federal National Mortgage Association Charter Act, 12 U.S.C. §§ 1716 *et seq.*[1] It was established in 1938 to promote affordable home ownership by facilitating the financing of home mortgages insured by the Federal Housing Administration. In 1968, Fannie Mae was privatized and reorganized into a government-sponsored entity with access to capital markets. In 1970, it was authorized to purchase conventional mortgages. From 1968 until 2010, Fannie Mae's stock was traded on the New York Stock Exchange. Its stock

[1] All citations of the U.S. Code are from Title 12 unless otherwise noted.

continues to trade.

24. Freddie Mac is a private stockholder-owned Virginia corporation organized and existing under the Federal Home Loan Mortgage Corporation Act, §§ 1451 *et seq*. It was established in 1970 to expand the secondary mortgage market. It was initially a wholly owned subsidiary of the Federal Home Loan Bank System, but Congress in 1989 reorganized and privatized it under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Under FIRREA, Freddie Mac became a for-profit corporation owned by private shareholders and had access to capital markets. From 1989 until 2010, Freddie Mac's stock was traded publicly on the New York Stock Exchange. Its stock continues to trade.

25. Three years after enacting FIRREA, Congress established the Office of Federal Housing Enterprise Oversight ("OFHEO"), through the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, to oversee and ensure the capital adequacy and financial safety and soundness of the Companies. OFHEO was authorized to place the Companies into conservatorship in certain circumstances, but did not employ this power.

26. Prior to 2008, Fannie Mae and Freddie Mac issued numerous series of non-cumulative Junior Preferred Stock. These series, respectively as to each Company, are *pari passu* with one another with respect to dividend payments and liquidation preferences, but have priority over the Companies' common stock.

27. Following their privatization, including after the establishment of OFHEO, the Companies operated successfully for decades, raising private capital, generating profits, regularly declaring and paying dividends on their various series of Junior Preferred Stock, and increasing shareholder value. Prior to 2007, Fannie Mae had not reported a full-year loss since 1985, and Freddie Mac had not since its privatization in 1989. Indeed, the Companies'

preferred stock was generally viewed as a conservative and reliable investment—even as of August 8, 2008, after enactment of the Recovery Act and shortly before the imposition of the conservatorship, Fannie Mae's Junior Preferred Stock was rated AA- by S&P, A1 by Moody's, and A+ by Fitch.

The Housing Crisis and the Recovery Act

28. The housing and mortgage markets substantially weakened in 2007, which reduced the value of Fannie Mae and Freddie Mac's guarantee and investment portfolios. Both Companies suffered net losses beginning in 2007. These losses, however, were largely due to credit provisions—which represent *estimates* of future credit losses—that ultimately proved excessive. Actual credit losses from 2007 to 2011 were approximately $140 billion less than anticipated. A significant portion of the losses recorded in that period related to the write-down of deferred tax assets, which the Companies would reverse when they returned to profitability.

29. Notwithstanding these challenges, OFHEO assured the public that the Companies were stable. On March 19, 2008, James Lockhart, then-Director of OFHEO, announced that "both companies. . . have prudent cushions above the OFHEO-directed capital requirements and have increased their reserves," adding that "[w]e believe they can play an even more positive role in providing the stability and liquidity the markets need right now." He also called the idea of a bailout "nonsense in [his] mind," as the Companies were "safe and sound, and they will continue to be safe and sound." *As Crisis Grew, a Few Options Shrank to One*, N.Y. Times (Sept. 7, 2008).

30. Lockhart similarly explained four months later, on July 8, that the Companies were "adequately capitalized, which is our highest criteria." Two days after that, on July 10, he again confirmed, in a public statement, that Fannie Mae and Freddie Mac were "adequately

capitalized, holding capital well in excess of the OFHEO-directed requirement, which exceeds the statutory minimums. They have large liquidity portfolios, access to the debt market and over $1.5 trillion in unpledged assets." This same day, then-Treasury Secretary Henry Paulson testified to the House Financial Services Committee that the Companies' "regulator has made clear that they are adequately capitalized." The then-Chairman of the Federal Reserve, Ben Bernanke, echoed this, also testifying before that committee, on July 16, 2008, that the Companies were adequately capitalized and in no danger of failing. Further, upon information and belief, an August 2008 analysis for the Agency of Freddie Mac's financial condition, by BlackRock, concluded that Freddie Mac's "long-term solvency does not appear endangered—we do not expect Freddie Mac to breach critical capital levels even in stress case."

31. At the end of July 2008, as the decline in the housing and mortgage markets accelerated, Congress passed and President George W. Bush signed the Recovery Act. That Act created FHFA as a new federal agency, replacing OFHEO, and charged it with regulating the Companies. § 4511; § 4513. Mr. Lockhart, who had been running OFHEO, became the Agency's first Director.

32. The Recovery Act gave the Director discretion under certain circumstances to place the Companies into conservatorship or receivership under the Agency. In a sub-section specifying the Agency's "General powers," as either "conservator or receiver," it authorizes the Agency to do a variety of things that include "preserv[ing] and conserv[ing] the assets and property" of the Companies but do not include liquidating them or winding them down. § 4617(b)(2)(B). The Agency as conservator or receiver may repudiate contracts, if done "within a reasonable period following such appointment," but must in such cases pay

damages. § 4617(d)(2).

33. The Recovery Act separately specifies the Agency's "Powers as conservator." It "may, as conservator, take such action as may be" (i) "necessary to put the [Company] in a sound and solvent condition" and (ii) "appropriate to carry on [its] business . . . and preserve and conserve [its] assets and property." § 4617(b)(2)(D). That Act allows a Company to consent to being placed into conservatorship, but also expressly authorizes a non-consenting Company to sue within 30 days to challenge that action. § 4617(a)(3)(I), (a)(5).

34. After specifying the Agency's powers as conservator, the Recovery Act in the next sub-section separately specifies its "Additional powers as receiver." Only here does the Act authorize (indeed, direct) the Agency to wind down a Company, stating that the it "shall place the [Company] in liquidation." § 4617(b)(2)(E). Receivership would terminate any existing conservatorship and trigger an immediate right to judicial review. It also would require numerous other special procedures, including a detailed process for the receiver to determine claims against a Company, which also incorporates an express right of judicial review. § 4617(b)(3); (b)(6).

35. The Recovery Act expressly provides that, even upon appointment of a receiver, the right of the Companies' shareholders "to payment, resolution, or other satisfaction of their claims" is not terminated. § 4617(b)(2)(K).

36. Under the Recovery Act, the Agency in its actions as a conservator or receiver is not to be "subject to the direction or supervision of any other agency of the United States." § 4617(a)(7).

37. In addition to these provisions concerning the Agency's imposition of conservatorship and receivership, the Recovery Act granted to Treasury the temporary

emergency authority—but only until December 31, 2009—to "purchase any obligations and other securities" of the Companies and "determine" those securities' "terms and conditions [and] . . . amounts." § 1455(*l*)(l)(A); § 1455(*l*)(4); § 1719(g).

38. Prior to exercising this temporary authority, the Treasury Secretary was required to "determine that such actions are necessary to: (i) provide stability to the financial markets; (ii) prevent disruptions in the availability of mortgage finance; and (iii) protect the taxpayer." §§ 1455(*l*)(1)(B); 1719(g)(1)(B). He also had to take specified factors into account: (i) the need for preferences or priorities regarding payments to the government; (ii) limits on maturity or disposition of obligations or securities to be purchased; (iii) the Company's plan for the orderly resumption of private market funding or capital market access; (iv) the probability of the Company's fulfilling the terms of any such obligation or other security, including repayment; (v) the need to maintain the Company's status as private and shareholder owned; and (vi) restrictions on the use of Company resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes. §§ 1455(*l*)(1)(C); 1719(g)(1)(C).

The Agency Makes Itself the Companies' Conservator, Enters Into (and Amends) SPAs with Treasury During the Authorized Period, and Reassures the Markets

39. In letters to each Company dated August 22, 2008, the Agency found (consistent with the Director's public statements) that each Company met all relevant capital requirements, including additional capital requirements imposed by the Agency above the statutory minimums and requirements arising from the Agency's risk-based capital stress test.

40. Nevertheless, on information and belief, Treasury and the Agency around the beginning of September 2008 sought the consent of the Companies' boards of directors to place the Companies into conservatorship. The Agency obtained such consent on the ground,

in part, that conservatorship would serve the interests of the Companies' shareholders. In exchange for the Agency's promise, the Companies agreed not to challenge being put under conservatorship.

41. On September 6, 2008, the Agency did place each of the Companies into conservatorship. As a result, the Agency, "as conservator," succeeded to "all rights, titles, powers, and privileges of the [Companies], and of any stockholder, officer, or director of [a Company] with respect to the [Company]." § 4617(b)(2)(A)(i). Conservatorship, unlike receivership, does not "terminate" any rights of shareholders. *Compare id. with* § 4617(b)(2)(K)(i) (providing for termination of rights of shareholders in event of receivership, "except for their right to payment, resolution or other satisfaction of their claims, as permitted under subsections (b)(9), (c), and (e)").

42. The next day, exercising its temporary authority under the Recovery Act, Treasury entered into the Treasury SPAs with the Companies (acting through the Agency as conservator). Treasury agreed to provide each Company with a commitment of up to $100 billion, as and when necessary for the Companies to maintain a positive net worth. In exchange, Treasury received one million shares of the Treasury Senior Preferred Stock. Treasury also received: (a) an initial liquidation preference of $1000 per share (equal to $1 billion), plus any outstanding amount drawn from the commitment; (b) a dividend of 10% per annum of the outstanding amount provided by Treasury (which also could be paid "in kind" by increasing the liquidation preference, subject to incurring a 12% accrual rate going forward); (c) warrants to buy up to 79.9% of each Company's common stock for $0.00001 per share, and (d) the right to receive payment of a periodic commitment fee, in an undetermined amount, to be paid by the Companies quarterly beginning on January 31, 2010. The Treasury

Senior Preferred Stock was senior to all Junior Preferred Stock, so that no dividends or liquidation distributions on any Junior Preferred Stock could be paid until after Treasury had received its full dividend or liquidation distributions.

43. In addition, covenants in the Treasury SPAs granted Treasury substantial ability to control the Companies and the Agency's conduct of the conservatorship, by restricting the ability to take certain actions without Treasury's prior written consent. This included restricting their ability to: (a) declare dividends on any outstanding common or preferred stock other than the Treasury Senior Preferred Stock; (b) sell or issue equity interests; (c) terminate the conservatorship; (d) transfer assets; (e) incur indebtedness; (f) enter into a merger, reorganization or recapitalization, or make acquisitions; or (g) enter into transactions with affiliates.

44. The Treasury SPAs also prohibited the Companies from owning more than a specified amount of mortgage assets and restricted the Agency from drawing on the Treasury commitment to pay any subordinated liabilities, including "a claim against [a Company] arising from rescission of a purchase or sale of a security issued by [a Company] . . . or for damages arising from the purchase, sale, or retention of such a security."

45. When he imposed the conservatorship and entered into the Treasury SPAs, Mr. Lockhart took pains to assure shareholders that their interests would be protected, stating that, "in order to conserve over $2 billion in capital every year, the common stock and preferred stock dividends will be eliminated, but the common and all preferred stocks will continue to remain outstanding." He added:

> [I]n order to restore the balance between safety and soundness and mission, FHFA has placed Fannie Mae and Freddie Mac into conservatorship. *That is a statutory process designed to stabilize a troubled institution with the objective of returning the entities to*

> *normal business operations*. FHFA will act as the conservator to operate the Enterprises until they are stabilized. (Emphasis added.)

46. The Agency in a fact-sheet at the time further stated that "[s]tockholders will continue to retain all rights in the stock's financial worth; as such worth is determined by the market," and that, "[u]pon the [Agency] Director's determination that the Conservator's plan to restore the Company to a safe and solvent condition has been completed successfully, *the Director will issue an order terminating the conservatorship*." (Emphasis added.)

47. Consistent with these assurances, news reports reflected the view that the conservatorship was motivated more by political considerations than financial need: "[Treasury Secretary] Paulson's decision seems to have been a philosophical one, rather than one forced by imminent crisis. Of course, for stagecraft purposes, it was played as impending disaster." *Paulson's Itchy Finger, on the Trigger of a Bazooka*, N.Y. Times (Sept. 9, 2008).

48. The Treasury SPAs were amended on September 26, 2008, to extend the commencement date for the periodic commitment fee by two months, until March 31, 2010. (The fee was never imposed.) The day before, Director Lockhart had again reaffirmed in public testimony to Congress that conservatorship was "a statutory process designed to stabilize a troubled institution with the objective of maintaining normal business operations and restoring its safety and soundness," and that the Agency would act as conservator only "until the [Companies] are stabilized." He further assured Congress that the Companies remained "private" and that "both the preferred and common shareholders have an economic interest in the companies."

49. The Companies did not exercise their express right under the Recovery Act to sue within thirty days to challenge being placed into conservatorships.

50. Under the Obama Administration, the Treasury SPAs were amended twice

more before Treasury's temporary emergency purchase authority expired on December 31, 2009. The first was on May 6, 2009, to provide that Treasury could increase the commitment to $200 billion as needed. That same month, the Agency submitted a report to Congress recognizing that "[c]onservatorship is a statutory process designed to restore safety and soundness while carrying on the business of a regulated entity and preserving and conserving its assets and property." The following month, Director Lockhart in public congressional testimony emphasized that, "[a]s the conservator, FHFA's most important goal is to preserve the assets of Fannie Mae and Freddie Mac over the conservatorship period. That is our statutory responsibility." The month after that, in July 2009, the Agency issued a "Strategic Plan 2009-2014," in which it included the following "strategic goal": "The conservatorship of Fannie Mae and Freddie Mac allows the FHFA to preserve the assets of the [Companies], ensure they focus on their housing mission and are positioned to emerge from conservatorship as financially strong." It again emphasized that the conservatorship was "designed to stabilize troubled institutions with the objective of maintaining normal business operations and restoring financial safety and soundness."

51. The second amendment was executed on December 24, 2009. It provided a formulaic maximum commitment of either $200 billion or the amount of the Companies' negative net worth from 2010 to 2012. Neither of these amendments affected the rights of the Companies' shareholders other than the United States.

52. A contemporaneous Treasury memorandum characterized the latter amendment as a "temporary" measure "to support [the Companies] until Congress determines a more sustainable long-term path." It also confirmed that "*[c]onservatorship . . . preserves the status and claims of the preferred and common shareholders*." (Emphasis added.)

Indeed, Treasury officials, writing to the then-Secretary of the Treasury, explained that the Companies already had "moved from being a source of instability during the early stages of the crisis to a stable and critical source of mortgage financing to the market today," and that Fannie Mae and Freddie Mac had only drawn $60 billion and $51 billion, respectively, of the $200 billion available to each.

53. Treasury officials at the time of the last of these amendments also recognized that, as the text of the Recovery Act provides, the deadline of December 31, 2009, "constrained" Treasury's "ability to make further changes to the [Treasury SPAs]."

The Agency Continues to Reassure the Markets, in the Years After Treasury's Emergency Stock-Purchase Authority Expires and as the Housing Market Rebounds

54. Over the next two years, throughout 2010 and 2011, the Agency continued to assure the markets that its intentions as conservator of the Companies were consistent with its statutorily specified "Powers as conservator" (to make the Companies "sound and solvent," "preserve and conserve" their assets and property, and "carry on" their businesses) and ordinary understandings of a conservator's duty to *conserve* a company. *See* § 4617(b)(2)(D). In February 2010, the Agency's new Acting Director, Edward J. DeMarco, told Senate and House leaders that "FHFA is focused on conserving the [Companies'] assets" and "put[ting] [them] in a sound and solvent condition." And in a report to Congress in June 2011, the Agency touted its goals of "preserv[ing] and conserv[ing] each [Company's] assets and property and restor[ing] the [Companies] to a sound financial condition so they could continue to fulfill their statutory mission of promoting liquidity and efficiency in the nation's housing finance markets."

55. Also in June 2011, the Agency recognized in issuing a final rule that "allowing capital distributions to deplete [a Company]'s conservatorship assets would be inconsistent

with the [A]gency's statutory goals, as they would result in removing capital at a time when *the Conservator is charged with rehabilitating the regulated [Company]*." 76 Fed. Reg. 35724, 35727 (June 20, 2011) (emphasis added). The rule underscored that, under the Recovery Act, "[a] conservator's goal is to continue the operations of a [Company], rehabilitate it and return it to a safe, sound, and solvent condition." *Id*. at 35730. In contrast, "[t]he ultimate responsibility of FHFA as receiver is to resolve and liquidate the [Company]." *Id*.

56. Later, on November 10, 2011, Mr. DeMarco continued this public theme, in a letter to the Senate: "By law, *the conservatorships are intended to rehabilitate the [Companies]* as private firms." (Emphasis added.) On December 1, 2011, he reiterated to Congress—quoting his "powers as conservator" as specified in the Recovery Act—that, "as I have noted, FHFA has a statutory responsibility as conservator of the [Companies] to 'take such action as may be: necessary to put the regulated entity in a sound and solvent condition; and appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.'"

57. By 2011, and consistent with the Agency's repeated assurance that it was seeking as conservator to rehabilitate the Companies, it was obvious that (as Treasury officials had begun to discern as early as December 2009), the Companies were past the trough in their financial performance. The United States recognized this repeatedly:

- As early as June 2011, on information and belief, in a meeting with restructuring experts from Blackstone, Treasury was told that the Companies were "showing improved financial performance and stabilized loss reserves," and that their tax assets (unusable in the event of a loss, but valuable in the event of a profit) could generate significant value.

- In October 2011, the Agency observed, in a report published to the public on its website, that the Companies' "actual results" were "substantially better than projected."
- A November 8, 2011, report prepared for Treasury recognized that, "[f]rom December 31, 2012, through September 30, 2018, Freddie Mac is not projected to draw on the liquidity commitment to make its dividend payments [to Treasury under the SPA] because of increased earnings driven by significantly reduced credit losses in 2012 and 2014."
- Upon information and belief, a December 2011 internal Treasury memorandum noted that "both Fannie Mae and Freddie Mac are expected to be net income positive (before dividends) on a stable, ongoing [basis] after 2012 . . . ."
- Upon information and belief, a presentation sent to senior Treasury officials in February 2012 stated that "Fannie and Freddie could have the earnings power to provide taxpayers with enough value to repay Treasury's net cash investments in the two entities."
- Upon information and belief, in June 2012, Treasury memorialized in an email that "the [Companies] will be generating large revenues over the coming years, thereby enabling them to pay the 10% annual dividend well into the future even with the caps" on Treasury's commitment. According to the email, this point was apparently discussed between then-Treasury Secretary Timothy Geithner and Mr. DeMarco at a June 24, 2012, meeting.
- On July 13, 2012, Agency officials circulated meeting minutes noting that Fannie

Mae's Chief Financial Officer had stated at an executive-management meeting four days before that the next eight years would likely be the "golden years of [Company] earnings," that "[c]urrent projections show that cumulative [Company] dividends paid will surpass cumulative [Company] Treasury draws by 2020," and that "[c]umulative 2012-2016 income is now forecast at $56.6 billion, $12.3 billion higher than the last projection."

- In a July 30, 2012, "PSPA Covenant and Timing Proposal" regarding the Sweep Amendment, Treasury acknowledged the "[Companies] will report very strong earnings on August 7, that will be in-excess of the 10% dividend to be paid to Treasury."
- At a meeting between senior Treasury officials and Fannie Mae on August 9, 2012, financial projections were introduced showing that, at no time between 2013 and 2022 would there be less than $116.1 billion of remaining funding available to Fannie Mae, or less than $148.3 billion available to Freddie Mac, under the Treasury SPAs. Furthermore, the projections showed that, even if the 10% dividends remained in place, dividends paid to Treasury would exceed cumulative draws under the Treasury SPAs as of 2020 in the case of Fannie Mae, and as of 2019 in the case of Freddie Mac.
- At the same meeting on August 9, 2012, just days before the Sweep Amendment was implemented, Fannie Mae's Chief Financial Officer, Susan McFarland, told Treasury officials that release of the valuation allowance on the deferred tax assets would likely occur in mid-2013 and would generate profits in the range of $50 billion.

58. These encouraging projections were well founded. On May 9, 2012, Fannie Mae announced a net worth of $268 million and comprehensive income of $3.1 billion for the quarter ending March 31, 2012, and announced that it would not request a draw from Treasury for the first time since being placed into conservatorship. Similarly, Freddie Mac on August 7, 2012, reported a net worth of $1.1 billion for the quarter ending June 30, 2012, and announced that it too would not request a Treasury draw. Thereafter, on August 8, 2012, Fannie Mae announced net income of $5.1 billion for the second quarter of 2012, more than sufficient to pay its $2.9 billion quarterly dividend to Treasury, and announced, "we expect our financial results in 2012 to be substantially better than the past few years."

59. The Companies also had sizeable deferred tax assets in 2012: Fannie Mae disclosed $64.1 billion on February 29, 2012, and Freddie Mac disclosed $34.7 billion on August 7, 2012. The Companies' renewed profitability suggested that they would soon recognize these massive assets.

Treasury Through the Sweep Amendment Effectively Nationalizes the Companies and Appropriates Owl Creek's Preferred Stock

60. Given the long history of assurances provided by the Agency and others, Owl Creek was shocked when, on August 17, 2012—nearly three years after Treasury's emergency authority to purchase the Companies' stock had expired and the Treasury SPAs had last been amended, but only days after the Companies' highly favorable second-quarter results had been announced—Treasury and the Agency (acting as purported conservator for the Companies) entered into the Sweep Amendment. It transformed the Companies' 10% dividend into a "dividend" of the "total assets of the Company . . . less the total liabilities of the Company" (subject to a capital reserve that diminished over time, initially set to be zero as of January 1, 2018, but reset to a nominal $3 billion in December 2017). The Sweep

Amendment has no termination date. In brief, it requires each of the Companies to turn over its entire net worth to Treasury—every quarter, in perpetuity.

61. Treasury thereby appropriated to itself all future profits of the Companies, effectively nationalizing them. Correspondingly, Treasury kept the Companies from accumulating capital that could ensure their ongoing solvency and ability to operate as private, rehabilitated companies without depending on the government; from having any funds to pay dividends to any other stockholders; and, except in limited circumstances, from being able to pay down the balance on the commitment (the net-worth payments do not reduce this balance) so as to substantially decrease Treasury's liquidation preference over the Junior Preferred and common stockholders.

62. The effect was to extinguish any possibility that any shareholder other than the United States will receive any value from the Companies. The government's action also, while not benefitting but actually harming the Companies, provided Treasury an expected and actual windfall of billions of dollars per year without the need for any appropriation from Congress. And it placed the burden of a public program, designed and intended to benefit the government's purposes, disproportionately upon the relatively small group of shareholders who invested and believed in the Companies' prospects, including Junior Preferred Stockholders, rather than upon the public as a whole.

63. It turns out that, during much of the period that the Agency was assuring Junior Preferred Shareholders that its objective was to stabilize the Companies and terminate the conservatorship, Treasury had quietly been seeking a way to wind-down the Companies, which came to include seeking a way to seize all of their value notwithstanding that its emergency stock-purchasing authority had expired. An internal memorandum to Treasury

Secretary Geithner from the then-Under Secretary of the Treasury for Domestic Finance, Jeffrey Goldstein, dated December 20, 2010, referred to a "commitment" by the Obama Administration to "ensure existing common equity holders *will not have access to any positive earnings from the [Companies] in the future*." (Emphasis added.) And in February 2011 Treasury issued a report expressing its intention to "us[e] a combination of policy levers to wind down Fannie Mae and Freddie Mac," claiming that the Administration would "work with [FHFA]" to this end—all while Mr. DeMarco continued throughout 2011 to assure Congress and the public that his goal was to *rehabilitate* the Companies. At the same time, Treasury stated its belief that, under the current Treasury SPAs, "there is sufficient funding to ensure the orderly and deliberate wind down of Fannie Mae and Freddie Mac, as described in our plan."

64. According to a senior Treasury official, Jeffrey Foster, the idea for a variable dividend payment based on positive net worth originated from a phone conversation between himself and Mario Ugoletti in 2010. Mr. Ugoletti had been appointed in 2009 as a special advisor to the Agency's Acting Director, and served as primary liaison to Treasury with respect to the Treasury SPAs and the amendments thereto. Before 2009, Mr. Ugoletti worked at Treasury for 14 years, from 1995 to 2009, serving as Director of the Office of Financial Institutions Policy during the last five years of his tenure. In that capacity, he participated, on behalf of Treasury, in creating and implementing the Treasury SPAs.

65. Mr. Foster testified that, during the phone call in 2010, he suggested to Mr. Ugoletti that the Treasury SPAs needed to be restructured to avoid the circularity of drawing from Treasury to then pay Treasury (the so-called "death spiral"). This conclusion was supposedly based upon financial modeling work that Treasury itself had commissioned from

Grant Thornton.

66. Mr. Foster found a receptive audience in the 14-year veteran of Treasury. Mr. Ugoletti has testified to his understanding that Treasury "all along" wanted to see a wind-down of the Companies and a new housing finance structure. In his position as special advisor to the Agency's Acting Director on the Treasury SPAs and the amendments thereto, he was in an ideal position to push Treasury's agenda.

67. In addition to his clear understanding of the wind-down objectives of his prior longtime employer, Mr. Ugoletti also understood that Treasury had the ability to control the Agency and dictate whether the Companies would ever emerge from conservatorship. As he explained in deposition, even if the Companies had been able to raise $189.5 billion in equity to pay off Treasury's liquidation preference and become sufficiently well capitalized to get the Agency's "stamp of approval on them," "Treasury still has to approve [the Companies'] coming out of conservatorship." As noted, the Treasury SPAs had given Treasury the right to block certain actions of the Agency as conservator in operating the Companies.

68. Treasury had used that power over the conservatorships to place the general interest of the government's coffers—beyond Treasury's interest in repayment of draws and in receiving dividends—ahead of the interests of shareholders and to hamper the Agency as conservator in preserving the value of the Companies for any shareholders other than Treasury. For example, in September 2009, the Companies had proposed to sell to third-party investors their investments in low-income-housing tax credits, to decrease their draws and dividend payments to Treasury. Treasury withheld its approval, explaining that "the proposed sale would result in *a loss of aggregate tax revenues* that would be greater than the *savings to the federal government* from a reduction in the capital contribution obligations of Treasury" to

the Companies under the Treasury SPAs.

69. Armed with its power to prevent the Agency from allowing the Companies to emerge from the conservatorships, Treasury sought to exert its influence upon the Agency's senior officials to adopt Treasury's bleak vision for the Companies and their shareholders. Upon information and belief, on January 4, 2012, Mary Miller of Treasury transmitted an agenda to Acting Director DeMarco claiming that Treasury and the Agency had "common goals" to "promote a strong housing market recovery, reduce government involvement in the housing market over time and to provide the public and financial markets with a clear *plan to wind down the [Companies]*." (Emphasis added.) One section of this agenda was titled, "Establish meaningful policies that demonstrate *a commitment to winding down the [Companies]*." (Emphasis added.)

70. As the financial condition of the Companies continued to improve dramatically, and the need for the Companies to remain in conservatorship diminished, the efforts of Treasury to implement the Sweep Amendment intensified. On June 13, 2012, Treasury prepared a "sensitive" and "pre-decisional" presentation, which stated that "Treasury would like to modify the [Treasury] SPAs given the challenges and circularity embedded in the current structure." In support of its modification proposal, which essentially mirrored the eventual Sweep Amendment, Treasury offered forecasts prepared by its own consultant, Grant Thornton, which showed a "base case" and a "downside case" that did not properly reflect the performance and prospects of the Companies. For example, under the base cases for Fannie Mae and Freddie Mac, the forecasts (made in June 2012) assumed, for 2012, a combined net comprehensive loss of $6.4 billion—even though their combined net comprehensive income of $4.9 billion for the first quarter alone exceeded that figure. Indeed, for full year 2012, the

Companies reported positive comprehensive income of $34.8 billion—a combined difference of $41.2 billion between the assumptions used by Grant Thornton and actual results. For 2013, the differences were even larger—the base cases projected combined net comprehensive positive income of $14.9 billion for the Companies, whereas their combined actual comprehensive income, excluding any deferred tax assets, was $64.5 billion, more than 425% higher than projected.

71. The need for Treasury to implement the Sweep Amendment took on even greater urgency following the meeting on August 9, 2012, attended by representatives of Treasury and Fannie Mae, at which Ms. McFarland advised Treasury officials that Fannie Mae would deliver sustainable profits over time and benefit from the likely near-term allowance of the deferred tax assets. The promising news conveyed at that meeting did not cause Treasury to reconsider its proposal to implement the Sweep Amendment. To the contrary, the same day as that meeting, Mr. Ugoletti emailed Mr. DeMarco and other Agency officials, advising them that, "[a]s a heads up, there appears to be a renewed push to move forward on [Treasury] SPA amendments." Mr. Ugoletti advised his Agency colleagues that he had not seen the proposed documents yet, but he understood that they were largely the same as previous versions he had reviewed, in terms of net income sweep, eliminating the commitment fee, and faster portfolio wind-down.

72. Treasury made the decision, on behalf of itself and the Agency, to cause the execution of the Sweep Amendment. This is evident from the fact that the Sweep Amendment was designed to promote Treasury's policy objectives. On information and belief, on August 13, 2012, just four days before the Sweep Amendment was executed, a draft presentation was circulated among Treasury officials, indicating that the Sweep Amendment

was "consistent with Treasury's policy to wind-down the [Companies]," and specifically intended to "ensure that the [Companies] will not be able to rebuild capital as they are wound down." Similarly, in an email between Treasury and White House officials on August 15, 2012, which did not copy the Agency or the Companies, Treasury official Adam Chepenik declared that, "[b]y taking all of their profits going forward, we are making clear that the [Companies] will *not* ever be allowed to return to profitable entities at the center of our housing finance system," and he confirmed that "taxpayers will receive every dollar of profit the [Companies] make." (Emphasis in original.)

73. While Treasury was pressing the Agency, through its liaison Mr. Ugoletti, to finalize the Sweep Amendments, neither Treasury nor the Agency apprised officials at the Companies about the existence of the Sweep Amendment, let alone invited them to discuss their own future. According to Mr. Ugoletti, representatives of the Companies received the near-final version of the Sweep Amendment not long before its execution and were "not too happy." Susan McFarland (who as Fannie Mae's Chief Financial Officer had met with Treasury on August 9, 2012) testified:

> So when the amendment went into place, part of my reaction was they did that in response to my communication of our forecasts and the implication of those forecasts, that it was probably a desire not to allow capital to build up within the enterprises and not to allow the enterprises to recapitalize themselves.

74. Had the Agency been acting as a conservator for the Companies, rather than as a federal regulator to implement Treasury's policy goals, the Agency would have had good reason to consult with the Companies' boards and management to determine whether the Sweep Amendment was or was not in the best interests of the Companies and their shareholders. On information and belief, this never happened. This failure of the Agency to

consult with the boards and management of the Companies for which it was purporting to act as conservator reinforces that the Agency was not acting as the conservator it had claimed it would be.

75. In short, Treasury orchestrated the Sweep Amendment, and the Agency was, to the extent it had any involvement, merely a federal agency acting at Treasury's direction, under its supervision, and for its purposes.

Treasury Boasts About Its Seizure of the Companies' Profits in Perpetuity

76. After imposing the Sweep Amendment, Treasury made no attempt to hide from the public that Treasury's purpose was to expropriate the entirety of the Companies' shareholders' private property rights for public use and a public purpose. In a press release the day it imposed the Sweep Amendment, Treasury announced that the so-called revised dividend would "replace the 10 percent dividend payments made to Treasury on its preferred stock investments in Fannie Mae and Freddie Mac with a quarterly sweep of every dollar of profit that each firm earns going forward," and "*make sure that every dollar of earnings each firm generates is used to benefit taxpayers*." (Emphasis added.) The press release further stated that the Sweep Amendment was a commitment that "*the [Companies] will be wound down and will not be allowed to retain profits, rebuild capital*, and return to the market in their prior form." (Emphasis added.)

77. Treasury did not indicate that, in entering into the Sweep Amendment, it had taken into consideration the need to maintain the Companies' status as private shareholder-owned companies. *See* § 1719(g)(1)(C)(v), § 1455(*l*)(1)(C)(v). Rather, its overriding concern was the government's own public interests.

78. Treasury made no effort in its press release to justify its authority for entering into the Sweep Amendment in the face of the expiration—nearly three years before, with no

purported amendments since—of its emergency purchasing authority. Nor did it attempt to justify its effective winding down of the Companies without putting them into receivership and providing shareholders the Recovery Act's protections in that event.

79. Furthermore, a White House senior advisor, in an email written to a senior Treasury official on the date of the Sweep Amendment, stated that "we've closed off [the] possibility that [Fannie and Freddie] ever[] go … private again," and forwarded an email expressing the advisor's view that the Sweep Amendment would "ensur[e] that [the Companies] can't recapitalize." The same White House advisor sent another email to Treasury officials that day characterizing the Sweep Amendment as a "policy," stating: "Team T[reasur]y, [y]ou guys did a remarkable job on the [Treasury] SPAs this week. You delivered *a policy change of enormous importance that's actually being recognized as such by the outside world* . . . , and as a credit to the Secretary and the President." (Emphasis added.)

80. These emails confirm that the Sweep Amendment emanated from the highest levels of the Administration, that it was intended to serve a perceived public policy with no regard for the conservation obligations of the Agency, and that the Administration recognized it was sharply diverging from the path that the government had drawn for the Companies and their investors.

In Executing the Sweep Amendment and Becoming a Mouthpiece for Treasury's Policy Objectives, the Agency Abrogated Its Public Commitments to Act as a "Conservator"

81. The Sweep Amendment did not make commercial or economic sense for the Companies (or their non-controlling shareholders), nor did the United States seriously claim otherwise. By contrast, the Sweep Amendment made a lot of sense for the United States Treasury, by expropriating valuable property belonging to Owl Creek for the benefit of the United States and its coffers, while implementing policy objectives that Treasury had secretly

long sought to achieve.

82. Thus, the Agency in "agreeing" to the Sweep Amendment had ceased to act in the best interests of the Companies and as the conservator that it had—repeatedly, for years—assured the markets that it would be, namely that it would act consistent with its "Powers as conservator" under the Recovery Act and with common, settled understandings of a conservator's role.

83. Thereafter, the Agency transformed itself into a mouthpiece for Treasury's policy objectives, which nakedly elevated the interests of "taxpayers" (*i.e.*, Treasury) over the interests of the Companies' soundness and solvency, let alone the Companies' stockholders other than the United States. Various documents and statements subsequent to the Sweep Amendment confirm the Agency's public switch to Treasury's position, notwithstanding Mr. DeMarco's reassurances to the market as recently as December 2011 that his duty as conservator was to rehabilitate the Companies. For example:

- On October 9, 2012, about two months after the Sweep Amendment, the Agency released its Strategic Plan for 2013-2017, which included the strategic goals of "minimiz[ing] taxpayer losses during the Enterprises' conservatorships" and "contract[ing] [Company] operations."
- On October 22, 2012, Timothy J. Mayopoulos, the President and CEO of Fannie Mae, stated that "[t]he [C]ompany is no longer run for the benefit of private shareholders."
- On March 20, 2013, the Agency's Office of Inspector General issued an Analysis of the Sweep Amendments in which it stated that, "[i]n overseeing the Enterprises, FHFA has to balance its responsibilities for maintaining the viability

of the Enterprises and for protecting the interests of taxpayers."

- In April 2013, Mr. DeMarco himself stated that "[t]he Administration has made clear that their preferred course of action is to wind down the [Companies]," and he explained that the "recent changes to the [Treasury SPAs], replacing the 10 percent dividend with a net worth sweep, reinforce the notion that *the [Companies] will not be building capital as a potential step to regaining their former corporate status*." (Emphasis added.)
- In May 2014, Agency Director Melvin L. Watt stated: "I don't lay awake at night worrying about what's fair to the shareholders." He added: "I just don't have time to think about what might happen in the future with the shareholders."

84. After lawsuits were filed challenging the Sweep Amendment, the Agency attempted to offer pre-textual justifications. In a declaration the Agency submitted in proceedings in the United States District Court for the District of Columbia, Mr. Ugoletti claimed that the Agency had agreed to the Sweep Amendment due to concerns that the burden of paying the 10% dividend owed to Treasury might reduce the amount of Treasury's commitment that remained available to the Companies. As noted above, however, Treasury knew that the Companies could pay the dividend "well into the future even with the caps," and projections available to both Treasury and the Agency indicated that the Companies would have more than sufficient funding through 2022. (As of the beginning of 2013, Freddie Mac had over $140 billion still available on its commitment from Treasury, and Fannie Mae had over $117.6 billion.) In fact, in an internal mark-up of a document explaining the reasoning for the sweep, a Treasury official wrote that the argument that the "10 percent dividend was likely to be unstable as the businesses were reduced" "[d]oesn't hold water."

Concerns that the 10% dividends were "circular" were unfounded for the additional reason that the dividends could be paid in-kind at a 12% rate, which would not require a further draw. Indeed, upon information and belief, a Treasury official involved in developing the Sweep Amendment was unable to identify any "problems of the circularity [in dividend payments that] would have remained had the [payment in kind] option been adopted," and internal Treasury documents recognized that, "[t]o the extent that required dividend payments exceed net income, FHFA, as conservator, could consider not declaring dividends pursuant to the certificates of designation for the preferred shares, so that draws on the [Treasury] SPAs are not used to pay dividends, preserving as much funding as possible to cover any unanticipated losses at Fannie Mae and Freddie Mac."

85. Rather than acting as a true conservator, or in the interests of the shareholders whose rights, titles, powers, and privileges with respect to the Companies it had assumed as conservator (§ 4617(b)(2)(A)), the Agency was acting under the de facto authority of, and in collusion, with Treasury.

86. Acting through Treasury—and in the face of Congress's assurance in § 4617(a)(7) that the Agency would *not* "be subject to the direction or supervision of any other agency of the United States" when "acting as conservator"—the United States by means of the Treasury SPAs, as well as through pressure and influence, came to exercise direction and control over the business and affairs of the Companies and caused the Agency to become hopelessly conflicted with respect to its obligations to the Companies and their shareholders, culminating with the Sweep Amendment.

87. In sum, the Agency abdicated its responsibility to act as conservator for the Companies, and instead, acting in its capacity as regulator and an agency of the United States,

acquiesced and succumbed to Treasury's mandate to execute the Sweep Amendment.

The United States' Windfall from the Sweep Amendment at the Companies' Expense

88. Treasury's actions to nationalize the Companies, stripping their shareholders (other than itself) of any benefit from the Companies' improving operations, proved well timed for the United States, in light of the Companies' results and market expectations as of August 2012.

89. In the first quarter of 2012, five months before the Sweep Amendment was announced, the Companies already had reported positive net income of over \$3.2 billion and in the fourth quarter of 2012, the first quarter after Treasury imposed the Sweep Amendment, Fannie Mae reported pre-tax income of \$7.6 billion. The quarter after that (first quarter of 2013), it reported \$8.1 billion—the largest quarterly pre-tax income in the Company's history. In its 10-Q for the first quarter of 2013, Fannie Mae stated that it expected "our annual earnings to remain strong over the next few years" and "to remain profitable for the foreseeable future." For 2017, Fannie Mae reported pre-tax income of approximately \$18 billion, and Freddie Mac reported pre-tax income of approximately \$17 billion.

90. In addition, and as had been long and widely anticipated, Fannie Mae announced on May 9, 2013, that it would release the valuation allowance on its deferred tax assets, resulting in a benefit for its federal income taxes of \$50.6 billion. This would have had the effect of increasing the Company's capital, which would have freed further assets to pay down the Treasury Senior Preferred Stock.

91. Under the Sweep Amendment, all of this went to Treasury. None went to ensuring the soundness and solvency of the Companies.

92. As shown in the below table, Fannie Mae and Freddie Mac have, as of the end

of 2017, handed over to Treasury over $223 billion in "dividends" under the Sweep Amendment. (That is in addition to the $55.2 billion in dividends paid to Treasury between 2008 and 2012.)

Dividend Payments Under the Sweep Amendment (in Billions of Dollars)

	Fannie	**Freddie**	**Combined**
2013	82.5	47.6	130.1
2014	20.6	19.6	40.2
2015	10.3	5.5	15.8
2016	9.6	5.0	14.6
2017	12.0	10.9	22.9
Total	**135**	**88.6**	**223.6**

93. By contrast, had the Companies continued to pay only 10% cash dividends under the earlier (authorized) Treasury SPAs, they would have paid Treasury from 2013 through the end of 2017 a total of approximately $94.7 billion. Alternatively, if they had been permitted to repay principal during this period, they would have had sufficient quarterly profits in excess of the 10% dividend to *fully redeem* the Treasury Senior Preferred Stock and to rebuild capital. The amount paid to Treasury under the Sweep Amendment exceeds by billions of dollars the amount that Treasury provided to the Companies through its commitment under the Treasury SPAs. A February 15, 2018, Freddie Mac presentation on fourth quarter 2017 financial results reveals that Freddie Mac has paid a cumulative total of $112.4 billion in dividends to Treasury, while it had, as of December 31, 2017, only requested $71.3 billion in draws. In fact, an August 16, 2012, "Sensitive and Pre-Decisional"

"[Treasury SPA] Amendment Q&A" answered the question why the Companies could not use profits to buy back Senior Preferred Stock from Treasury by saying that "this would have reduced the amount taxpayers are reimbursed for their substantial contribution to support the [Companies]." This reveals the real intent behind the Sweep Amendment—to benefit the government at the expense of the Junior Preferred stockholders and common stockholders.

94. All told, had the Companies not entered into the Sweep Amendment, they would have retained at least $128.9 billion in capital, which they could have used to protect themselves from future downturns and reassure shareholders of the soundness of their investment. Moreover, if the Agency and Treasury were legitimately concerned about the Companies entering a "death spiral," they could have caused the Companies to elect to pay the dividend "in kind" by adding 12% annually to the liquidation preference of the Treasury Senior Preferred Stock. This would have had the effect of creating an additional $94.7 billion in capital, since cash that would have been paid as dividends would instead have been retained to increase the Companies' safety and soundness. Instead, the United States has forced the Companies to operate on the brink of insolvency (and suffer the attendant economic consequences, such as increased borrowing costs) and thus in perpetual dependency on the government. Meanwhile, the government pockets all of this money for its own purposes.

95. Moreover, because the Companies' dividend payments under the Sweep Amendment do not reduce the liquidation preference (and leave no other funds with which to do so), Treasury's massive liquidation preference under the Treasury SPAs, due to the Companies' having drawn on the commitment prior to 2012, is set in stone—as to Fannie Mae, $117.1 billion; and as to Freddie Mac, $72.3 billion, prior to December 31, 2017. Thus, in addition to the over $223 billion that Treasury has already expropriated from the

Companies, Treasury and the Agency contend that Treasury retains, forever, a further $189.5 billon liquidation preference. Thus, the diversion of profits under the Sweep Amendment also ensures the perpetual nullification of the liquidation rights of all other shareholders, particularly the Junior Preferred holders, who would be first in line but for Treasury's holdings.

The Sweep Amendment Took Owl Creek's Property Rights In And Under their Junior Preferred Stock Certificates

96. Owl Creek purchased Junior Preferred Stock after the imposition of the conservatorship but before the Sweep Amendment. Thus, at the time of the Sweep Amendment, it had vested property rights in the economic value of its Junior Preferred Stock, including the equity and market value of the Junior Preferred Stock, and the expectation of future dividend payments.

97. In addition, Owl Creek had vested contractual property rights in the Junior Preferred Stock. The Certificate of Designation for each series of Junior Preferred Stock issued by the Companies grants the holders rights to non-cumulative dividends to be declared at the discretion of the applicable Company's board of directors. For example, the Certificate of Designation for Fannie Mae's Series O Junior Preferred Stock provides:

> Holders of record of Series O Preferred Stock (each individually a "Holder", or collectively the "Holders") will be entitled to receive, when, as and if declared by the Board of Directors of Fannie Mae, or a duly authorized committee thereof, in its sole discretion out of funds legally available therefor, non-cumulative quarterly dividends which will accrue from and including the date of issuance and will be payable on March 31, June 30, September 30 and December 31 of each year (each, a "Dividend Payment Date"), commencing March 31, 2005.

98. The Certificates of Designation for each series of Junior Preferred Stock also provide for liquidation rights and preferences. For example, the Certificate of Designation for

Fannie Mae's Series O Junior Preferred Stock provides in part:

> (a) Upon any voluntary or involuntary dissolution, liquidation or winding up of Fannie Mae, after payment or provision for the liabilities of Fannie Mae and the expenses of such dissolution, liquidation or winding up, the Holders of outstanding shares of the Series O Preferred Stock will be entitled to receive out of the assets of Fannie Mae or proceeds thereof available for distribution to stockholders, before any payment or distribution of assets is made to holders of Fannie Mae's common stock (or any other stock of Fannie Mae ranking, as to the distribution of assets upon dissolution, liquidation or winding up of Fannie Mae, junior to the Series O Preferred Stock), the amount of $50 per share plus an amount, determined in accordance with Section 2 above, equal to the dividend (whether or not declared) for the then-current quarterly Dividend Period accrued to but excluding the date of such liquidation payment, but without accumulation of unpaid dividends on the Series O Preferred Stock for prior Dividend Periods.
>
> (b) If the assets of Fannie Mae available for distribution in such event are insufficient to pay in full the aggregate amount payable to Holders of Series O Preferred Stock and holders of all other classes or series of stock of Fannie Mae, if any, ranking, as to the distribution of assets upon dissolution, liquidation or winding up of Fannie Mae, on a parity with the Series O Preferred Stock, the assets will be distributed to the Holders of Series O Preferred Stock and holders of all such other stock pro rata, based on the full respective preferential amounts to which they are entitled (but without, in the case of any noncumulative preferred stock, accumulation of unpaid dividends for prior Dividend Periods).

Owl Creek Had Reasonable, Investment-Backed Expectations

99. Given the conditions of the market and the Companies, together with the assurances of the Agency in light of its powers as conservator under the Recovery Act (as well as the longstanding record of the Companies, and statements of the United States, before conservatorship), Owl Creek reasonably expected that the mortgage market would recover; that the Companies would return as bulwarks in housing; and that the Agency, having ensured the soundness and solvency of the Companies, accordingly would terminate their conservatorships. Moreover, Owl Creek reasonably believed that the valuation allowance on

the Companies' sizeable deferred tax assets would soon be released.

100. Owl Creek further expected that, in any event, the Agency would—as it had assured markets it would do, and as the Recovery Act reasonably indicated it should and would do—act with a view to rehabilitating the Companies and not as an accomplice to Treasury's carnivorous secret plan to seize, for itself, the entire value of the Companies in disregard of the property interests of Owl Creek and other shareholders.

101. As such, by early summer of 2012, Owl Creek reasonably anticipated that the Companies would soon emerge from conservatorship (as two Directors of the Agency had publicly predicted), from which it would be in a position to redeem the Treasury Senior Preferred Stock and allow Owl Creek to realize benefits from its reasonable investment-backed expectations in the property interests represented by the Junior Preferred Stock. Owl Creek, in any event, did not reasonably expect the Sweep Amendment or any other action that would make the conservatorship *antithetical* to those goals and in fact make them impossible to achieve.

102. Indeed, the terms of the Recovery Act's conservatorship provisions (among others) are materially identical to the longstanding ones in FIRREA by which the Federal Deposit Insurance Corporation ("FDIC") acts as conservator of troubled banks. *See* § 1821(d)(2)(D). Until the Sweep Amendment, this language had always been interpreted to mean that FDIC has a mandatory duty to preserve and protect the assets of banks when acting as conservator. Moreover, historically the United States' regulation of the Companies has been less extensive than its regulation of banks. Nor was Owl Creek aware of any prior use of a senior preferred stock instrument to strip 100% of a company's profits in perpetuity, to the derogation of the property rights of other holders of stock. Prior to the implementation of the

Sweep Amendment, the holders of Junior Preferred Stock could not have reasonably anticipated such a divergence from historical precedent.

103. The Sweep Amendment deprived Owl Creek of its economic and contractual property rights with respect to the Junior Preferred Stock. It made it impossible for Owl Creek to realize the future value of its property interests in the Companies.

104. One indication of this immediate, severe deprivation was the precipitous drop in the trading price of the Junior Preferred Stock in the over-the-counter market in the first two weeks alone following the enactment of the Sweep Amendment—indeed, by the end of August 2012, the trading price for the Junior Preferred Stock held by Owl Creek had decreased by an average of over 65% since August 16. That drop, however, represents only the tip of the iceberg in measuring the true loss of value of the Junior Preferred Stock immediately before versus immediately after the Sweep Amendment. Immediately before the Sweep Amendment, the Junior Preferred Stock did not reflect information—known at Treasury, the Agency, and the Companies, but not to the public—regarding the financial condition of and prospects for the Companies. Had that information been publicly available, the trading price just prior to the Sweep Amendment would have been far higher, reflecting the true value of the Junior Preferred Stock. Conversely, the Sweep Amendment, by its terms, extinguished any existing market value for the Junior Preferred Stock by eliminating any possible investment return. Any remaining trading value was necessarily attributable to the possibility that litigation success could result in a return on the Junior Preferred Stock.

105. Owl Creek has been provided neither just compensation nor any compensation at all in return for the United States' taking of all the economic value associated with its Junior Preferred Stock.

The United States, Which Controls the Companies, Has Through the Sweep Amendment Disproportionately Harmed Shareholders Other than the United States and, In Any Event, Has a Conflict of Interest With Respect to the Rights of the Companies

106. The United States, as the result of the Treasury SPAs as well as its conservatorships of the Companies via the Agency, was a shareholder that controlled the Companies prior to the Sweep Amendment.

107. The Sweep Amendment, in radically altering the Treasury SPAs, effectively created a new security for the United States. Treasury, in obtaining this result by means of its control of the Agency and the Companies did not, in exchange, provide to the Companies anything of the same value, but rather provided (at best) significantly lesser value. Further, Treasury's new rights to receive, every quarter in perpetuity, "dividends" equal to the entire net worth of the Companies increased its rights with respect to the Companies while correspondingly reducing the rights of all other shareholders.

108. In so doing, the United States engaged in self-dealing and breached its fiduciary duty arising from its control of the Companies.

109. As a result, any claim raised by Owl Creek that might be considered derivative on behalf of the Company is in fact direct, on behalf of Owl Creek itself.

CLAIMS FOR RELIEF

COUNT I
Just Compensation under the Fifth Amendment for the Taking of Private Property for Public Use

110. Owl Creek incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

111. The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

112. Owl Creek had cognizable property interests in the Junior Preferred Stock, including in its contract rights to dividends, to liquidation rights and preferences, and to voting rights, and in its economic interests in the Junior Preferred Stock, including its proportionate share of the Company's future earnings and the equity and value of the Junior Preferred Stock.

113. Owl Creek had investment-backed expectations to participate in the Companies' future earnings and to receive a share of any residual value of the Companies in the event of liquidation, and those expectations were reasonable.

114. By way of the Sweep Amendment, executed under the purported authority of the Recovery Act and by one arm of the federal government (Treasury) imposing its will and dominion over another arm (the Agency) under its control, the United States directly appropriated for itself Owl Creek's property interests in the Junior Preferred Stock "to benefit taxpayers." The Sweep Amendment, although unlawful, was an authorized act of the government, done within the general scope of the duties of the agencies and officers who executed it.

115. The Sweep Amendment immediately diminished the value of Owl Creek's Junior Preferred Stock, repudiated Owl Creek's contractual property rights, and directly and proximately caused a severe, present, continuing and actual economic injury to the Junior Preferred Shareholders' property interests. Indeed, Owl Creek has been deprived of all economically beneficial uses of its Junior Preferred Stock in Fannie Mae and Freddie Mac, while the United States has received payments from the Companies of more than $200 billion in dividends since the Sweep Amendment, without any corresponding reduction in the liquidation preference payable to the United States. Thus, contrary to the United States'

position asserted in other litigation, Owl Creek's takings claim is clearly ripe.

116. Owl Creek is entitled to just compensation for the government's taking of its property.

COUNT II
Illegal Exaction in Violation of the Fifth Amendment

117. Owl Creek incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

118. Alternatively, the Sweep Amendment was imposed by the United States without authority. Under the Recovery Act, the Agency "as conservator" was to act to put the Companies "in a sound and solvent condition," to "preserve and conserve [their] assets," and to "carry on" their business. Contrary to these objectives, the Sweep Amendment ensures that the Companies will perpetually be on the verge of insolvency, wastes their assets, and destroys their ability to carry on their mandate as private, shareholder-owned companies. It does the opposite of conserving the Companies, and accomplishes a wind-down in contravention of the Act's separate provisions (and protections) for a receivership. In addition, Treasury's exertion of control over the Agency was both unlawful and unauthorized pursuant to 12 U.S.C. § 4617(a)(7). Moreover, the Sweep Amendment was *ultra vires* on the part of Treasury as well, because it was executed contrary to the provisions of the Recovery Act (and the Companies' charters) granting Treasury only temporary emergency authority to purchase and determine the terms, conditions, and amounts of securities of the Companies. The Sweep Amendment also was unauthorized due to the Agency's violating constitutional separation of powers principles, including because (1) the Agency's head is a single director, whom the President may remove only for cause; (2) the Agency is allowed to fund itself through assessments; and (3) when the Sweep Amendment was instituted, the Agency was

headed by an "acting" director (whom the President had been allowed to designate only from among the deputy directors, themselves appointed by the director) who had held that position for three years.

119. Through the Sweep Amendment, the United States, in obtaining for itself a quarterly payment in perpetuity equal to the Companies' entire net worth, has appropriated to itself the property of Owl Creek, holder of Junior Preferred Stock. This appropriation was, in effect, a forced payment of money by Owl Creek to the government.

120. To the extent that the United States' violation of a "money mandating" statute is a necessary predicate for this Count, the Recovery Act is such a statute, particularly in the circumstances here, where the United States, in and as the result of assuming control of the Companies, assumed a fiduciary duty whose breach is appropriately remedied by damages.

121. The Sweep Amendment is thus an illegal exaction imposed in violation of the Due Process Clause of the Fifth Amendment.

122. Owl Creek is entitled to compensation for its illegally exacted property.

123. For avoidance of doubt, Paragraphs 118 through 122 are pled solely in the alternative to Count I of the Amended Complaint and the remaining allegations in the Amended Complaint.

COUNT III
Breach of Fiduciary Duty

124. Owl Creek incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

125. As alleged above, the Treasury SPAs are contracts that gave the United States (via Treasury) control over the Companies and over the Agency as conservator of the Companies, which it exercised; moreover, the Agency as conservator under the Recovery Act

controlled the Companies, succeeded to the rights of shareholders, and assumed the obligations of the then-existing contracts of the Companies. The United States thereby assumed fiduciary duties to Owl Creek and the other non-controlling shareholders, including (at a minimum) a duty not to manage the Companies for the United States' own pecuniary and policy interests at the expense of the interests of the shareholders other than the United States and not to engage in arbitrary or unreasonable conduct that would prevent non-controlling shareholders from benefitting from the fruit of their bargain with the Companies, such as in the Certificates of Designation of Owl Creek's Junior Preferred Stock and the implied-in-fact contract between the United States and the Companies.

126. The United States breached its fiduciary duty to Owl Creek by entering into the Sweep Amendment, which was not in the best interests of the Companies' shareholders (other than the United States), but rather was contrary to their interests and arbitrarily and unreasonably provided a windfall to the United States at the expense of non-controlling shareholders. The Agency abdicated its responsibility to Treasury; and Treasury, by virtue of the Treasury SPAs, was conflicted. The Agency and Treasury acted together as a controlling group to implement their shared goal, the Sweep Amendment, in the interests of the United States rather than the best interests of the Companies and their shareholders, and thus in breach of their fiduciary duties to other shareholders including Owl Creek.

127. Owl Creek as a result suffered injury and loss of property, and is entitled to damages.

128. To the extent that rescission has been rendered impossible or impracticable, and because this Court may not grant that remedy, Owl Creek is entitled (without limitation) to rescissory damages.

129. According to Treasury, any fiduciary duties it owes to plaintiffs challenging the Sweep Amendment arise from a contract, such that a claim that it breached its fiduciary duty is in essence a contract action. This confirms that this Count is founded upon a contract with the United States.

COUNT IV

Breach of Implied-in-Fact Contract Between the United States and the Companies

130. Owl Creek incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

131. Prior to appointing itself conservator on September 6, 2008, the Agency unambiguously offered to place Fannie Mae and Freddie Mac into conservatorship by consent, under § 4617(a)(3)(I), with certain conditions described below, and the boards of directors of the Companies accepted this offer. The Agency made no finding of insolvency, undercapitalization, or any other ground to impose conservatorship under § 4617(a)(3)(A)-(H) or (J)-(L).

132. The Agency offered, and the boards of Fannie Mae and Freddie Mac accepted, a conservatorship that would aim to "preserve and conserve the [Companies'] assets and property" and restore the Companies to a "sound and solvent condition." *See* § 4617(b)(2)(D). The offer was also of a conservatorship that would end when that goal was achieved. Neither of these conditions was ambiguous, and both would benefit the known and distinct class of the shareholders of the Companies, on whose behalf the boards of directors of the Companies had a fiduciary duty to act. In fact, the Agency obtained the boards' consent on the ground, in part, that conservatorship would serve the interests of the Companies' shareholders.

133. Underlying the Agency's offer was its promise that the Agency would not, as

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conservator, wind down or liquidate the Companies. The Agency stated contemporaneously with its offer that it could not, as conservator, place the Companies into liquidation. The Agency stated at the time, and for several years into the conservatorship, that its goal was instead to "restore the [Companies'] assets and property to a sound and solvent condition," which continued course of performance constitutes evidence of the offer's original terms.

134. When consenting to the conservatorship, the boards of the Companies furnished good and valuable consideration to the Agency by agreeing to forbear from a judicial or legislative challenge that the United States feared. *See* § 4617(a)(5). This forbearance was unambiguously furnished in exchange for the Agency's promises to act to restore the Companies to a safe and solvent condition.

135. The United States and the Companies, through the acts described above, entered into an implied-in-fact contract. The terms of that contract, as relevant here, were that the Agency if made conservator would "preserve and conserve the [Companies'] assets and property," that its conservatorship would continue only until the Companies were placed in a safe and solvent condition, and that, in exchange, the boards of the Companies would consent to, and not challenge or litigate, such a course of action. Both the Agency and the Companies intended that an implied contract would exist. That contract required the Agency to preserve the Companies' assets and property, and forbade it from diminishing or expropriating the Companies' assets and property. This intent was demonstrated through the offer and acceptance detailed above. The Agency's offer was not ambiguous in its terms, and the boards' acceptance was manifested in the Agency's subsequent imposition of conservatorship based on the boards' consent.

136. Under these terms of the implied-in-fact contract, and given the known

fiduciary duty of the boards of directors of the Companies, the shareholders of the Companies were intended beneficiaries of the contract.

137. The Agency had actual authority, as an agency of the United States Government, to bind the United States.

138. The Sweep Agreement breached the contract by rendering it impossible for the Companies to build and retain the capital necessary to exit conservatorship and return to normal business operations.

139. Each subsequent Sweep Amendment payment independently breaches that contract by depleting the Companies of capital (rather than "preserv[ing] and conserv[ing]" it), in a manner that the Agency has expressly recognized undermines the goals of conservatorship.

140. Had the United States adhered to the contract, it would have protected the rights of holders of stock (other than itself) in the Companies. Through the Sweep Amendment, however, the United States instead engaged in self-dealing, benefitting itself while harming the shareholders other than itself.

141. The Sweep Amendment, thus, directly harmed Owl Creek, by preventing the termination of the conservatorship; stripping the Companies of their ability to generate and retain funds to ever distribute as dividends to holders of the Junior Preferred Stock; and nullifying Owl Creek's contractual right, as holders of Junior Preferred Stock, to ever receive a liquidation preference upon the dissolution, liquidation, or winding up of the Companies. Owl Creek is accordingly entitled to damages.

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PRAYER FOR RELIEF

WHEREFORE, Owl Creek seeks a judgment as follows:

A. Finding that the United States has taken or illegally exacted Owl Creek's private property in violation of the Takings or Due Process clauses of the Constitution;

B. Awarding Owl Creek just compensation under the Fifth Amendment for the United States' taking of its property;

C. Determining and awarding to Owl Creek the damages sustained by it as a result of the violations set forth above;

D. Awarding rescissory damages, based upon the breach of fiduciary duty that occurred;

E. Awarding to Owl Creek the costs and disbursements of this action, including reasonable attorneys' and experts' fees, costs and expenses; and

F. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted:

August 16, 2018

By: *s/ Lawrence D. Rosenberg*

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UNITED STATES COURT OF FEDERAL CLAIMS

MASON CAPITAL L.P., AND MASON CAPITAL MASTER FUND L.P., Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-529 Chief Judge Sweeney

FIRST AMENDED COMPLAINT

Plaintiffs Mason Capital L.P., and Mason Capital Master Fund L.P. (collectively, "Mason"), by and through the undersigned attorneys, hereby bring this action against the United States of America seeking (a) compensation for the taking of their property in violation of the Fifth Amendment to the Constitution or (b) in the alternative, the illegal exaction of their property in violation of the Fifth Amendment; (c) breach of fiduciary duty; and (d) breach of implied contract. In support, Mason alleges as follows:

NATURE AND SUMMARY OF THE ACTION

1. This is an action to redress the United States' wiping out of Mason's shares in the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac" and, collectively with Fannie Mae, the "Companies") by seizing for itself all earnings of the solvent Companies in perpetuity.

2. On August 17, 2012, two arms of the United States—the Department of Treasury ("Treasury") and the Federal Housing Finance Agency ("Agency" or "FHFA"), which was purportedly acting as the conservator of the Companies—agreed between themselves to a "Third Amendment to Amended and Restated Senior Preferred Stock Purchase Agreement" (the "Sweep Amendment"). Through the operation of the Sweep Amendment, the United States has

expropriated hundreds of billions of dollars in net worth from the Companies, to benefit the government at the expense of the Companies' other shareholders. At the time of the Sweep Amendment, Mason held several series of junior preferred stock issued by the Companies (the "Junior Preferred Stock"), with a "stated value" and/or "liquidation preference" (term varies by stock certificate) in excess of $1.14 billion. As a direct result of the Sweep Amendment, Mason has suffered severe economic loss to its property interests in the Junior Preferred Stock.

3. The Companies are (as Congress has provided) private, for-profit, shareholder-owned corporations whose purpose is to support liquidity, stability, and affordability in the secondary mortgage market by securitizing mortgage loans originated by primary market lenders and selling the bundled loans to investors.

4. In July 2008, amid the financial crisis in the housing and mortgage markets, Congress enacted the Housing and Economic Recovery Act of 2008 (the "Recovery Act"). The Recovery Act created the Agency and granted its director the discretion, under certain circumstances, to place the Companies into conservatorship or receivership. The Recovery Act also granted to Treasury temporary emergency authority to purchase obligations or other securities of the Companies under certain circumstances.

5. On September 6, 2008, the Agency placed the Companies into conservatorship under itself. In such case, Congress in the Recovery Act expressly charged the Agency, as conservator, to seek to return the Companies to a "sound and solvent condition" and to "preserve and conserve the assets and property" of the Companies.

6. The next day, Treasury, via the Agency, entered into Senior Preferred Stock Purchase Agreements (the "Treasury SPAs") with the Companies. Under the Treasury SPAs, Treasury committed to invest in the Companies in exchange for preferred stock that ranked

senior to all series of Junior Preferred Stock (the "Treasury Senior Preferred Stock"). Treasury received for this commitment, among other things, (a) $1 billion of Treasury Senior Preferred Stock, (b) a warrant to purchase up to 79.9% of the common stock of each Company for a nominal price, (c) a liquidation preference equal to the $1 billion initial commitment fee plus the amount invested by Treasury in the applicable Company, and (d) a periodic commitment fee, in an undetermined amount, to be paid beginning in 2010. Through these and other provisions of the Treasury SPAs, Treasury acquired the ability to control the Companies.

7. Consistent with its statutory mandate under the Recovery Act, as well as historical understandings of conservatorship against which Congress had enacted it, the Agency assured the market that same day—and repeatedly for more than three years thereafter—that the goal of the conservatorship was to "return[] the entities to normal business operations"; that the conservatorship would be temporary and would terminate once the Companies had been restored "to a safe and solvent condition"; that the Junior Preferred Stock would remain outstanding and continue to trade; and that stockholders would "continue to retain all rights in the stock's financial worth, as such worth is determined by the market."

8. At least by 2011, Treasury and the Agency recognized that the Companies had stabilized and their financial performance was improving. By the first and second quarters of 2012, Fannie Mae and Freddie Mac, respectively, reported positive net worth and announced that they would not be requesting a further draw under the Treasury SPAs. Moreover, the Companies' renewed profitability suggested that they might well soon recognize sizeable deferred tax assets.

9. On the heels of such news, Treasury and the Agency (as purported conservator of the Companies) on August 17, 2012, entered into the Sweep Amendment, which eliminated the

dividend payable under the Treasury Senior Preferred Stock (10% of the outstanding amount drawn, if paid in cash) and imposed a requirement that the Companies each quarter pay to Treasury their entire net worth in perpetuity. Thus, the Sweep Amendment barred the Companies from ever realizing a profit and from ever paying down Treasury's liquidation preference. It thereby eliminated any possibility that Mason could ever receive any value from the Companies based on their property interests in the Junior Preferred Stock.

10. The Sweep Amendment appropriated the Companies' net worth in perpetuity to the benefit of the United States at the expense of the Companies and their shareholders, including Mason. As Treasury admitted, the purpose was to take "every dollar of earnings each firm generates . . . to benefit taxpayers," ensuring that shareholders other than the United States received *no* benefit from those earnings. The United States paid no compensation to holders of the Junior Preferred Stock for this taking of their valuable property rights for the public benefit.

11. Mason purchased Junior Preferred Stock after the Agency imposed the conservatorship, but before it capitulated to Treasury's Sweep Amendment, because Mason believed in the future economic prospects of the Companies, reasonably relied upon the Agency's assurances of its intention that Mason and other holders of stock would retain their property rights, and expected the Companies to emerge from conservatorship as the Agency had promised repeatedly. At the time of purchase, Mason had no reasonable ground to expect that the United States instead would expropriate its investment and force shareholders into years of litigation to recoup their investments. Accordingly, through this action, Mason seeks the just compensation to which it is entitled under the Fifth Amendment to the United States Constitution for the government's taking of its property, as well as remedies under other causes of action detailed below—illegal exaction, breach of fiduciary duty, and breach of implied contract.

JURISDICTION AND VENUE

12. This Court has jurisdiction under 28 U.S.C. § 1491(a)(1) because this suit asserts claims against the United States founded upon the Fifth Amendment and on a contract to which the United States is a party. Venue is proper under 28 U.S.C. § 1491(a)(1).

THE PARTIES

13. Plaintiff Mason Capital, L.P., is a Delaware limited partnership that, as of market close on August 16, 2012, held 8,138,752 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $203,468,800, and 5,387,465 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $134,686,625.

14. Plaintiff Mason Capital Master Fund, L.P., is a Cayman Islands limited partnership that, as of market close on August 16, 2012, held 19,271,893 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $481,797,325, and 13,187,435 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $329,685,875.

15. Defendant United States includes Treasury, the Agency, the Secretary and Director thereof, respectively, and agents acting at their direction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

16. Mason's claims for taking (or, in the alternative, illegal exaction) are founded on the Fifth Amendment to the United States Constitution, which provides in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Mason's contract claims are under 28 U.S.C. § 1491(a), which provides for claims founded on a contract with the United States.

FACTUAL ALLEGATIONS

Fannie Mae, Freddie Mac, and their Junior Preferred Stock

17. Fannie Mae is a private stockholder-owned Delaware corporation organized and existing under the Federal National Mortgage Association Charter Act, 12 U.S.C. §§ 1716 *et seq*.[1] It was established in 1938 to promote affordable home ownership by facilitating the financing of home mortgages insured by the Federal Housing Administration. In 1968, Fannie Mae was privatized and reorganized into a government-sponsored entity with access to capital markets. In 1970, it was authorized to purchase conventional mortgages. From 1968 until 2010, Fannie Mae's stock was traded on the New York Stock Exchange. Its stock continues to trade.

18. Freddie Mac is a private stockholder-owned Virginia corporation organized and existing under the Federal Home Loan Mortgage Corporation Act, §§ 1451 *et seq*. It was established in 1970 to expand the secondary mortgage market. It was initially a wholly owned subsidiary of the Federal Home Loan Bank System, but Congress in 1989 reorganized and privatized it under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Under FIRREA, Freddie Mac became a for-profit corporation owned by private shareholders and had access to capital markets. From 1989 until 2010, Freddie Mac's stock was traded publicly on the New York Stock Exchange. Its stock continues to trade.

19. Three years after enacting FIRREA, Congress established the Office of Federal Housing Enterprise Oversight ("OFHEO"), through the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, to oversee and ensure the capital adequacy and financial safety and soundness of the Companies. OFHEO was authorized to place the Companies into

[1] All citations of the U.S. Code are from Title 12 unless otherwise noted.

conservatorship in certain circumstances, but did not employ this power.

20. Prior to 2008, Fannie Mae and Freddie Mac issued numerous series of non-cumulative Junior Preferred Stock. These series, respectively as to each Company, are *pari passu* with one another with respect to dividend payments and liquidation preferences, but have priority over the Companies' common stock.

21. Following their privatization, including after the establishment of OFHEO, the Companies operated successfully for decades, raising private capital, generating profits, regularly declaring and paying dividends on their various series of Junior Preferred Stock, and increasing shareholder value. Prior to 2007, Fannie Mae had not reported a full-year loss since 1985, and Freddie Mac had not since its privatization in 1989. Indeed, the Companies' preferred stock was generally viewed as a conservative and reliable investment—even as of August 8, 2008, after enactment of the Recovery Act and shortly before the imposition of the conservatorship, Fannie Mae's Junior Preferred Stock was rated AA- by S&P, A1 by Moody's, and A+ by Fitch.

The Housing Crisis and the Recovery Act

22. The housing and mortgage markets substantially weakened in 2007, which reduced the value of Fannie Mae and Freddie Mac's guarantee and investment portfolios. Both Companies suffered net losses beginning in 2007. These losses, however, were largely due to credit provisions—which represent *estimates* of future credit losses—that ultimately proved excessive. Actual credit losses from 2007 to 2011 were approximately $140 billion less than anticipated. A significant portion of the losses recorded in that period related to the write-down of deferred tax assets, which the Companies would reverse when they returned to profitability.

23. Notwithstanding these challenges, OFHEO assured the public that the

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Companies were stable. On March 19, 2008, James Lockhart, then-Director of OFHEO, announced that "both companies. . . have prudent cushions above the OFHEO-directed capital requirements and have increased their reserves," adding that "[w]e believe they can play an even more positive role in providing the stability and liquidity the markets need right now." He also called the idea of a bailout "nonsense in [his] mind," as the Companies were "safe and sound, and they will continue to be safe and sound." *As Crisis Grew, a Few Options Shrank to One*, N.Y. Times (Sept. 7, 2008).

24. Lockhart similarly explained four months later, on July 8, that the Companies were "adequately capitalized, which is our highest criteria." Two days after that, on July 10, he again confirmed, in a public statement, that Fannie Mae and Freddie Mac were "adequately capitalized, holding capital well in excess of the OFHEO-directed requirement, which exceeds the statutory minimums. They have large liquidity portfolios, access to the debt market and over $1.5 trillion in unpledged assets." This same day, then-Treasury Secretary Henry Paulson testified to the House Financial Services Committee that the Companies' "regulator has made clear that they are adequately capitalized." The then-Chairman of the Federal Reserve, Ben Bernanke, echoed this, also testifying before that committee, on July 16, 2008, that the Companies were adequately capitalized and in no danger of failing. Further, upon information and belief, an August 2008 analysis for the Agency of Freddie Mac's financial condition, by BlackRock, concluded that Freddie Mac's "long-term solvency does not appear endangered—we do not expect Freddie Mac to breach critical capital levels even in stress case."

25. At the end of July 2008, as the decline in the housing and mortgage markets accelerated, Congress passed and President George W. Bush signed the Recovery Act. That

Act created FHFA as a new federal agency, replacing OFHEO, and charged it with regulating the Companies. § 4511; § 4513. Mr. Lockhart, who had been running OFHEO, became the Agency's first Director.

26. The Recovery Act gave the Director discretion under certain circumstances to place the Companies into conservatorship or receivership under the Agency. In a sub-section specifying the Agency's "General powers," as either "conservator or receiver," it authorizes the Agency to do a variety of things that include "preserv[ing] and conserv[ing] the assets and property" of the Companies but do not include liquidating them or winding them down. § 4617(b)(2)(B). The Agency as conservator or receiver may repudiate contracts, if done "within a reasonable period following such appointment," but must in such cases pay damages. § 4617(d)(2).

27. The Recovery Act separately specifies the Agency's "Powers as conservator." It "may, as conservator, take such action as may be" (i) "necessary to put the [Company] in a sound and solvent condition" and (ii) "appropriate to carry on [its] business . . . and preserve and conserve [its] assets and property." § 4617(b)(2)(D). That Act allows a Company to consent to being placed into conservatorship, but also expressly authorizes a non-consenting Company to sue within 30 days to challenge that action. § 4617(a)(3)(I), (a)(5).

28. After specifying the Agency's powers as conservator, the Recovery Act in the next sub-section separately specifies its "Additional powers as receiver." Only here does the Act authorize (indeed, direct) the Agency to wind down a Company, stating that the it "shall place the [Company] in liquidation." § 4617(b)(2)(E). Receivership would terminate any existing conservatorship and trigger an immediate right to judicial review. It also would require numerous other special procedures, including a detailed process for the receiver to

determine claims against a Company, which also incorporates an express right of judicial review. § 4617(b)(3); (b)(6).

29. The Recovery Act expressly provides that, even upon appointment of a receiver, the right of the Companies' shareholders "to payment, resolution, or other satisfaction of their claims" is not terminated. § 4617(b)(2)(K).

30. Under the Recovery Act, the Agency in its actions as a conservator or receiver is not to be "subject to the direction or supervision of any other agency of the United States." § 4617(a)(7).

31. In addition to these provisions concerning the Agency's imposition of conservatorship and receivership, the Recovery Act granted to Treasury the temporary emergency authority—but only until December 31, 2009—to "purchase any obligations and other securities" of the Companies and "determine" those securities' "terms and conditions [and] . . . amounts." § 1455(*l*)(l)(A); § 1455(*l*)(4); § 1719(g).

32. Prior to exercising this temporary authority, the Treasury Secretary was required to "determine that such actions are necessary to: (i) provide stability to the financial markets; (ii) prevent disruptions in the availability of mortgage finance; and (iii) protect the taxpayer." §§ 1455(*l*)(1)(B); 1719(g)(1)(B). He also had to take specified factors into account: (i) the need for preferences or priorities regarding payments to the government; (ii) limits on maturity or disposition of obligations or securities to be purchased; (iii) the Company's plan for the orderly resumption of private market funding or capital market access; (iv) the probability of the Company's fulfilling the terms of any such obligation or other security, including repayment; (v) the need to maintain the Company's status as private and shareholder owned; and (vi) restrictions on the use of Company resources, including

limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes. §§ 1455(*l*)(1)(C); 1719(g)(1)(C).

The Agency Makes Itself the Companies' Conservator, Enters Into (and Amends) SPAs with Treasury During the Authorized Period, and Reassures the Markets

33. In letters to each Company dated August 22, 2008, the Agency found (consistent with the Director's public statements) that each Company met all relevant capital requirements, including additional capital requirements imposed by the Agency above the statutory minimums and requirements arising from the Agency's risk-based capital stress test.

34. Nevertheless, on information and belief, Treasury and the Agency around the beginning of September 2008 sought the consent of the Companies' boards of directors to place the Companies into conservatorship. The Agency obtained such consent on the ground, in part, that conservatorship would serve the interests of the Companies' shareholders. In exchange for the Agency's promise, the Companies agreed not to challenge being put under conservatorship.

35. On September 6, 2008, the Agency did place each of the Companies into conservatorship. As a result, the Agency, "as conservator," succeeded to "all rights, titles, powers, and privileges of the [Companies], and of any stockholder, officer, or director of [a Company] with respect to the [Company]." § 4617(b)(2)(A)(i). Conservatorship, unlike receivership, does not "terminate" any rights of shareholders. *Compare id. with* § 4617(b)(2)(K)(i) (providing for termination of rights of shareholders in event of receivership, "except for their right to payment, resolution or other satisfaction of their claims, as permitted under subsections (b)(9), (c), and (e)").

36. The next day, exercising its temporary authority under the Recovery Act, Treasury entered into the Treasury SPAs with the Companies (acting through the Agency as

conservator). Treasury agreed to provide each Company with a commitment of up to $100 billion, as and when necessary for the Companies to maintain a positive net worth. In exchange, Treasury received one million shares of the Treasury Senior Preferred Stock. Treasury also received: (a) an initial liquidation preference of $1000 per share (equal to $1 billion), plus any outstanding amount drawn from the commitment; (b) a dividend of 10% per annum of the outstanding amount provided by Treasury (which also could be paid "in kind" by increasing the liquidation preference, subject to incurring a 12% accrual rate going forward); (c) warrants to buy up to 79.9% of each Company's common stock for $0.00001 per share, and (d) the right to receive payment of a periodic commitment fee, in an undetermined amount, to be paid by the Companies quarterly beginning on January 31, 2010. The Treasury Senior Preferred Stock was senior to all Junior Preferred Stock, so that no dividends or liquidation distributions on any Junior Preferred Stock could be paid until after Treasury had received its full dividend or liquidation distributions.

37. In addition, covenants in the Treasury SPAs granted Treasury substantial ability to control the Companies and the Agency's conduct of the conservatorship, by restricting the ability to take certain actions without Treasury's prior written consent. This included restricting their ability to: (a) declare dividends on any outstanding common or preferred stock other than the Treasury Senior Preferred Stock; (b) sell or issue equity interests; (c) terminate the conservatorship; (d) transfer assets; (e) incur indebtedness; (f) enter into a merger, reorganization or recapitalization, or make acquisitions; or (g) enter into transactions with affiliates.

38. The Treasury SPAs also prohibited the Companies from owning more than a specified amount of mortgage assets and restricted the Agency from drawing on the Treasury

commitment to pay any subordinated liabilities, including "a claim against [a Company] arising from rescission of a purchase or sale of a security issued by [a Company] . . . or for damages arising from the purchase, sale, or retention of such a security."

39. When he imposed the conservatorship and entered into the Treasury SPAs, Mr. Lockhart took pains to assure shareholders that their interests would be protected, stating that, "in order to conserve over $2 billion in capital every year, the common stock and preferred stock dividends will be eliminated, but the common and all preferred stocks will continue to remain outstanding." He added:

> [I]n order to restore the balance between safety and soundness and mission, FHFA has placed Fannie Mae and Freddie Mac into conservatorship. *That is a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations*. FHFA will act as the conservator to operate the Enterprises until they are stabilized. (Emphasis added.)

40. The Agency in a fact-sheet at the time further stated that "[s]tockholders will continue to retain all rights in the stock's financial worth; as such worth is determined by the market," and that, "[u]pon the [Agency] Director's determination that the Conservator's plan to restore the Company to a safe and solvent condition has been completed successfully, *the Director will issue an order terminating the conservatorship*." (Emphasis added.)

41. Consistent with these assurances, news reports reflected the view that the conservatorship was motivated more by political considerations than financial need: "[Treasury Secretary] Paulson's decision seems to have been a philosophical one, rather than one forced by imminent crisis. Of course, for stagecraft purposes, it was played as impending disaster." *Paulson's Itchy Finger, on the Trigger of a Bazooka*, N.Y. Times (Sept. 9, 2008).

42. The Treasury SPAs were amended on September 26, 2008, to extend the commencement date for the periodic commitment fee by two months, until March 31, 2010.

(The fee was never imposed.) The day before, Director Lockhart had again reaffirmed in public testimony to Congress that conservatorship was "a statutory process designed to stabilize a troubled institution with the objective of maintaining normal business operations and restoring its safety and soundness," and that the Agency would act as conservator only "until the [Companies] are stabilized." He further assured Congress that the Companies remained "private" and that "both the preferred and common shareholders have an economic interest in the companies."

43. The Companies did not exercise their express right under the Recovery Act to sue within thirty days to challenge being placed into conservatorships.

44. Under the Obama Administration, the Treasury SPAs were amended twice more before Treasury's temporary emergency purchase authority expired on December 31, 2009. The first was on May 6, 2009, to provide that Treasury could increase the commitment to $200 billion as needed. That same month, the Agency submitted a report to Congress recognizing that "[c]onservatorship is a statutory process designed to restore safety and soundness while carrying on the business of a regulated entity and preserving and conserving its assets and property." The following month, Director Lockhart in public congressional testimony emphasized that, "[a]s the conservator, FHFA's most important goal is to preserve the assets of Fannie Mae and Freddie Mac over the conservatorship period. That is our statutory responsibility." The month after that, in July 2009, the Agency issued a "Strategic Plan 2009-2014," in which it included the following "strategic goal": "The conservatorship of Fannie Mae and Freddie Mac allows the FHFA to preserve the assets of the [Companies], ensure they focus on their housing mission and are positioned to emerge from conservatorship as financially strong." It again emphasized that the conservatorship was "designed to stabilize

troubled institutions with the objective of maintaining normal business operations and restoring financial safety and soundness."

45. The second amendment was executed on December 24, 2009. It provided a formulaic maximum commitment of either $200 billion or the amount of the Companies' negative net worth from 2010 to 2012. Neither of these amendments affected the rights of the Companies' shareholders other than the United States.

46. A contemporaneous Treasury memorandum characterized the latter amendment as a "temporary" measure "to support [the Companies] until Congress determines a more sustainable long-term path." It also confirmed that "*[c]onservatorship . . . preserves the status and claims of the preferred and common shareholders*." (Emphasis added.) Indeed, Treasury officials, writing to the then-Secretary of the Treasury, explained that the Companies already had "moved from being a source of instability during the early stages of the crisis to a stable and critical source of mortgage financing to the market today," and that Fannie Mae and Freddie Mac had only drawn $60 billion and $51 billion, respectively, of the $200 billion available to each.

47. Treasury officials at the time of the last of these amendments also recognized that, as the text of the Recovery Act provides, the deadline of December 31, 2009, "constrained" Treasury's "ability to make further changes to the [Treasury SPAs]."

The Agency Continues to Reassure the Markets, in the Years After Treasury's Emergency Stock-Purchase Authority Expires and as the Housing Market Rebounds

48. Over the next two years, throughout 2010 and 2011, the Agency continued to assure the markets that its intentions as conservator of the Companies were consistent with its statutorily specified "Powers as conservator" (to make the Companies "sound and solvent," "preserve and conserve" their assets and property, and "carry on" their businesses) and

ordinary understandings of a conservator's duty to *conserve* a company. *See* § 4617(b)(2)(D). In February 2010, the Agency's new Acting Director, Edward J. DeMarco, told Senate and House leaders that "FHFA is focused on conserving the [Companies'] assets" and "put[ting] [them] in a sound and solvent condition." And in a report to Congress in June 2011, the Agency touted its goals of "preserv[ing] and conserv[ing] each [Company's] assets and property and restor[ing] the [Companies] to a sound financial condition so they could continue to fulfill their statutory mission of promoting liquidity and efficiency in the nation's housing finance markets."

49. Also in June 2011, the Agency recognized in issuing a final rule that "allowing capital distributions to deplete [a Company]'s conservatorship assets would be inconsistent with the [A]gency's statutory goals, as they would result in removing capital at a time when *the Conservator is charged with rehabilitating the regulated [Company]*." 76 Fed. Reg. 35724, 35727 (June 20, 2011) (emphasis added). The rule underscored that, under the Recovery Act, "[a] conservator's goal is to continue the operations of a [Company], rehabilitate it and return it to a safe, sound, and solvent condition." *Id*. at 35730. In contrast, "[t]he ultimate responsibility of FHFA as receiver is to resolve and liquidate the [Company]." *Id*.

50. Later, on November 10, 2011, Mr. DeMarco continued this public theme, in a letter to the Senate: "By law, *the conservatorships are intended to rehabilitate the [Companies]* as private firms." (Emphasis added.) On December 1, 2011, he reiterated to Congress—quoting his "powers as conservator" as specified in the Recovery Act—that, "as I have noted, FHFA has a statutory responsibility as conservator of the [Companies] to 'take such action as may be: necessary to put the regulated entity in a sound and solvent condition;

and appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.'"

51. By 2011, and consistent with the Agency's repeated assurance that it was seeking as conservator to rehabilitate the Companies, it was obvious that (as Treasury officials had begun to discern as early as December 2009), the Companies were past the trough in their financial performance. The United States recognized this repeatedly:

- As early as June 2011, on information and belief, in a meeting with restructuring experts from Blackstone, Treasury was told that the Companies were "showing improved financial performance and stabilized loss reserves," and that their tax assets (unusable in the event of a loss, but valuable in the event of a profit) could generate significant value.
- In October 2011, the Agency observed, in a report published to the public on its website, that the Companies' "actual results" were "substantially better than projected."
- A November 8, 2011, report prepared for Treasury recognized that, "[f]rom December 31, 2012, through September 30, 2018, Freddie Mac is not projected to draw on the liquidity commitment to make its dividend payments [to Treasury under the SPA] because of increased earnings driven by significantly reduced credit losses in 2012 and 2014."
- Upon information and belief, a December 2011 internal Treasury memorandum noted that "both Fannie Mae and Freddie Mac are expected to be net income positive (before dividends) on a stable, ongoing [basis] after 2012 . . . ."
- Upon information and belief, a presentation sent to senior Treasury officials in

February 2012 stated that "Fannie and Freddie could have the earnings power to provide taxpayers with enough value to repay Treasury's net cash investments in the two entities."

- Upon information and belief, in June 2012, Treasury memorialized in an email that "the [Companies] will be generating large revenues over the coming years, thereby enabling them to pay the 10% annual dividend well into the future even with the caps" on Treasury's commitment. According to the email, this point was apparently discussed between then-Treasury Secretary Timothy Geithner and Mr. DeMarco at a June 24, 2012, meeting.
- On July 13, 2012, Agency officials circulated meeting minutes noting that Fannie Mae's Chief Financial Officer had stated at an executive-management meeting four days before that the next eight years would likely be the "golden years of [Company] earnings," that "[c]urrent projections show that cumulative [Company] dividends paid will surpass cumulative [Company] Treasury draws by 2020," and that "[c]umulative 2012-2016 income is now forecast at $56.6 billion, $12.3 billion higher than the last projection."
- In a July 30, 2012, "PSPA Covenant and Timing Proposal" regarding the Sweep Amendment, Treasury acknowledged the "[Companies] will report very strong earnings on August 7, that will be in-excess of the 10% dividend to be paid to Treasury."
- At a meeting between senior Treasury officials and Fannie Mae on August 9, 2012, financial projections were introduced showing that, at no time between 2013 and 2022 would there be less than $116.1 billion of remaining funding

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available to Fannie Mae, or less than $148.3 billion available to Freddie Mac, under the Treasury SPAs. Furthermore, the projections showed that, even if the 10% dividends remained in place, dividends paid to Treasury would exceed cumulative draws under the Treasury SPAs as of 2020 in the case of Fannie Mae, and as of 2019 in the case of Freddie Mac.

- At the same meeting on August 9, 2012, just days before the Sweep Amendment was implemented, Fannie Mae's Chief Financial Officer, Susan McFarland, told Treasury officials that release of the valuation allowance on the deferred tax assets would likely occur in mid-2013 and would generate profits in the range of $50 billion.

52. These encouraging projections were well founded. On May 9, 2012, Fannie Mae announced a net worth of $268 million and comprehensive income of $3.1 billion for the quarter ending March 31, 2012, and announced that it would not request a draw from Treasury for the first time since being placed into conservatorship. Similarly, Freddie Mac on August 7, 2012, reported a net worth of $1.1 billion for the quarter ending June 30, 2012, and announced that it too would not request a Treasury draw. Thereafter, on August 8, 2012, Fannie Mae announced net income of $5.1 billion for the second quarter of 2012, more than sufficient to pay its $2.9 billion quarterly dividend to Treasury, and announced, "we expect our financial results in 2012 to be substantially better than the past few years."

53. The Companies also had sizeable deferred tax assets in 2012: Fannie Mae disclosed $64.1 billion on February 29, 2012, and Freddie Mac disclosed $34.7 billion on August 7, 2012. The Companies' renewed profitability suggested that they would soon recognize these massive assets.

Treasury Through the Sweep Amendment Effectively Nationalizes the Companies and Appropriates Mason's Preferred Stock

54. Given the long history of assurances provided by the Agency and others, Mason was shocked when, on August 17, 2012—nearly three years after Treasury's emergency authority to purchase the Companies' stock had expired and the Treasury SPAs had last been amended, but only days after the Companies' highly favorable second-quarter results had been announced—Treasury and the Agency (acting as purported conservator for the Companies) entered into the Sweep Amendment. It transformed the Companies' 10% dividend into a "dividend" of the "total assets of the Company . . . less the total liabilities of the Company" (subject to a capital reserve that diminished over time, initially set to be zero as of January 1, 2018, but reset to a nominal $3 billion in December 2017). The Sweep Amendment has no termination date. In brief, it requires each of the Companies to turn over its entire net worth to Treasury—every quarter, in perpetuity.

55. Treasury thereby appropriated to itself all future profits of the Companies, effectively nationalizing them. Correspondingly, Treasury kept the Companies from accumulating capital that could ensure their ongoing solvency and ability to operate as private, rehabilitated companies without depending on the government; from having any funds to pay dividends to any other stockholders; and, except in limited circumstances, from being able to pay down the balance on the commitment (the net-worth payments do not reduce this balance) so as to substantially decrease Treasury's liquidation preference over the Junior Preferred and common stockholders.

56. The effect was to extinguish any possibility that any shareholder other than the United States will receive any value from the Companies. The government's action also, while not benefitting but actually harming the Companies, provided Treasury an expected and

actual windfall of billions of dollars per year without the need for any appropriation from Congress. And it placed the burden of a public program, designed and intended to benefit the government's purposes, disproportionately upon the relatively small group of shareholders who invested and believed in the Companies' prospects, including Junior Preferred Stockholders, rather than upon the public as a whole.

57. It turns out that, during much of the period that the Agency was assuring Junior Preferred Shareholders that its objective was to stabilize the Companies and terminate the conservatorship, Treasury had quietly been seeking a way to wind-down the Companies, which came to include seeking a way to seize all of their value notwithstanding that its emergency stock-purchasing authority had expired. An internal memorandum to Treasury Secretary Geithner from the then-Under Secretary of the Treasury for Domestic Finance, Jeffrey Goldstein, dated December 20, 2010, referred to a "commitment" by the Obama Administration to "ensure existing common equity holders *will not have access to any positive earnings from the [Companies] in the future*." (Emphasis added.) And in February 2011 Treasury issued a report expressing its intention to "us[e] a combination of policy levers to wind down Fannie Mae and Freddie Mac," claiming that the Administration would "work with [FHFA]" to this end—all while Mr. DeMarco continued throughout 2011 to assure Congress and the public that his goal was to *rehabilitate* the Companies. At the same time, Treasury stated its belief that, under the current Treasury SPAs, "there is sufficient funding to ensure the orderly and deliberate wind down of Fannie Mae and Freddie Mac, as described in our plan."

58. According to a senior Treasury official, Jeffrey Foster, the idea for a variable dividend payment based on positive net worth originated from a phone conversation between

himself and Mario Ugoletti in 2010. Mr. Ugoletti had been appointed in 2009 as a special advisor to the Agency's Acting Director, and served as primary liaison to Treasury with respect to the Treasury SPAs and the amendments thereto. Before 2009, Mr. Ugoletti worked at Treasury for 14 years, from 1995 to 2009, serving as Director of the Office of Financial Institutions Policy during the last five years of his tenure. In that capacity, he participated, on behalf of Treasury, in creating and implementing the Treasury SPAs.

59. Mr. Foster testified that, during the phone call in 2010, he suggested to Mr. Ugoletti that the Treasury SPAs needed to be restructured to avoid the circularity of drawing from Treasury to then pay Treasury (the so-called "death spiral"). This conclusion was supposedly based upon financial modeling work that Treasury itself had commissioned from Grant Thornton.

60. Mr. Foster found a receptive audience in the 14-year veteran of Treasury. Mr. Ugoletti has testified to his understanding that Treasury "all along" wanted to see a wind-down of the Companies and a new housing finance structure. In his position as special advisor to the Agency's Acting Director on the Treasury SPAs and the amendments thereto, he was in an ideal position to push Treasury's agenda.

61. In addition to his clear understanding of the wind-down objectives of his prior longtime employer, Mr. Ugoletti also understood that Treasury had the ability to control the Agency and dictate whether the Companies would ever emerge from conservatorship. As he explained in deposition, even if the Companies had been able to raise $189.5 billion in equity to pay off Treasury's liquidation preference and become sufficiently well capitalized to get the Agency's "stamp of approval on them," "Treasury still has to approve [the Companies'] coming out of conservatorship." As noted, the Treasury SPAs had given Treasury the right to

block certain actions of the Agency as conservator in operating the Companies.

62. Treasury had used that power over the conservatorships to place the general interest of the government's coffers—beyond Treasury's interest in repayment of draws and in receiving dividends—ahead of the interests of shareholders and to hamper the Agency as conservator in preserving the value of the Companies for any shareholders other than Treasury. For example, in September 2009, the Companies had proposed to sell to third-party investors their investments in low-income-housing tax credits, to decrease their draws and dividend payments to Treasury. Treasury withheld its approval, explaining that "the proposed sale would result in *a loss of aggregate tax revenues* that would be greater than the *savings to the federal government* from a reduction in the capital contribution obligations of Treasury" to the Companies under the Treasury SPAs.

63. Armed with its power to prevent the Agency from allowing the Companies to emerge from the conservatorships, Treasury sought to exert its influence upon the Agency's senior officials to adopt Treasury's bleak vision for the Companies and their shareholders. Upon information and belief, on January 4, 2012, Mary Miller of Treasury transmitted an agenda to Acting Director DeMarco claiming that Treasury and the Agency had "common goals" to "promote a strong housing market recovery, reduce government involvement in the housing market over time and to provide the public and financial markets with a clear *plan to wind down the [Companies]*." (Emphasis added.) One section of this agenda was titled, "Establish meaningful policies that demonstrate *a commitment to winding down the [Companies]*." (Emphasis added.)

64. As the financial condition of the Companies continued to improve dramatically, and the need for the Companies to remain in conservatorship diminished, the

efforts of Treasury to implement the Sweep Amendment intensified. On June 13, 2012, Treasury prepared a "sensitive" and "pre-decisional" presentation, which stated that "Treasury would like to modify the [Treasury] SPAs given the challenges and circularity embedded in the current structure." In support of its modification proposal, which essentially mirrored the eventual Sweep Amendment, Treasury offered forecasts prepared by its own consultant, Grant Thornton, which showed a "base case" and a "downside case" that did not properly reflect the performance and prospects of the Companies. For example, under the base cases for Fannie Mae and Freddie Mac, the forecasts (made in June 2012) assumed, for 2012, a combined net comprehensive loss of $6.4 billion—even though their combined net comprehensive income of $4.9 billion for the first quarter alone exceeded that figure. Indeed, for full year 2012, the Companies reported positive comprehensive income of $34.8 billion—a combined difference of $41.2 billion between the assumptions used by Grant Thornton and actual results. For 2013, the differences were even larger—the base cases projected combined net comprehensive positive income of $14.9 billion for the Companies, whereas their combined actual comprehensive income, excluding any deferred tax assets, was $64.5 billion, more than 425% higher than projected.

65. The need for Treasury to implement the Sweep Amendment took on even greater urgency following the meeting on August 9, 2012, attended by representatives of Treasury and Fannie Mae, at which Ms. McFarland advised Treasury officials that Fannie Mae would deliver sustainable profits over time and benefit from the likely near-term allowance of the deferred tax assets. The promising news conveyed at that meeting did not cause Treasury to reconsider its proposal to implement the Sweep Amendment. To the contrary, the same day as that meeting, Mr. Ugoletti emailed Mr. DeMarco and other Agency

officials, advising them that, "[a]s a heads up, there appears to be a renewed push to move forward on [Treasury] SPA amendments." Mr. Ugoletti advised his Agency colleagues that he had not seen the proposed documents yet, but he understood that they were largely the same as previous versions he had reviewed, in terms of net income sweep, eliminating the commitment fee, and faster portfolio wind-down.

66. Treasury made the decision, on behalf of itself and the Agency, to cause the execution of the Sweep Amendment. This is evident from the fact that the Sweep Amendment was designed to promote Treasury's policy objectives. On information and belief, on August 13, 2012, just four days before the Sweep Amendment was executed, a draft presentation was circulated among Treasury officials, indicating that the Sweep Amendment was "consistent with Treasury's policy to wind-down the [Companies]," and specifically intended to "ensure that the [Companies] will not be able to rebuild capital as they are wound down." Similarly, in an email between Treasury and White House officials on August 15, 2012, which did not copy the Agency or the Companies, Treasury official Adam Chepenik declared that, "[b]y taking all of their profits going forward, we are making clear that the [Companies] will *not* ever be allowed to return to profitable entities at the center of our housing finance system," and he confirmed that "taxpayers will receive every dollar of profit the [Companies] make." (Emphasis in original.)

67. While Treasury was pressing the Agency, through its liaison Mr. Ugoletti, to finalize the Sweep Amendments, neither Treasury nor the Agency apprised officials at the Companies about the existence of the Sweep Amendment, let alone invited them to discuss their own future. According to Mr. Ugoletti, representatives of the Companies received the near-final version of the Sweep Amendment not long before its execution and were "not too

happy." Susan McFarland (who as Fannie Mae's Chief Financial Officer had met with Treasury on August 9, 2012) testified:

> So when the amendment went into place, part of my reaction was they did that in response to my communication of our forecasts and the implication of those forecasts, that it was probably a desire not to allow capital to build up within the enterprises and not to allow the enterprises to recapitalize themselves.

68. Had the Agency been acting as a conservator for the Companies, rather than as a federal regulator to implement Treasury's policy goals, the Agency would have had good reason to consult with the Companies' boards and management to determine whether the Sweep Amendment was or was not in the best interests of the Companies and their shareholders. On information and belief, this never happened. This failure of the Agency to consult with the boards and management of the Companies for which it was purporting to act as conservator reinforces that the Agency was not acting as the conservator it had claimed it would be.

69. In short, Treasury orchestrated the Sweep Amendment, and the Agency was, to the extent it had any involvement, merely a federal agency acting at Treasury's direction, under its supervision, and for its purposes.

Treasury Boasts About Its Seizure of the Companies' Profits in Perpetuity

70. After imposing the Sweep Amendment, Treasury made no attempt to hide from the public that Treasury's purpose was to expropriate the entirety of the Companies' shareholders' private property rights for public use and a public purpose. In a press release the day it imposed the Sweep Amendment, Treasury announced that the so-called revised dividend would "replace the 10 percent dividend payments made to Treasury on its preferred stock investments in Fannie Mae and Freddie Mac with a quarterly sweep of every dollar of

profit that each firm earns going forward," and "*make sure that every dollar of earnings each firm generates is used to benefit taxpayers*." (Emphasis added.) The press release further stated that the Sweep Amendment was a commitment that "*the [Companies] will be wound down and will not be allowed to retain profits, rebuild capital*, and return to the market in their prior form." (Emphasis added.)

71. Treasury did not indicate that, in entering into the Sweep Amendment, it had taken into consideration the need to maintain the Companies' status as private shareholder-owned companies. *See* § 1719(g)(1)(C)(v), § 1455(*l*)(1)(C)(v). Rather, its overriding concern was the government's own public interests.

72. Treasury made no effort in its press release to justify its authority for entering into the Sweep Amendment in the face of the expiration—nearly three years before, with no purported amendments since—of its emergency purchasing authority. Nor did it attempt to justify its effective winding down of the Companies without putting them into receivership and providing shareholders the Recovery Act's protections in that event.

73. Furthermore, a White House senior advisor, in an email written to a senior Treasury official on the date of the Sweep Amendment, stated that "we've closed off [the] possibility that [Fannie and Freddie] ever[] go … private again," and forwarded an email expressing the advisor's view that the Sweep Amendment would "ensur[e] that [the Companies] can't recapitalize." The same White House advisor sent another email to Treasury officials that day characterizing the Sweep Amendment as a "policy," stating: "Team T[reasur]y, [y]ou guys did a remarkable job on the [Treasury] SPAs this week. You delivered *a policy change of enormous importance that's actually being recognized as such by the outside world* . . . , and as a credit to the Secretary and the President." (Emphasis added.)

74. These emails confirm that the Sweep Amendment emanated from the highest levels of the Administration, that it was intended to serve a perceived public policy with no regard for the conservation obligations of the Agency, and that the Administration recognized it was sharply diverging from the path that the government had drawn for the Companies and their investors.

In Executing the Sweep Amendment and Becoming a Mouthpiece for Treasury's Policy Objectives, the Agency Abrogated Its Public Commitments to Act as a "Conservator"

75. The Sweep Amendment did not make commercial or economic sense for the Companies (or their non-controlling shareholders), nor did the United States seriously claim otherwise. By contrast, the Sweep Amendment made a lot of sense for the United States Treasury, by expropriating valuable property belonging to Mason for the benefit of the United States and its coffers, while implementing policy objectives that Treasury had secretly long sought to achieve.

76. Thus, the Agency in "agreeing" to the Sweep Amendment had ceased to act in the best interests of the Companies and as the conservator that it had—repeatedly, for years—assured the markets that it would be, namely that it would act consistent with its "Powers as conservator" under the Recovery Act and with common, settled understandings of a conservator's role.

77. Thereafter, the Agency transformed itself into a mouthpiece for Treasury's policy objectives, which nakedly elevated the interests of "taxpayers" (*i.e.*, Treasury) over the interests of the Companies' soundness and solvency, let alone the Companies' stockholders other than the United States. Various documents and statements subsequent to the Sweep Amendment confirm the Agency's public switch to Treasury's position, notwithstanding Mr. DeMarco's reassurances to the market as recently as December 2011 that his duty as

conservator was to rehabilitate the Companies. For example:

- On October 9, 2012, about two months after the Sweep Amendment, the Agency released its Strategic Plan for 2013-2017, which included the strategic goals of "minimiz[ing] taxpayer losses during the Enterprises' conservatorships" and "contract[ing] [Company] operations."
- On October 22, 2012, Timothy J. Mayopoulos, the President and CEO of Fannie Mae, stated that "[t]he [C]ompany is no longer run for the benefit of private shareholders."
- On March 20, 2013, the Agency's Office of Inspector General issued an Analysis of the Sweep Amendments in which it stated that, "[i]n overseeing the Enterprises, FHFA has to balance its responsibilities for maintaining the viability of the Enterprises and for protecting the interests of taxpayers."
- In April 2013, Mr. DeMarco himself stated that "[t]he Administration has made clear that their preferred course of action is to wind down the [Companies]," and he explained that the "recent changes to the [Treasury SPAs], replacing the 10 percent dividend with a net worth sweep, reinforce the notion that *the [Companies] will not be building capital as a potential step to regaining their former corporate status*." (Emphasis added.)
- In May 2014, Agency Director Melvin L. Watt stated: "I don't lay awake at night worrying about what's fair to the shareholders." He added: "I just don't have time to think about what might happen in the future with the shareholders."

78. After lawsuits were filed challenging the Sweep Amendment, the Agency attempted to offer pre-textual justifications. In a declaration the Agency submitted in

proceedings in the United States District Court for the District of Columbia, Mr. Ugoletti claimed that the Agency had agreed to the Sweep Amendment due to concerns that the burden of paying the 10% dividend owed to Treasury might reduce the amount of Treasury's commitment that remained available to the Companies. As noted above, however, Treasury knew that the Companies could pay the dividend "well into the future even with the caps," and projections available to both Treasury and the Agency indicated that the Companies would have more than sufficient funding through 2022. (As of the beginning of 2013, Freddie Mac had over $140 billion still available on its commitment from Treasury, and Fannie Mae had over $117.6 billion.) In fact, in an internal mark-up of a document explaining the reasoning for the sweep, a Treasury official wrote that the argument that the "10 percent dividend was likely to be unstable as the businesses were reduced" "[d]oesn't hold water." Concerns that the 10% dividends were "circular" were unfounded for the additional reason that the dividends could be paid in-kind at a 12% rate, which would not require a further draw. Indeed, upon information and belief, a Treasury official involved in developing the Sweep Amendment was unable to identify any "problems of the circularity [in dividend payments that] would have remained had the [payment in kind] option been adopted," and internal Treasury documents recognized that, "[t]o the extent that required dividend payments exceed net income, FHFA, as conservator, could consider not declaring dividends pursuant to the certificates of designation for the preferred shares, so that draws on the [Treasury] SPAs are not used to pay dividends, preserving as much funding as possible to cover any unanticipated losses at Fannie Mae and Freddie Mac."

79. Rather than acting as a true conservator, or in the interests of the shareholders whose rights, titles, powers, and privileges with respect to the Companies it had assumed as

conservator (§ 4617(b)(2)(A)), the Agency was acting under the de facto authority of, and in collusion, with Treasury.

80. Acting through Treasury—and in the face of Congress's assurance in § 4617(a)(7) that the Agency would *not* "be subject to the direction or supervision of any other agency of the United States" when "acting as conservator"—the United States by means of the Treasury SPAs, as well as through pressure and influence, came to exercise direction and control over the business and affairs of the Companies and caused the Agency to become hopelessly conflicted with respect to its obligations to the Companies and their shareholders, culminating with the Sweep Amendment.

81. In sum, the Agency abdicated its responsibility to act as conservator for the Companies, and instead, acting in its capacity as regulator and an agency of the United States, acquiesced and succumbed to Treasury's mandate to execute the Sweep Amendment.

The United States' Windfall from the Sweep Amendment at the Companies' Expense

82. Treasury's actions to nationalize the Companies, stripping their shareholders (other than itself) of any benefit from the Companies' improving operations, proved well timed for the United States, in light of the Companies' results and market expectations as of August 2012.

83. In the first quarter of 2012, five months before the Sweep Amendment was announced, the Companies already had reported positive net income of over $3.2 billion and in the fourth quarter of 2012, the first quarter after Treasury imposed the Sweep Amendment, Fannie Mae reported pre-tax income of $7.6 billion. The quarter after that (first quarter of 2013), it reported $8.1 billion—the largest quarterly pre-tax income in the Company's history. In its 10-Q for the first quarter of 2013, Fannie Mae stated that it expected "our annual

earnings to remain strong over the next few years" and "to remain profitable for the foreseeable future." For 2017, Fannie Mae reported pre-tax income of approximately $18 billion, and Freddie Mac reported pre-tax income of approximately $17 billion.

84. In addition, and as had been long and widely anticipated, Fannie Mae announced on May 9, 2013, that it would release the valuation allowance on its deferred tax assets, resulting in a benefit for its federal income taxes of $50.6 billion. This would have had the effect of increasing the Company's capital, which would have freed further assets to pay down the Treasury Senior Preferred Stock.

85. Under the Sweep Amendment, all of this went to Treasury. None went to ensuring the soundness and solvency of the Companies.

86. As shown in the below table, Fannie Mae and Freddie Mac have, as of the end of 2017, handed over to Treasury over $223 billion in "dividends" under the Sweep Amendment. (That is in addition to the $55.2 billion in dividends paid to Treasury between 2008 and 2012.)

Dividend Payments Under the Sweep Amendment (in Billions of Dollars)

	Fannie	**Freddie**	**Combined**
2013	82.5	47.6	130.1
2014	20.6	19.6	40.2
2015	10.3	5.5	15.8
2016	9.6	5.0	14.6
2017	12.0	10.9	22.9
Total	**135**	**88.6**	**223.6**

87. By contrast, had the Companies continued to pay only 10% cash dividends under the earlier (authorized) Treasury SPAs, they would have paid Treasury from 2013 through the end of 2017 a total of approximately $94.7 billion. Alternatively, if they had been permitted to repay principal during this period, they would have had sufficient quarterly profits in excess of the 10% dividend to *fully redeem* the Treasury Senior Preferred Stock and to rebuild capital. The amount paid to Treasury under the Sweep Amendment exceeds by billions of dollars the amount that Treasury provided to the Companies through its commitment under the Treasury SPAs. A February 15, 2018, Freddie Mac presentation on fourth quarter 2017 financial results reveals that Freddie Mac has paid a cumulative total of $112.4 billion in dividends to Treasury, while it had, as of December 31, 2017, only requested $71.3 billion in draws. In fact, an August 16, 2012, "Sensitive and Pre-Decisional" "[Treasury SPA] Amendment Q&A" answered the question why the Companies could not use profits to buy back Senior Preferred Stock from Treasury by saying that "this would have reduced the amount taxpayers are reimbursed for their substantial contribution to support the [Companies]." This reveals the real intent behind the Sweep Amendment—to benefit the government at the expense of the Junior Preferred stockholders and common stockholders.

88. All told, had the Companies not entered into the Sweep Amendment, they would have retained at least $128.9 billion in capital, which they could have used to protect themselves from future downturns and reassure shareholders of the soundness of their investment. Moreover, if the Agency and Treasury were legitimately concerned about the Companies entering a "death spiral," they could have caused the Companies to elect to pay the dividend "in kind" by adding 12% annually to the liquidation preference of the Treasury Senior Preferred Stock. This would have had the effect of creating an additional $94.7 billion

in capital, since cash that would have been paid as dividends would instead have been retained to increase the Companies' safety and soundness. Instead, the United States has forced the Companies to operate on the brink of insolvency (and suffer the attendant economic consequences, such as increased borrowing costs) and thus in perpetual dependency on the government. Meanwhile, the government pockets all of this money for its own purposes.

89. Moreover, because the Companies' dividend payments under the Sweep Amendment do not reduce the liquidation preference (and leave no other funds with which to do so), Treasury's massive liquidation preference under the Treasury SPAs, due to the Companies' having drawn on the commitment prior to 2012, is set in stone—as to Fannie Mae, $117.1 billion; and as to Freddie Mac, $72.3 billion, prior to December 31, 2017. Thus, in addition to the over $223 billion that Treasury has already expropriated from the Companies, Treasury and the Agency contend that Treasury retains, forever, a further $189.5 billon liquidation preference. Thus, the diversion of profits under the Sweep Amendment also ensures the perpetual nullification of the liquidation rights of all other shareholders, particularly the Junior Preferred holders, who would be first in line but for Treasury's holdings.

The Sweep Amendment Took Mason's Property Rights In And Under Its Junior Preferred Stock Certificates

90. Mason purchased Junior Preferred Stock after the imposition of the conservatorship but before the Sweep Amendment. Thus, at the time of the Sweep Amendment, it had vested property rights in the economic value of its Junior Preferred Stock, including the equity and market value of the Junior Preferred Stock, and the expectation of future dividend payments.

91. In addition, Mason had vested contractual property rights in the Junior

Preferred Stock. The Certificate of Designation for each series of Junior Preferred Stock issued by the Companies grants the holders rights to non-cumulative dividends to be declared at the discretion of the applicable Company's board of directors. For example, the Certificate of Designation for Fannie Mae's Series T Junior Preferred Stock provides:

> Holders of record of Series T Preferred Stock (each individually a "Holder", or collectively the "Holders") will be entitled to receive, ratably, when, as and if declared by the Board of Directors, in its sole discretion out of funds legally available therefor, non-cumulative cash dividends at a rate of 8.25% per annum of the stated value of $25 per share of Series T Preferred Stock. Dividends on the Series T Preferred Stock shall accrue from and including May 19, 2008 (the "Issue Date") and will be payable when, as and if declared by the Board of Directors (or a designated committee of the Board) quarterly on March 31, June 30, September 30 and December 31 of each year (each, a "Dividend Payment Date"), commencing June 30, 2008.

92. The Certificates of Designation for each series of Junior Preferred Stock also provide for liquidation rights and preferences. For example, the Certificate of Designation for Fannie Mae's Series T Junior Preferred Stock provides in part:

> (a) Upon any voluntary or involuntary dissolution, liquidation or winding up of Fannie Mae, after payment or provision for the liabilities of Fannie Mae and the expenses of such dissolution, liquidation or winding up, the Holders of outstanding shares of the Series T Preferred Stock will be entitled to receive out of the assets of Fannie Mae or proceeds thereof available for distribution to stockholders, before any payment or distribution of assets is made to holders of Fannie Mae's common stock (or any other stock of Fannie Mae ranking, as to the distribution of assets upon dissolution, liquidation or winding up of Fannie Mae, junior to the Series T Preferred Stock), the amount of $25 per share plus an amount, determined in accordance with Section 2 above, equal to the dividend (whether or not declared) for the then-current quarterly Dividend Period accrued to but excluding the date of such liquidation payment, but without accumulation of unpaid dividends on the Series T Preferred Stock for prior Dividend Periods.
>
> (b) If the assets of Fannie Mae available for distribution in such event are insufficient to pay in full the aggregate amount payable

> to Holders of Series T Preferred Stock and holders of all other classes or series of stock of Fannie Mae, if any, ranking, as to the distribution of assets upon dissolution, liquidation or winding up of Fannie Mae, on a parity with the Series T Preferred Stock, the assets will be distributed to the Holders of Series T Preferred Stock and holders of all such other stock pro rata, based on the full respective preferential amounts to which they are entitled (but without, in the case of any non-cumulative preferred stock, accumulation of unpaid dividends for prior Dividend Periods).

Mason Had Reasonable, Investment-Backed Expectations

93. Given the conditions of the market and the Companies, together with the assurances of the Agency in light of its powers as conservator under the Recovery Act (as well as the longstanding record of the Companies, and statements of the United States, before conservatorship), Mason reasonably expected that the mortgage market would recover; that the Companies would return as bulwarks in housing; and that the Agency, having ensured the soundness and solvency of the Companies, accordingly would terminate their conservatorships. Moreover, Mason reasonably believed that the valuation allowance on the Companies' sizeable deferred tax assets would soon be released.

94. Mason further expected that, in any event, the Agency would—as it had assured markets it would do, and as the Recovery Act reasonably indicated it should and would do—act with a view to rehabilitating the Companies and not as an accomplice to Treasury's carnivorous secret plan to seize, for itself, the entire value of the Companies in disregard of the property interests of Mason and other shareholders.

95. As such, by early summer of 2012, Mason reasonably anticipated that the Companies would soon emerge from conservatorship (as two Directors of the Agency had publicly predicted), from which they would be in a position to redeem the Treasury Senior Preferred Stock and allow Mason to realize benefits from its reasonable investment-backed expectations in the property interests represented by the Junior Preferred Stock. Mason, in

any event, did not reasonably expect the Sweep Amendment or any other action that would make the conservatorship *antithetical* to those goals and in fact make them impossible to achieve.

96. Indeed, the terms of the Recovery Act's conservatorship provisions (among others) are materially identical to the longstanding ones in FIRREA by which the Federal Deposit Insurance Corporation ("FDIC") acts as conservator of troubled banks. *See* § 1821(d)(2)(D). Until the Sweep Amendment, this language had always been interpreted to mean that FDIC has a mandatory duty to preserve and protect the assets of banks when acting as conservator. Moreover, historically the United States' regulation of the Companies has been less extensive than its regulation of banks. Nor was Mason aware of any prior use of a senior preferred stock instrument to strip 100% of a company's profits in perpetuity, to the derogation of the property rights of other holders of stock. Prior to the implementation of the Sweep Amendment, the holders of Junior Preferred Stock could not have reasonably anticipated such a divergence from historical precedent.

97. The Sweep Amendment deprived Mason of its economic and contractual property rights with respect to the Junior Preferred Stock. It made it impossible for Mason to realize the future value of its property interests in the Companies.

98. One indication of this immediate, severe deprivation was the precipitous drop in the trading price of the Junior Preferred Stock in the over-the-counter market in the first two weeks alone following the enactment of the Sweep Amendment—indeed, by the end of August 2012, the trading price for the Junior Preferred Stock held by Mason had decreased by an average of over 64% since August 16. That drop, however, represents only the tip of the iceberg in measuring the true loss of value of the Junior Preferred Stock immediately before

versus immediately after the Sweep Amendment. Immediately before the Sweep Amendment, the Junior Preferred Stock did not reflect information—known at Treasury, the Agency, and the Companies, but not to the public—regarding the financial condition of and prospects for the Companies. Had that information been publicly available, the trading price just prior to the Sweep Amendment would have been far higher, reflecting the true value of the Junior Preferred Stock. Conversely, the Sweep Amendment, by its terms, extinguished any existing market value for the Junior Preferred Stock by eliminating any possible investment return. Any remaining trading value was necessarily attributable to the possibility that litigation success could result in a return on the Junior Preferred Stock.

99. Mason has been provided neither just compensation nor any compensation at all in return for the United States' taking of all the economic value associated with its Junior Preferred Stock.

The United States, Which Controls the Companies, Has Through the Sweep Amendment Disproportionately Harmed Shareholders Other than the United States and, In Any Event, Has a Conflict of Interest With Respect to the Rights of the Companies

100. The United States, as the result of the Treasury SPAs as well as its conservatorships of the Companies via the Agency, was a shareholder that controlled the Companies prior to the Sweep Amendment.

101. The Sweep Amendment, in radically altering the Treasury SPAs, effectively created a new security for the United States. Treasury, in obtaining this result by means of its control of the Agency and the Companies did not, in exchange, provide to the Companies anything of the same value, but rather provided (at best) significantly lesser value. Further, Treasury's new rights to receive, every quarter in perpetuity, "dividends" equal to the entire net worth of the Companies increased its rights with respect to the Companies while correspondingly reducing the rights of all other shareholders.

102. In so doing, the United States engaged in self-dealing and breached its fiduciary duty arising from its control of the Companies.

103. As a result, any claim raised by Mason that might be considered derivative on behalf of the Company is in fact direct, on behalf of Mason itself.

CLAIMS FOR RELIEF

COUNT I
Just Compensation under the Fifth Amendment for the Taking of Private Property for Public Use

104. Mason incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

105. The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

106. Mason had cognizable property interests in the Junior Preferred Stock, including in its contract rights to dividends, to liquidation rights and preferences, and to voting rights, and in its economic interests in the Junior Preferred Stock, including its proportionate share of the Company's future earnings and the equity and value of the Junior Preferred Stock.

107. Mason had investment-backed expectations to participate in the Companies' future earnings and to receive a share of any residual value of the Companies in the event of liquidation, and those expectations were reasonable.

108. By way of the Sweep Amendment, executed under the purported authority of the Recovery Act and by one arm of the federal government (Treasury) imposing its will and dominion over another arm (the Agency) under its control, the United States directly appropriated for itself Mason's property interests in the Junior Preferred Stock "to benefit

taxpayers." The Sweep Amendment, although unlawful, was an authorized act of the government, done within the general scope of the duties of the agencies and officers who executed it.

109. The Sweep Amendment immediately diminished the value of Mason's Junior Preferred Stock, repudiated Mason's contractual property rights, and directly and proximately caused a severe, present, continuing and actual economic injury to the Junior Preferred Shareholders' property interests. Indeed, Mason has been deprived of all economically beneficial uses of its Junior Preferred Stock in Fannie Mae and Freddie Mac, while the United States has received payments from the Companies of more than $200 billion in dividends since the Sweep Amendment, without any corresponding reduction in the liquidation preference payable to the United States. Thus, contrary to the United States' position asserted in other litigation, Mason's takings claim is clearly ripe.

110. Mason is entitled to just compensation for the government's taking of its property.

COUNT II
Illegal Exaction in Violation of the Fifth Amendment

111. Mason incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

112. Alternatively, the Sweep Amendment was imposed by the United States without authority. Under the Recovery Act, the Agency "as conservator" was to act to put the Companies "in a sound and solvent condition," to "preserve and conserve [their] assets," and to "carry on" their business. Contrary to these objectives, the Sweep Amendment ensures that the Companies will perpetually be on the verge of insolvency, wastes their assets, and destroys their ability to carry on their mandate as private, shareholder-owned companies. It

does the opposite of conserving the Companies, and accomplishes a wind-down in contravention of the Act's separate provisions (and protections) for a receivership. In addition, Treasury's exertion of control over the Agency was both unlawful and unauthorized pursuant to 12 U.S.C. § 4617(a)(7). Moreover, the Sweep Amendment was *ultra vires* on the part of Treasury as well, because it was executed contrary to the provisions of the Recovery Act (and the Companies' charters) granting Treasury only temporary emergency authority to purchase and determine the terms, conditions, and amounts of securities of the Companies. The Sweep Amendment also was unauthorized due to the Agency's violating constitutional separation of powers principles, including because (1) the Agency's head is a single director, whom the President may remove only for cause; (2) the Agency is allowed to fund itself through assessments; and (3) when the Sweep Amendment was instituted, the Agency was headed by an "acting" director (whom the President had been allowed to designate only from among the deputy directors, themselves appointed by the director) who had held that position for three years.

113. Through the Sweep Amendment, the United States, in obtaining for itself a quarterly payment in perpetuity equal to the Companies' entire net worth, has appropriated to itself the property of Mason, holder of Junior Preferred Stock. This appropriation was, in effect, a forced payment of money by Mason to the government.

114. To the extent that the United States' violation of a "money mandating" statute is a necessary predicate for this Count, the Recovery Act is such a statute, particularly in the circumstances here, where the United States, in and as the result of assuming control of the Companies, assumed a fiduciary duty whose breach is appropriately remedied by damages.

115. The Sweep Amendment is thus an illegal exaction imposed in violation of the

Due Process Clause of the Fifth Amendment.

116. Mason is entitled to compensation for its illegally exacted property.

117. For avoidance of doubt, Paragraphs 112 through 116 are pled solely in the alternative to Count I of the Amended Complaint and the remaining allegations in the Amended Complaint.

COUNT III
Breach of Fiduciary Duty

118. Mason incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

119. As alleged above, the Treasury SPAs are contracts that gave the United States (via Treasury) control over the Companies and over the Agency as conservator of the Companies, which it exercised; moreover, the Agency as conservator under the Recovery Act controlled the Companies, succeeded to the rights of shareholders, and assumed the obligations of the then-existing contracts of the Companies. The United States thereby assumed fiduciary duties to Mason and the other non-controlling shareholders, including (at a minimum) a duty not to manage the Companies for the United States' own pecuniary and policy interests at the expense of the interests of the shareholders other than the United States and not to engage in arbitrary or unreasonable conduct that would prevent non-controlling shareholders from benefitting from the fruit of their bargain with the Companies, such as in the Certificates of Designation of Mason's Junior Preferred Stock and the implied-in-fact contract between the United States and the Companies.

120. The United States breached its fiduciary duty to Mason by entering into the Sweep Amendment, which was not in the best interests of the Companies' shareholders (other than the United States), but rather was contrary to their interests and arbitrarily and

unreasonably provided a windfall to the United States at the expense of non-controlling shareholders. The Agency abdicated its responsibility to Treasury; and Treasury, by virtue of the Treasury SPAs, was conflicted. The Agency and Treasury acted together as a controlling group to implement their shared goal, the Sweep Amendment, in the interests of the United States rather than the best interests of the Companies and their shareholders, and thus in breach of their fiduciary duties to other shareholders including Mason.

121. Mason as a result suffered injury and loss of property, and is entitled to damages.

122. To the extent that rescission has been rendered impossible or impracticable, and because this Court may not grant that remedy, Mason is entitled (without limitation) to rescissory damages.

123. According to Treasury, any fiduciary duties it owes to plaintiffs challenging the Sweep Amendment arise from a contract, such that a claim that it breached its fiduciary duty is in essence a contract action. This confirms that this Count is founded upon a contract with the United States.

COUNT IV
Breach of Implied-in-Fact Contract Between the United States and the Companies

124. Mason incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

125. Prior to appointing itself conservator on September 6, 2008, the Agency unambiguously offered to place Fannie Mae and Freddie Mac into conservatorship by consent, under § 4617(a)(3)(I), with certain conditions described below, and the boards of directors of the Companies accepted this offer. The Agency made no finding of insolvency, undercapitalization, or any other ground to impose conservatorship under § 4617(a)(3)(A)-(H)

or (J)-(L).

126. The Agency offered, and the boards of Fannie Mae and Freddie Mac accepted, a conservatorship that would aim to "preserve and conserve the [Companies'] assets and property" and restore the Companies to a "sound and solvent condition." *See* § 4617(b)(2)(D). The offer was also of a conservatorship that would end when that goal was achieved. Neither of these conditions was ambiguous, and both would benefit the known and distinct class of the shareholders of the Companies, on whose behalf the boards of directors of the Companies had a fiduciary duty to act. In fact, the Agency obtained the boards' consent on the ground, in part, that conservatorship would serve the interests of the Companies' shareholders.

127. Underlying the Agency's offer was its promise that the Agency would not, as conservator, wind down or liquidate the Companies. The Agency stated contemporaneously with its offer that it could not, as conservator, place the Companies into liquidation. The Agency stated at the time, and for several years into the conservatorship, that its goal was instead to "restore the [Companies'] assets and property to a sound and solvent condition," which continued course of performance constitutes evidence of the offer's original terms.

128. When consenting to the conservatorship, the boards of the Companies furnished good and valuable consideration to the Agency by agreeing to forbear from a judicial or legislative challenge that the United States feared. *See* § 4617(a)(5). This forbearance was unambiguously furnished in exchange for the Agency's promises to act to restore the Companies to a safe and solvent condition.

129. The United States and the Companies, through the acts described above, entered into an implied-in-fact contract. The terms of that contract, as relevant here, were that

the Agency if made conservator would "preserve and conserve the [Companies'] assets and property," that its conservatorship would continue only until the Companies were placed in a safe and solvent condition, and that, in exchange, the boards of the Companies would consent to, and not challenge or litigate, such a course of action. Both the Agency and the Companies intended that an implied contract would exist. That contract required the Agency to preserve the Companies' assets and property, and forbade it from diminishing or expropriating the Companies' assets and property. This intent was demonstrated through the offer and acceptance detailed above. The Agency's offer was not ambiguous in its terms, and the boards' acceptance was manifested in the Agency's subsequent imposition of conservatorship based on the boards' consent.

130. Under these terms of the implied-in-fact contract, and given the known fiduciary duty of the boards of directors of the Companies, the shareholders of the Companies were intended beneficiaries of the contract.

131. The Agency had actual authority, as an agency of the United States Government, to bind the United States.

132. The Sweep Agreement breached the contract by rendering it impossible for the Companies to build and retain the capital necessary to exit conservatorship and return to normal business operations.

133. Each subsequent Sweep Amendment payment independently breaches that contract by depleting the Companies of capital (rather than "preserv[ing] and conserv[ing]" it), in a manner that the Agency has expressly recognized undermines the goals of conservatorship.

134. Had the United States adhered to the contract, it would have protected the

rights of holders of stock (other than itself) in the Companies. Through the Sweep Amendment, however, the United States instead engaged in self-dealing, benefitting itself while harming the shareholders other than itself.

135. The Sweep Amendment, thus, directly harmed Mason, by preventing the termination of the conservatorship; stripping the Companies of their ability to generate and retain funds to ever distribute as dividends to holders of the Junior Preferred Stock; and nullifying Mason's contractual right, as holders of Junior Preferred Stock, to ever receive a liquidation preference upon the dissolution, liquidation, or winding up of the Companies. Mason is accordingly entitled to damages.

PRAYER FOR RELIEF

WHEREFORE, Mason seeks a judgment as follows:

A. Finding that the United States has taken or illegally exacted Mason's private property in violation of the Takings or Due Process clauses of the Constitution;

B. Awarding Mason just compensation under the Fifth Amendment for the United States' taking of its property;

C. Determining and awarding to Mason the damages sustained by it as a result of the violations set forth above;

D. Awarding rescissory damages, based upon the breach of fiduciary duty that occurred;

E. Awarding to Mason the costs and disbursements of this action, including reasonable attorneys' and experts' fees, costs and expenses; and

F. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted:

August 16, 2018

By: *s/ Lawrence D. Rosenberg*

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UNITED STATES COURT OF FEDERAL CLAIMS

AKANTHOS OPPORTUNITY MASTER FUND, L.P., Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-369 Chief Judge Sweeney

FIRST AMENDED COMPLAINT

Plaintiff Akanthos Opportunity Master Fund, L.P. (formerly Akanthos Arbitrage Master Fund, L.P.) ("Akanthos"), by and through the undersigned attorneys, hereby brings this action against the United States of America seeking (a) compensation for the taking of its property in violation of the Fifth Amendment to the Constitution or (b) in the alternative, the illegal exaction of its property in violation of the Fifth Amendment; (c) breach of fiduciary duty; and (d) breach of implied contract. In support, Akanthos alleges as follows:

NATURE AND SUMMARY OF THE ACTION

1. This is an action to redress the United States' wiping out of Akanthos's shares in the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac" and, collectively with Fannie Mae, the "Companies") by seizing for itself all earnings of the solvent Companies in perpetuity.

2. On August 17, 2012, two arms of the United States—the Department of Treasury ("Treasury") and the Federal Housing Finance Agency ("Agency" or "FHFA"), which was purportedly acting as the conservator of the Companies—agreed between themselves to a "Third Amendment to Amended and Restated Senior Preferred Stock Purchase Agreement" (the "Sweep Amendment"). Through the operation of the Sweep Amendment, the United States has

expropriated hundreds of billions of dollars in net worth from the Companies, to benefit the government at the expense of the Companies' other shareholders. At the time of the Sweep Amendment, Akanthos held several series of junior preferred stock issued by the Companies (the "Junior Preferred Stock"), with a "stated value" and/or "liquidation preference" (term varies by stock certificate) in excess of $137 million. As a direct result of the Sweep Amendment, Akanthos has suffered severe economic loss to its property interests in the Junior Preferred Stock.

3. The Companies are (as Congress has provided) private, for-profit, shareholder-owned corporations whose purpose is to support liquidity, stability, and affordability in the secondary mortgage market by securitizing mortgage loans originated by primary market lenders and selling the bundled loans to investors.

4. In July 2008, amid the financial crisis in the housing and mortgage markets, Congress enacted the Housing and Economic Recovery Act of 2008 (the "Recovery Act"). The Recovery Act created the Agency and granted its director the discretion, under certain circumstances, to place the Companies into conservatorship or receivership. The Recovery Act also granted to Treasury temporary emergency authority to purchase obligations or other securities of the Companies under certain circumstances.

5. On September 6, 2008, the Agency placed the Companies into conservatorship under itself. In such case, Congress in the Recovery Act expressly charged the Agency, as conservator, to seek to return the Companies to a "sound and solvent condition" and to "preserve and conserve the assets and property" of the Companies.

6. The next day, Treasury, via the Agency, entered into Senior Preferred Stock Purchase Agreements (the "Treasury SPAs") with the Companies. Under the Treasury SPAs,

Treasury committed to invest in the Companies in exchange for preferred stock that ranked senior to all series of Junior Preferred Stock (the "Treasury Senior Preferred Stock"). Treasury received for this commitment, among other things, (a) $1 billion of Treasury Senior Preferred Stock, (b) a warrant to purchase up to 79.9% of the common stock of each Company for a nominal price, (c) a liquidation preference equal to the $1 billion initial commitment fee plus the amount invested by Treasury in the applicable Company, and (d) a periodic commitment fee, in an undetermined amount, to be paid beginning in 2010. Through these and other provisions of the Treasury SPAs, Treasury acquired the ability to control the Companies.

7. Consistent with its statutory mandate under the Recovery Act, as well as historical understandings of conservatorship against which Congress had enacted it, the Agency assured the market that same day—and repeatedly for more than three years thereafter—that the goal of the conservatorship was to "return[] the entities to normal business operations"; that the conservatorship would be temporary and would terminate once the Companies had been restored "to a safe and solvent condition"; that the Junior Preferred Stock would remain outstanding and continue to trade; and that stockholders would "continue to retain all rights in the stock's financial worth, as such worth is determined by the market."

8. At least by 2011, Treasury and the Agency recognized that the Companies had stabilized and their financial performance was improving. By the first and second quarters of 2012, Fannie Mae and Freddie Mac, respectively, reported positive net worth and announced that they would not be requesting a further draw under the Treasury SPAs. Moreover, the Companies' renewed profitability suggested that they might well soon recognize sizeable deferred tax assets.

9. On the heels of such news, Treasury and the Agency (as purported conservator of

the Companies) on August 17, 2012, entered into the Sweep Amendment, which eliminated the dividend payable under the Treasury Senior Preferred Stock (10% of the outstanding amount drawn, if paid in cash) and imposed a requirement that the Companies each quarter pay to Treasury their entire net worth in perpetuity. Thus, the Sweep Amendment barred the Companies from ever realizing a profit and from ever paying down Treasury's liquidation preference. It thereby eliminated any possibility that Akanthos could ever receive any value from the Companies based on its property interests in the Junior Preferred Stock.

10. The Sweep Amendment appropriated the Companies' net worth in perpetuity to the benefit of the United States at the expense of the Companies and their shareholders, including Akanthos. As Treasury admitted, the purpose was to take "every dollar of earnings each firm generates . . . to benefit taxpayers," ensuring that shareholders other than the United States received *no* benefit from those earnings. The United States paid no compensation to holders of the Junior Preferred Stock for this taking of their valuable property rights for the public benefit.

11. Akanthos purchased Junior Preferred Stock both before and after the Agency imposed the conservatorship, but it purchased all of its Junior Preferred Stock before the Agency capitulated to Treasury's Sweep Amendment, because Akanthos believed in the future economic prospects of the Companies, reasonably relied upon the Agency's assurances of its intention that Akanthos and other holders of stock would retain their property rights, and expected the Companies to emerge from conservatorship as the Agency had promised repeatedly. At the time of purchase, Akanthos had no reasonable ground to expect that the United States instead would expropriate its investment and force shareholders into years of litigation to recoup their investments. Accordingly, through this action, Akanthos seeks the just compensation to which it is entitled under the Fifth Amendment to the United States Constitution for the government's

taking of its property, as well as remedies under other causes of action detailed below—illegal exaction, breach of fiduciary duty, and breach of implied contract.

JURISDICTION AND VENUE

12. This Court has jurisdiction under 28 U.S.C. § 1491(a)(1) because this suit asserts claims against the United States founded upon the Fifth Amendment and on a contract to which the United States is a party. Venue is proper under 28 U.S.C. § 1491(a)(1).

THE PARTIES

13. Plaintiff Akanthos is a Cayman Islands Exempted Limited Partnership that, as of market close on August 16, 2012, held 1,329,456 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $116.5 million, and 422,000 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $21.1 million.

14. Defendant United States includes Treasury, the Agency, the Secretary and Director thereof, respectively, and agents acting at their direction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

15. Akanthos's claims for taking (or, in the alternative, illegal exaction) are founded on the Fifth Amendment to the United States Constitution, which provides in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Akanthos's contract claims are under 28 U.S.C. § 1491(a), which provides for claims founded on a contract with the United States.

FACTUAL ALLEGATIONS

Fannie Mae, Freddie Mac, and their Junior Preferred Stock

16. Fannie Mae is a private stockholder-owned Delaware corporation organized

and existing under the Federal National Mortgage Association Charter Act, 12 U.S.C. §§ 1716 *et seq*.[1] It was established in 1938 to promote affordable home ownership by facilitating the financing of home mortgages insured by the Federal Housing Administration. In 1968, Fannie Mae was privatized and reorganized into a government-sponsored entity with access to capital markets. In 1970, it was authorized to purchase conventional mortgages. From 1968 until 2010, Fannie Mae's stock was traded on the New York Stock Exchange. Its stock continues to trade.

17. Freddie Mac is a private stockholder-owned Virginia corporation organized and existing under the Federal Home Loan Mortgage Corporation Act, §§ 1451 *et seq*. It was established in 1970 to expand the secondary mortgage market. It was initially a wholly owned subsidiary of the Federal Home Loan Bank System, but Congress in 1989 reorganized and privatized it under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Under FIRREA, Freddie Mac became a for-profit corporation owned by private shareholders and had access to capital markets. From 1989 until 2010, Freddie Mac's stock was traded publicly on the New York Stock Exchange. Its stock continues to trade.

18. Three years after enacting FIRREA, Congress established the Office of Federal Housing Enterprise Oversight ("OFHEO"), through the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, to oversee and ensure the capital adequacy and financial safety and soundness of the Companies. OFHEO was authorized to place the Companies into conservatorship in certain circumstances, but did not employ this power.

19. Prior to 2008, Fannie Mae and Freddie Mac issued numerous series of non-cumulative Junior Preferred Stock. These series, respectively as to each Company, are *pari*

[1] All citations of the U.S. Code are from Title 12 unless otherwise noted.

passu with one another with respect to dividend payments and liquidation preferences, but have priority over the Companies' common stock.

20. Following their privatization, including after the establishment of OFHEO, the Companies operated successfully for decades, raising private capital, generating profits, regularly declaring and paying dividends on their various series of Junior Preferred Stock, and increasing shareholder value. Prior to 2007, Fannie Mae had not reported a full-year loss since 1985, and Freddie Mac had not since its privatization in 1989. Indeed, the Companies' preferred stock was generally viewed as a conservative and reliable investment—even as of August 8, 2008, after enactment of the Recovery Act and shortly before the imposition of the conservatorship, Fannie Mae's Junior Preferred Stock was rated AA- by S&P, A1 by Moody's, and A+ by Fitch.

The Housing Crisis and the Recovery Act

21. The housing and mortgage markets substantially weakened in 2007, which reduced the value of Fannie Mae and Freddie Mac's guarantee and investment portfolios. Both Companies suffered net losses beginning in 2007. These losses, however, were largely due to credit provisions—which represent *estimates* of future credit losses—that ultimately proved excessive. Actual credit losses from 2007 to 2011 were approximately $140 billion less than anticipated. A significant portion of the losses recorded in that period related to the write-down of deferred tax assets, which the Companies would reverse when they returned to profitability.

22. Notwithstanding these challenges, OFHEO assured the public that the Companies were stable. On March 19, 2008, James Lockhart, then-Director of OFHEO, announced that "both companies. . . have prudent cushions above the OFHEO-directed capital requirements and have increased their reserves," adding that "[w]e believe they can play an

even more positive role in providing the stability and liquidity the markets need right now." He also called the idea of a bailout "nonsense in [his] mind," as the Companies were "safe and sound, and they will continue to be safe and sound." *As Crisis Grew, a Few Options Shrank to One*, N.Y. Times (Sept. 7, 2008).

23. Lockhart similarly explained four months later, on July 8, that the Companies were "adequately capitalized, which is our highest criteria." Two days after that, on July 10, he again confirmed, in a public statement, that Fannie Mae and Freddie Mac were "adequately capitalized, holding capital well in excess of the OFHEO-directed requirement, which exceeds the statutory minimums. They have large liquidity portfolios, access to the debt market and over $1.5 trillion in unpledged assets." This same day, then-Treasury Secretary Henry Paulson testified to the House Financial Services Committee that the Companies' "regulator has made clear that they are adequately capitalized." The then-Chairman of the Federal Reserve, Ben Bernanke, echoed this, also testifying before that committee, on July 16, 2008, that the Companies were adequately capitalized and in no danger of failing. Further, upon information and belief, an August 2008 analysis for the Agency of Freddie Mac's financial condition, by BlackRock, concluded that Freddie Mac's "long-term solvency does not appear endangered—we do not expect Freddie Mac to breach critical capital levels even in stress case."

24. At the end of July 2008, as the decline in the housing and mortgage markets accelerated, Congress passed and President George W. Bush signed the Recovery Act. That Act created FHFA as a new federal agency, replacing OFHEO, and charged it with regulating the Companies. § 4511; § 4513. Mr. Lockhart, who had been running OFHEO, became the Agency's first Director.

25. The Recovery Act gave the Director discretion under certain circumstances to place the Companies into conservatorship or receivership under the Agency. In a sub-section specifying the Agency's "General powers," as either "conservator or receiver," it authorizes the Agency to do a variety of things that include "preserv[ing] and conserv[ing] the assets and property" of the Companies but do not include liquidating them or winding them down. § 4617(b)(2)(B). The Agency as conservator or receiver may repudiate contracts, if done "within a reasonable period following such appointment," but must in such cases pay damages. § 4617(d)(2).

26. The Recovery Act separately specifies the Agency's "Powers as conservator." It "may, as conservator, take such action as may be" (i) "necessary to put the [Company] in a sound and solvent condition" and (ii) "appropriate to carry on [its] business . . . and preserve and conserve [its] assets and property." § 4617(b)(2)(D). That Act allows a Company to consent to being placed into conservatorship, but also expressly authorizes a non-consenting Company to sue within 30 days to challenge that action. § 4617(a)(3)(I), (a)(5).

27. After specifying the Agency's powers as conservator, the Recovery Act in the next sub-section separately specifies its "Additional powers as receiver." Only here does the Act authorize (indeed, direct) the Agency to wind down a Company, stating that the it "shall place the [Company] in liquidation." § 4617(b)(2)(E). Receivership would terminate any existing conservatorship and trigger an immediate right to judicial review. It also would require numerous other special procedures, including a detailed process for the receiver to determine claims against a Company, which also incorporates an express right of judicial review. § 4617(b)(3); (b)(6).

28. The Recovery Act expressly provides that, even upon appointment of a

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receiver, the right of the Companies' shareholders "to payment, resolution, or other satisfaction of their claims" is not terminated. § 4617(b)(2)(K).

29. Under the Recovery Act, the Agency in its actions as a conservator or receiver is not to be "subject to the direction or supervision of any other agency of the United States." § 4617(a)(7).

30. In addition to these provisions concerning the Agency's imposition of conservatorship and receivership, the Recovery Act granted to Treasury the temporary emergency authority—but only until December 31, 2009—to "purchase any obligations and other securities" of the Companies and "determine" those securities' "terms and conditions [and] . . . amounts." § 1455(*l*)(l)(A); § 1455(*l*)(4); § 1719(g).

31. Prior to exercising this temporary authority, the Treasury Secretary was required to "determine that such actions are necessary to: (i) provide stability to the financial markets; (ii) prevent disruptions in the availability of mortgage finance; and (iii) protect the taxpayer." §§ 1455(*l*)(1)(B); 1719(g)(1)(B). He also had to take specified factors into account: (i) the need for preferences or priorities regarding payments to the government; (ii) limits on maturity or disposition of obligations or securities to be purchased; (iii) the Company's plan for the orderly resumption of private market funding or capital market access; (iv) the probability of the Company's fulfilling the terms of any such obligation or other security, including repayment; (v) the need to maintain the Company's status as private and shareholder owned; and (vi) restrictions on the use of Company resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes. §§ 1455(*l*)(1)(C); 1719(g)(1)(C).

The Agency Makes Itself the Companies' Conservator, Enters Into (and Amends) SPAs with Treasury During the Authorized Period, and Reassures the Markets

32. In letters to each Company dated August 22, 2008, the Agency found (consistent with the Director's public statements) that each Company met all relevant capital requirements, including additional capital requirements imposed by the Agency above the statutory minimums and requirements arising from the Agency's risk-based capital stress test.

33. Nevertheless, on information and belief, Treasury and the Agency around the beginning of September 2008 sought the consent of the Companies' boards of directors to place the Companies into conservatorship. The Agency obtained such consent on the ground, in part, that conservatorship would serve the interests of the Companies' shareholders. In exchange for the Agency's promise, the Companies agreed not to challenge being put under conservatorship.

34. On September 6, 2008, the Agency did place each of the Companies into conservatorship. As a result, the Agency, "as conservator," succeeded to "all rights, titles, powers, and privileges of the [Companies], and of any stockholder, officer, or director of [a Company] with respect to the [Company]." § 4617(b)(2)(A)(i). Conservatorship, unlike receivership, does not "terminate" any rights of shareholders. *Compare id. with* § 4617(b)(2)(K)(i) (providing for termination of rights of shareholders in event of receivership, "except for their right to payment, resolution or other satisfaction of their claims, as permitted under subsections (b)(9), (c), and (e)").

35. The next day, exercising its temporary authority under the Recovery Act, Treasury entered into the Treasury SPAs with the Companies (acting through the Agency as conservator). Treasury agreed to provide each Company with a commitment of up to $100 billion, as and when necessary for the Companies to maintain a positive net worth. In

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exchange, Treasury received one million shares of the Treasury Senior Preferred Stock. Treasury also received: (a) an initial liquidation preference of $1000 per share (equal to $1 billion), plus any outstanding amount drawn from the commitment; (b) a dividend of 10% per annum of the outstanding amount provided by Treasury (which also could be paid "in kind" by increasing the liquidation preference, subject to incurring a 12% accrual rate going forward); (c) warrants to buy up to 79.9% of each Company's common stock for $0.00001 per share, and (d) the right to receive payment of a periodic commitment fee, in an undetermined amount, to be paid by the Companies quarterly beginning on January 31, 2010. The Treasury Senior Preferred Stock was senior to all Junior Preferred Stock, so that no dividends or liquidation distributions on any Junior Preferred Stock could be paid until after Treasury had received its full dividend or liquidation distributions.

36. In addition, covenants in the Treasury SPAs granted Treasury substantial ability to control the Companies and the Agency's conduct of the conservatorship, by restricting the ability to take certain actions without Treasury's prior written consent. This included restricting their ability to: (a) declare dividends on any outstanding common or preferred stock other than the Treasury Senior Preferred Stock; (b) sell or issue equity interests; (c) terminate the conservatorship; (d) transfer assets; (e) incur indebtedness; (f) enter into a merger, reorganization or recapitalization, or make acquisitions; or (g) enter into transactions with affiliates.

37. The Treasury SPAs also prohibited the Companies from owning more than a specified amount of mortgage assets and restricted the Agency from drawing on the Treasury commitment to pay any subordinated liabilities, including "a claim against [a Company] arising from rescission of a purchase or sale of a security issued by [a Company] . . . or for

damages arising from the purchase, sale, or retention of such a security."

38. When he imposed the conservatorship and entered into the Treasury SPAs, Mr. Lockhart took pains to assure shareholders that their interests would be protected, stating that, "in order to conserve over $2 billion in capital every year, the common stock and preferred stock dividends will be eliminated, but the common and all preferred stocks will continue to remain outstanding." He added:

> [I]n order to restore the balance between safety and soundness and mission, FHFA has placed Fannie Mae and Freddie Mac into conservatorship. *That is a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations*. FHFA will act as the conservator to operate the Enterprises until they are stabilized. (Emphasis added.)

39. The Agency in a fact-sheet at the time further stated that "[s]tockholders will continue to retain all rights in the stock's financial worth; as such worth is determined by the market," and that, "[u]pon the [Agency] Director's determination that the Conservator's plan to restore the Company to a safe and solvent condition has been completed successfully, *the Director will issue an order terminating the conservatorship*." (Emphasis added.)

40. Consistent with these assurances, news reports reflected the view that the conservatorship was motivated more by political considerations than financial need: "[Treasury Secretary] Paulson's decision seems to have been a philosophical one, rather than one forced by imminent crisis. Of course, for stagecraft purposes, it was played as impending disaster." *Paulson's Itchy Finger, on the Trigger of a Bazooka*, N.Y. Times (Sept. 9, 2008).

41. The Treasury SPAs were amended on September 26, 2008, to extend the commencement date for the periodic commitment fee by two months, until March 31, 2010. (The fee was never imposed.) The day before, Director Lockhart had again reaffirmed in public testimony to Congress that conservatorship was "a statutory process designed to

stabilize a troubled institution with the objective of maintaining normal business operations and restoring its safety and soundness," and that the Agency would act as conservator only "until the [Companies] are stabilized." He further assured Congress that the Companies remained "private" and that "both the preferred and common shareholders have an economic interest in the companies."

42. The Companies did not exercise their express right under the Recovery Act to sue within thirty days to challenge being placed into conservatorships.

43. Under the Obama Administration, the Treasury SPAs were amended twice more before Treasury's temporary emergency purchase authority expired on December 31, 2009. The first was on May 6, 2009, to provide that Treasury could increase the commitment to $200 billion as needed. That same month, the Agency submitted a report to Congress recognizing that "[c]onservatorship is a statutory process designed to restore safety and soundness while carrying on the business of a regulated entity and preserving and conserving its assets and property." The following month, Director Lockhart in public congressional testimony emphasized that, "[a]s the conservator, FHFA's most important goal is to preserve the assets of Fannie Mae and Freddie Mac over the conservatorship period. That is our statutory responsibility." The month after that, in July 2009, the Agency issued a "Strategic Plan 2009-2014," in which it included the following "strategic goal": "The conservatorship of Fannie Mae and Freddie Mac allows the FHFA to preserve the assets of the [Companies], ensure they focus on their housing mission and are positioned to emerge from conservatorship as financially strong." It again emphasized that the conservatorship was "designed to stabilize troubled institutions with the objective of maintaining normal business operations and restoring financial safety and soundness."

44. The second amendment was executed on December 24, 2009. It provided a formulaic maximum commitment of either $200 billion or the amount of the Companies' negative net worth from 2010 to 2012. Neither of these amendments affected the rights of the Companies' shareholders other than the United States.

45. A contemporaneous Treasury memorandum characterized the latter amendment as a "temporary" measure "to support [the Companies] until Congress determines a more sustainable long-term path." It also confirmed that "*[c]onservatorship . . . preserves the status and claims of the preferred and common shareholders*." (Emphasis added.) Indeed, Treasury officials, writing to the then-Secretary of the Treasury, explained that the Companies already had "moved from being a source of instability during the early stages of the crisis to a stable and critical source of mortgage financing to the market today," and that Fannie Mae and Freddie Mac had only drawn $60 billion and $51 billion, respectively, of the $200 billion available to each.

46. Treasury officials at the time of the last of these amendments also recognized that, as the text of the Recovery Act provides, the deadline of December 31, 2009, "constrained" Treasury's "ability to make further changes to the [Treasury SPAs]."

The Agency Continues to Reassure the Markets, in the Years After Treasury's Emergency Stock-Purchase Authority Expires and as the Housing Market Rebounds

47. Over the next two years, throughout 2010 and 2011, the Agency continued to assure the markets that its intentions as conservator of the Companies were consistent with its statutorily specified "Powers as conservator" (to make the Companies "sound and solvent," "preserve and conserve" their assets and property, and "carry on" their businesses) and ordinary understandings of a conservator's duty to *conserve* a company. *See* § 4617(b)(2)(D). In February 2010, the Agency's new Acting Director, Edward J. DeMarco, told Senate and

House leaders that "FHFA is focused on conserving the [Companies'] assets" and "put[ting] [them] in a sound and solvent condition." And in a report to Congress in June 2011, the Agency touted its goals of "preserv[ing] and conserv[ing] each [Company's] assets and property and restor[ing] the [Companies] to a sound financial condition so they could continue to fulfill their statutory mission of promoting liquidity and efficiency in the nation's housing finance markets."

48. Also in June 2011, the Agency recognized in issuing a final rule that "allowing capital distributions to deplete [a Company]'s conservatorship assets would be inconsistent with the [A]gency's statutory goals, as they would result in removing capital at a time when *the Conservator is charged with rehabilitating the regulated [Company]*." 76 Fed. Reg. 35724, 35727 (June 20, 2011) (emphasis added). The rule underscored that, under the Recovery Act, "[a] conservator's goal is to continue the operations of a [Company], rehabilitate it and return it to a safe, sound, and solvent condition." *Id*. at 35730. In contrast, "[t]he ultimate responsibility of FHFA as receiver is to resolve and liquidate the [Company]." *Id*.

49. Later, on November 10, 2011, Mr. DeMarco continued this public theme, in a letter to the Senate: "By law, *the conservatorships are intended to rehabilitate the [Companies]* as private firms." (Emphasis added.) On December 1, 2011, he reiterated to Congress—quoting his "powers as conservator" as specified in the Recovery Act—that, "as I have noted, FHFA has a statutory responsibility as conservator of the [Companies] to 'take such action as may be: necessary to put the regulated entity in a sound and solvent condition; and appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.'"

50. By 2011, and consistent with the Agency's repeated assurance that it was seeking as conservator to rehabilitate the Companies, it was obvious that (as Treasury officials had begun to discern as early as December 2009), the Companies were past the trough in their financial performance. The United States recognized this repeatedly:

- As early as June 2011, on information and belief, in a meeting with restructuring experts from Blackstone, Treasury was told that the Companies were "showing improved financial performance and stabilized loss reserves," and that their tax assets (unusable in the event of a loss, but valuable in the event of a profit) could generate significant value.
- In October 2011, the Agency observed, in a report published to the public on its website, that the Companies' "actual results" were "substantially better than projected."
- A November 8, 2011, report prepared for Treasury recognized that, "[f]rom December 31, 2012, through September 30, 2018, Freddie Mac is not projected to draw on the liquidity commitment to make its dividend payments [to Treasury under the SPA] because of increased earnings driven by significantly reduced credit losses in 2012 and 2014."
- Upon information and belief, a December 2011 internal Treasury memorandum noted that "both Fannie Mae and Freddie Mac are expected to be net income positive (before dividends) on a stable, ongoing [basis] after 2012 . . . ."
- Upon information and belief, a presentation sent to senior Treasury officials in February 2012 stated that "Fannie and Freddie could have the earnings power to provide taxpayers with enough value to repay Treasury's net cash investments in

the two entities."

- Upon information and belief, in June 2012, Treasury memorialized in an email that "the [Companies] will be generating large revenues over the coming years, thereby enabling them to pay the 10% annual dividend well into the future even with the caps" on Treasury's commitment. According to the email, this point was apparently discussed between then-Treasury Secretary Timothy Geithner and Mr. DeMarco at a June 24, 2012, meeting.
- On July 13, 2012, Agency officials circulated meeting minutes noting that Fannie Mae's Chief Financial Officer had stated at an executive-management meeting four days before that the next eight years would likely be the "golden years of [Company] earnings," that "[c]urrent projections show that cumulative [Company] dividends paid will surpass cumulative [Company] Treasury draws by 2020," and that "[c]umulative 2012-2016 income is now forecast at $56.6 billion, $12.3 billion higher than the last projection."
- In a July 30, 2012, "PSPA Covenant and Timing Proposal" regarding the Sweep Amendment, Treasury acknowledged the "[Companies] will report very strong earnings on August 7, that will be in-excess of the 10% dividend to be paid to Treasury."
- At a meeting between senior Treasury officials and Fannie Mae on August 9, 2012, financial projections were introduced showing that, at no time between 2013 and 2022 would there be less than $116.1 billion of remaining funding available to Fannie Mae, or less than $148.3 billion available to Freddie Mac, under the Treasury SPAs. Furthermore, the projections showed that, even if the

10% dividends remained in place, dividends paid to Treasury would exceed cumulative draws under the Treasury SPAs as of 2020 in the case of Fannie Mae, and as of 2019 in the case of Freddie Mac.

- At the same meeting on August 9, 2012, just days before the Sweep Amendment was implemented, Fannie Mae's Chief Financial Officer, Susan McFarland, told Treasury officials that release of the valuation allowance on the deferred tax assets would likely occur in mid-2013 and would generate profits in the range of $50 billion.

51. These encouraging projections were well founded. On May 9, 2012, Fannie Mae announced a net worth of $268 million and comprehensive income of $3.1 billion for the quarter ending March 31, 2012, and announced that it would not request a draw from Treasury for the first time since being placed into conservatorship. Similarly, Freddie Mac on August 7, 2012, reported a net worth of $1.1 billion for the quarter ending June 30, 2012, and announced that it too would not request a Treasury draw. Thereafter, on August 8, 2012, Fannie Mae announced net income of $5.1 billion for the second quarter of 2012, more than sufficient to pay its $2.9 billion quarterly dividend to Treasury, and announced, "we expect our financial results in 2012 to be substantially better than the past few years."

52. The Companies also had sizeable deferred tax assets in 2012: Fannie Mae disclosed $64.1 billion on February 29, 2012, and Freddie Mac disclosed $34.7 billion on August 7, 2012. The Companies' renewed profitability suggested that they would soon recognize these massive assets.

Treasury Through the Sweep Amendment Effectively Nationalizes the Companies and Appropriates Akanthos's Preferred Stock

53. Given the long history of assurances provided by the Agency and others,

Akanthos was shocked when, on August 17, 2012—nearly three years after Treasury's emergency authority to purchase the Companies' stock had expired and the Treasury SPAs had last been amended, but only days after the Companies' highly favorable second-quarter results had been announced—Treasury and the Agency (acting as purported conservator for the Companies) entered into the Sweep Amendment. It transformed the Companies' 10% dividend into a "dividend" of the "total assets of the Company . . . less the total liabilities of the Company" (subject to a capital reserve that diminished over time, initially set to be zero as of January 1, 2018, but reset to a nominal $3 billion in December 2017). The Sweep Amendment has no termination date. In brief, it requires each of the Companies to turn over its entire net worth to Treasury—every quarter, in perpetuity.

54. Treasury thereby appropriated to itself all future profits of the Companies, effectively nationalizing them. Correspondingly, Treasury kept the Companies from accumulating capital that could ensure their ongoing solvency and ability to operate as private, rehabilitated companies without depending on the government; from having any funds to pay dividends to any other stockholders; and, except in limited circumstances, from being able to pay down the balance on the commitment (the net-worth payments do not reduce this balance) so as to substantially decrease Treasury's liquidation preference over the Junior Preferred and common stockholders.

55. The effect was to extinguish any possibility that any shareholder other than the United States will receive any value from the Companies. The government's action also, while not benefitting but actually harming the Companies, provided Treasury an expected and actual windfall of billions of dollars per year without the need for any appropriation from Congress. And it placed the burden of a public program, designed and intended to benefit the

government's purposes, disproportionately upon the relatively small group of shareholders who invested and believed in the Companies' prospects, including Junior Preferred Stockholders, rather than upon the public as a whole.

56. It turns out that, during much of the period that the Agency was assuring Junior Preferred Shareholders that its objective was to stabilize the Companies and terminate the conservatorship, Treasury had quietly been seeking a way to wind-down the Companies, which came to include seeking a way to seize all of their value notwithstanding that its emergency stock-purchasing authority had expired. An internal memorandum to Treasury Secretary Geithner from the then-Under Secretary of the Treasury for Domestic Finance, Jeffrey Goldstein, dated December 20, 2010, referred to a "commitment" by the Obama Administration to "ensure existing common equity holders *will not have access to any positive earnings from the [Companies] in the future*." (Emphasis added.) And in February 2011 Treasury issued a report expressing its intention to "us[e] a combination of policy levers to wind down Fannie Mae and Freddie Mac," claiming that the Administration would "work with [FHFA]" to this end—all while Mr. DeMarco continued throughout 2011 to assure Congress and the public that his goal was to *rehabilitate* the Companies. At the same time, Treasury stated its belief that, under the current Treasury SPAs, "there is sufficient funding to ensure the orderly and deliberate wind down of Fannie Mae and Freddie Mac, as described in our plan."

57. According to a senior Treasury official, Jeffrey Foster, the idea for a variable dividend payment based on positive net worth originated from a phone conversation between himself and Mario Ugoletti in 2010. Mr. Ugoletti had been appointed in 2009 as a special advisor to the Agency's Acting Director, and served as primary liaison to Treasury with

respect to the Treasury SPAs and the amendments thereto. Before 2009, Mr. Ugoletti worked at Treasury for 14 years, from 1995 to 2009, serving as Director of the Office of Financial Institutions Policy during the last five years of his tenure. In that capacity, he participated, on behalf of Treasury, in creating and implementing the Treasury SPAs.

58. Mr. Foster testified that, during the phone call in 2010, he suggested to Mr. Ugoletti that the Treasury SPAs needed to be restructured to avoid the circularity of drawing from Treasury to then pay Treasury (the so-called “death spiral”). This conclusion was supposedly based upon financial modeling work that Treasury itself had commissioned from Grant Thornton.

59. Mr. Foster found a receptive audience in the 14-year veteran of Treasury. Mr. Ugoletti has testified to his understanding that Treasury “all along” wanted to see a wind-down of the Companies and a new housing finance structure. In his position as special advisor to the Agency’s Acting Director on the Treasury SPAs and the amendments thereto, he was in an ideal position to push Treasury’s agenda.

60. In addition to his clear understanding of the wind-down objectives of his prior longtime employer, Mr. Ugoletti also understood that Treasury had the ability to control the Agency and dictate whether the Companies would ever emerge from conservatorship. As he explained in deposition, even if the Companies had been able to raise $189.5 billion in equity to pay off Treasury’s liquidation preference and become sufficiently well capitalized to get the Agency’s “stamp of approval on them,” “Treasury still has to approve [the Companies’] coming out of conservatorship.” As noted, the Treasury SPAs had given Treasury the right to block certain actions of the Agency as conservator in operating the Companies.

61. Treasury had used that power over the conservatorships to place the general

interest of the government's coffers—beyond Treasury's interest in repayment of draws and in receiving dividends—ahead of the interests of shareholders and to hamper the Agency as conservator in preserving the value of the Companies for any shareholders other than Treasury. For example, in September 2009, the Companies had proposed to sell to third-party investors their investments in low-income-housing tax credits, to decrease their draws and dividend payments to Treasury. Treasury withheld its approval, explaining that "the proposed sale would result in *a loss of aggregate tax revenues* that would be greater than the *savings to the federal government* from a reduction in the capital contribution obligations of Treasury" to the Companies under the Treasury SPAs.

62. Armed with its power to prevent the Agency from allowing the Companies to emerge from the conservatorships, Treasury sought to exert its influence upon the Agency's senior officials to adopt Treasury's bleak vision for the Companies and their shareholders. Upon information and belief, on January 4, 2012, Mary Miller of Treasury transmitted an agenda to Acting Director DeMarco claiming that Treasury and the Agency had "common goals" to "promote a strong housing market recovery, reduce government involvement in the housing market over time and to provide the public and financial markets with a clear *plan to wind down the [Companies]*." (Emphasis added.) One section of this agenda was titled, "Establish meaningful policies that demonstrate *a commitment to winding down the [Companies]*." (Emphasis added.)

63. As the financial condition of the Companies continued to improve dramatically, and the need for the Companies to remain in conservatorship diminished, the efforts of Treasury to implement the Sweep Amendment intensified. On June 13, 2012, Treasury prepared a "sensitive" and "pre-decisional" presentation, which stated that "Treasury

would like to modify the [Treasury] SPAs given the challenges and circularity embedded in the current structure." In support of its modification proposal, which essentially mirrored the eventual Sweep Amendment, Treasury offered forecasts prepared by its own consultant, Grant Thornton, which showed a "base case" and a "downside case" that did not properly reflect the performance and prospects of the Companies. For example, under the base cases for Fannie Mae and Freddie Mac, the forecasts (made in June 2012) assumed, for 2012, a combined net comprehensive loss of $6.4 billion—even though their combined net comprehensive income of $4.9 billion for the first quarter alone exceeded that figure. Indeed, for full year 2012, the Companies reported positive comprehensive income of $34.8 billion—a combined difference of $41.2 billion between the assumptions used by Grant Thornton and actual results. For 2013, the differences were even larger—the base cases projected combined net comprehensive positive income of $14.9 billion for the Companies, whereas their combined actual comprehensive income, excluding any deferred tax assets, was $64.5 billion, more than 425% higher than projected.

64. The need for Treasury to implement the Sweep Amendment took on even greater urgency following the meeting on August 9, 2012, attended by representatives of Treasury and Fannie Mae, at which Ms. McFarland advised Treasury officials that Fannie Mae would deliver sustainable profits over time and benefit from the likely near-term allowance of the deferred tax assets. The promising news conveyed at that meeting did not cause Treasury to reconsider its proposal to implement the Sweep Amendment. To the contrary, the same day as that meeting, Mr. Ugoletti emailed Mr. DeMarco and other Agency officials, advising them that, "[a]s a heads up, there appears to be a renewed push to move forward on [Treasury] SPA amendments." Mr. Ugoletti advised his Agency colleagues that

he had not seen the proposed documents yet, but he understood that they were largely the same as previous versions he had reviewed, in terms of net income sweep, eliminating the commitment fee, and faster portfolio wind-down.

65. Treasury made the decision, on behalf of itself and the Agency, to cause the execution of the Sweep Amendment. This is evident from the fact that the Sweep Amendment was designed to promote Treasury's policy objectives. On information and belief, on August 13, 2012, just four days before the Sweep Amendment was executed, a draft presentation was circulated among Treasury officials, indicating that the Sweep Amendment was "consistent with Treasury's policy to wind-down the [Companies]," and specifically intended to "ensure that the [Companies] will not be able to rebuild capital as they are wound down." Similarly, in an email between Treasury and White House officials on August 15, 2012, which did not copy the Agency or the Companies, Treasury official Adam Chepenik declared that, "[b]y taking all of their profits going forward, we are making clear that the [Companies] will *not* ever be allowed to return to profitable entities at the center of our housing finance system," and he confirmed that "taxpayers will receive every dollar of profit the [Companies] make." (Emphasis in original.)

66. While Treasury was pressing the Agency, through its liaison Mr. Ugoletti, to finalize the Sweep Amendments, neither Treasury nor the Agency apprised officials at the Companies about the existence of the Sweep Amendment, let alone invited them to discuss their own future. According to Mr. Ugoletti, representatives of the Companies received the near-final version of the Sweep Amendment not long before its execution and were "not too happy." Susan McFarland (who as Fannie Mae's Chief Financial Officer had met with Treasury on August 9, 2012) testified:

> So when the amendment went into place, part of my reaction was they did that in response to my communication of our forecasts and the implication of those forecasts, that it was probably a desire not to allow capital to build up within the enterprises and not to allow the enterprises to recapitalize themselves.

67. Had the Agency been acting as a conservator for the Companies, rather than as a federal regulator to implement Treasury's policy goals, the Agency would have had good reason to consult with the Companies' boards and management to determine whether the Sweep Amendment was or was not in the best interests of the Companies and their shareholders. On information and belief, this never happened. This failure of the Agency to consult with the boards and management of the Companies for which it was purporting to act as conservator reinforces that the Agency was not acting as the conservator it had claimed it would be.

68. In short, Treasury orchestrated the Sweep Amendment, and the Agency was, to the extent it had any involvement, merely a federal agency acting at Treasury's direction, under its supervision, and for its purposes.

Treasury Boasts About Its Seizure of the Companies' Profits in Perpetuity

69. After imposing the Sweep Amendment, Treasury made no attempt to hide from the public that Treasury's purpose was to expropriate the entirety of the Companies' shareholders' private property rights for public use and a public purpose. In a press release the day it imposed the Sweep Amendment, Treasury announced that the so-called revised dividend would "replace the 10 percent dividend payments made to Treasury on its preferred stock investments in Fannie Mae and Freddie Mac with a quarterly sweep of every dollar of profit that each firm earns going forward," and "*make sure that every dollar of earnings each firm generates is used to benefit taxpayers*." (Emphasis added.) The press release further

stated that the Sweep Amendment was a commitment that "*the [Companies] will be wound down and will not be allowed to retain profits, rebuild capital*, and return to the market in their prior form." (Emphasis added.)

70. Treasury did not indicate that, in entering into the Sweep Amendment, it had taken into consideration the need to maintain the Companies' status as private shareholder-owned companies. *See* § 1719(g)(1)(C)(v), § 1455(*l*)(1)(C)(v). Rather, its overriding concern was the government's own public interests.

71. Treasury made no effort in its press release to justify its authority for entering into the Sweep Amendment in the face of the expiration—nearly three years before, with no purported amendments since—of its emergency purchasing authority. Nor did it attempt to justify its effective winding down of the Companies without putting them into receivership and providing shareholders the Recovery Act's protections in that event.

72. Furthermore, a White House senior advisor, in an email written to a senior Treasury official on the date of the Sweep Amendment, stated that "we've closed off [the] possibility that [Fannie and Freddie] ever[] go … private again," and forwarded an email expressing the advisor's view that the Sweep Amendment would "ensur[e] that [the Companies] can't recapitalize." The same White House advisor sent another email to Treasury officials that day characterizing the Sweep Amendment as a "policy," stating: "Team T[reasur]y, [y]ou guys did a remarkable job on the [Treasury] SPAs this week. You delivered *a policy change of enormous importance that's actually being recognized as such by the outside world* . . . , and as a credit to the Secretary and the President." (Emphasis added.)

73. These emails confirm that the Sweep Amendment emanated from the highest levels of the Administration, that it was intended to serve a perceived public policy with no

regard for the conservation obligations of the Agency, and that the Administration recognized it was sharply diverging from the path that the government had drawn for the Companies and their investors.

In Executing the Sweep Amendment and Becoming a Mouthpiece for Treasury's Policy Objectives, the Agency Abrogated Its Public Commitments to Act as a "Conservator"

74. The Sweep Amendment did not make commercial or economic sense for the Companies (or their non-controlling shareholders), nor did the United States seriously claim otherwise. By contrast, the Sweep Amendment made a lot of sense for the United States Treasury, by expropriating valuable property belonging to Akanthos for the benefit of the United States and its coffers, while implementing policy objectives that Treasury had secretly long sought to achieve.

75. Thus, the Agency in "agreeing" to the Sweep Amendment had ceased to act in the best interests of the Companies and as the conservator that it had—repeatedly, for years—assured the markets that it would be, namely that it would act consistent with its "Powers as conservator" under the Recovery Act and with common, settled understandings of a conservator's role.

76. Thereafter, the Agency transformed itself into a mouthpiece for Treasury's policy objectives, which nakedly elevated the interests of "taxpayers" (*i.e.*, Treasury) over the interests of the Companies' soundness and solvency, let alone the Companies' stockholders other than the United States. Various documents and statements subsequent to the Sweep Amendment confirm the Agency's public switch to Treasury's position, notwithstanding Mr. DeMarco's reassurances to the market as recently as December 2011 that his duty as conservator was to rehabilitate the Companies. For example:

- On October 9, 2012, about two months after the Sweep Amendment, the Agency released its Strategic Plan for 2013-2017, which included the strategic goals of "minimiz[ing] taxpayer losses during the Enterprises' conservatorships" and "contract[ing] [Company] operations."

- On October 22, 2012, Timothy J. Mayopoulos, the President and CEO of Fannie Mae, stated that "[t]he [C]ompany is no longer run for the benefit of private shareholders."
- On March 20, 2013, the Agency's Office of Inspector General issued an Analysis of the Sweep Amendments in which it stated that, "[i]n overseeing the Enterprises, FHFA has to balance its responsibilities for maintaining the viability of the Enterprises and for protecting the interests of taxpayers."
- In April 2013, Mr. DeMarco himself stated that "[t]he Administration has made clear that their preferred course of action is to wind down the [Companies]," and he explained that the "recent changes to the [Treasury SPAs], replacing the 10 percent dividend with a net worth sweep, reinforce the notion that *the [Companies] will not be building capital as a potential step to regaining their former corporate status*." (Emphasis added.)
- In May 2014, Agency Director Melvin L. Watt stated: "I don't lay awake at night worrying about what's fair to the shareholders." He added: "I just don't have time to think about what might happen in the future with the shareholders."

77. After lawsuits were filed challenging the Sweep Amendment, the Agency attempted to offer pre-textual justifications. In a declaration the Agency submitted in proceedings in the United States District Court for the District of Columbia, Mr. Ugoletti claimed that the Agency had agreed to the Sweep Amendment due to concerns that the burden

of paying the 10% dividend owed to Treasury might reduce the amount of Treasury's commitment that remained available to the Companies. As noted above, however, Treasury knew that the Companies could pay the dividend "well into the future even with the caps," and projections available to both Treasury and the Agency indicated that the Companies would have more than sufficient funding through 2022. (As of the beginning of 2013, Freddie Mac had over $140 billion still available on its commitment from Treasury, and Fannie Mae had over $117.6 billion.) In fact, in an internal mark-up of a document explaining the reasoning for the sweep, a Treasury official wrote that the argument that the "10 percent dividend was likely to be unstable as the businesses were reduced" "[d]oesn't hold water." Concerns that the 10% dividends were "circular" were unfounded for the additional reason that the dividends could be paid in-kind at a 12% rate, which would not require a further draw. Indeed, upon information and belief, a Treasury official involved in developing the Sweep Amendment was unable to identify any "problems of the circularity [in dividend payments that] would have remained had the [payment in kind] option been adopted," and internal Treasury documents recognized that, "[t]o the extent that required dividend payments exceed net income, FHFA, as conservator, could consider not declaring dividends pursuant to the certificates of designation for the preferred shares, so that draws on the [Treasury] SPAs are not used to pay dividends, preserving as much funding as possible to cover any unanticipated losses at Fannie Mae and Freddie Mac."

78. Rather than acting as a true conservator, or in the interests of the shareholders whose rights, titles, powers, and privileges with respect to the Companies it had assumed as conservator (§ 4617(b)(2)(A)), the Agency was acting under the de facto authority of, and in collusion, with Treasury.

79. Acting through Treasury—and in the face of Congress's assurance in § 4617(a)(7) that the Agency would *not* "be subject to the direction or supervision of any other agency of the United States" when "acting as conservator"—the United States by means of the Treasury SPAs, as well as through pressure and influence, came to exercise direction and control over the business and affairs of the Companies and caused the Agency to become hopelessly conflicted with respect to its obligations to the Companies and their shareholders, culminating with the Sweep Amendment.

80. In sum, the Agency abdicated its responsibility to act as conservator for the Companies, and instead, acting in its capacity as regulator and an agency of the United States, acquiesced and succumbed to Treasury's mandate to execute the Sweep Amendment.

The United States' Windfall from the Sweep Amendment at the Companies' Expense

81. Treasury's actions to nationalize the Companies, stripping their shareholders (other than itself) of any benefit from the Companies' improving operations, proved well timed for the United States, in light of the Companies' results and market expectations as of August 2012.

82. In the first quarter of 2012, five months before the Sweep Amendment was announced, the Companies already had reported positive net income of over $3.2 billion and in the fourth quarter of 2012, the first quarter after Treasury imposed the Sweep Amendment, Fannie Mae reported pre-tax income of $7.6 billion. The quarter after that (first quarter of 2013), it reported $8.1 billion—the largest quarterly pre-tax income in the Company's history. In its 10-Q for the first quarter of 2013, Fannie Mae stated that it expected "our annual earnings to remain strong over the next few years" and "to remain profitable for the foreseeable future." For 2017, Fannie Mae reported pre-tax income of approximately $18

billion, and Freddie Mac reported pre-tax income of approximately $17 billion.

83. In addition, and as had been long and widely anticipated, Fannie Mae announced on May 9, 2013, that it would release the valuation allowance on its deferred tax assets, resulting in a benefit for its federal income taxes of $50.6 billion. This would have had the effect of increasing the Company's capital, which would have freed further assets to pay down the Treasury Senior Preferred Stock.

84. Under the Sweep Amendment, all of this went to Treasury. None went to ensuring the soundness and solvency of the Companies.

85. As shown in the below table, Fannie Mae and Freddie Mac have, as of the end of 2017, handed over to Treasury over $223 billion in "dividends" under the Sweep Amendment. (That is in addition to the $55.2 billion in dividends paid to Treasury between 2008 and 2012.)

Dividend Payments Under the Sweep Amendment (in Billions of Dollars)

	Fannie	**Freddie**	**Combined**
2013	82.5	47.6	130.1
2014	20.6	19.6	40.2
2015	10.3	5.5	15.8
2016	9.6	5.0	14.6
2017	12.0	10.9	22.9
Total	**135**	**88.6**	**223.6**

86. By contrast, had the Companies continued to pay only 10% cash dividends under the earlier (authorized) Treasury SPAs, they would have paid Treasury from 2013

through the end of 2017 a total of approximately $94.7 billion. Alternatively, if they had been permitted to repay principal during this period, they would have had sufficient quarterly profits in excess of the 10% dividend to *fully redeem* the Treasury Senior Preferred Stock and to rebuild capital. The amount paid to Treasury under the Sweep Amendment exceeds by billions of dollars the amount that Treasury provided to the Companies through its commitment under the Treasury SPAs. A February 15, 2018, Freddie Mac presentation on fourth quarter 2017 financial results reveals that Freddie Mac has paid a cumulative total of $112.4 billion in dividends to Treasury, while it had, as of December 31, 2017, only requested $71.3 billion in draws. In fact, an August 16, 2012, “Sensitive and Pre-Decisional” “[Treasury SPA] Amendment Q&A” answered the question why the Companies could not use profits to buy back Senior Preferred Stock from Treasury by saying that “this would have reduced the amount taxpayers are reimbursed for their substantial contribution to support the [Companies].” This reveals the real intent behind the Sweep Amendment—to benefit the government at the expense of the Junior Preferred stockholders and common stockholders.

87. All told, had the Companies not entered into the Sweep Amendment, they would have retained at least $128.9 billion in capital, which they could have used to protect themselves from future downturns and reassure shareholders of the soundness of their investment. Moreover, if the Agency and Treasury were legitimately concerned about the Companies entering a “death spiral,” they could have caused the Companies to elect to pay the dividend “in kind” by adding 12% annually to the liquidation preference of the Treasury Senior Preferred Stock. This would have had the effect of creating an additional $94.7 billion in capital, since cash that would have been paid as dividends would instead have been retained to increase the Companies’ safety and soundness. Instead, the United States has forced the

Companies to operate on the brink of insolvency (and suffer the attendant economic consequences, such as increased borrowing costs) and thus in perpetual dependency on the government. Meanwhile, the government pockets all of this money for its own purposes.

88. Moreover, because the Companies' dividend payments under the Sweep Amendment do not reduce the liquidation preference (and leave no other funds with which to do so), Treasury's massive liquidation preference under the Treasury SPAs, due to the Companies' having drawn on the commitment prior to 2012, is set in stone—as to Fannie Mae, $117.1 billion; and as to Freddie Mac, $72.3 billion, prior to December 31, 2017. Thus, in addition to the over $223 billion that Treasury has already expropriated from the Companies, Treasury and the Agency contend that Treasury retains, forever, a further $189.5 billon liquidation preference. Thus, the diversion of profits under the Sweep Amendment also ensures the perpetual nullification of the liquidation rights of all other shareholders, particularly the Junior Preferred holders, who would be first in line but for Treasury's holdings.

The Sweep Amendment Took Akanthos's Property Rights In And Under Its Junior Preferred Stock Certificates

89. Akanthos purchased Junior Preferred Stock both before and after the imposition of the conservatorship but before the Sweep Amendment. Thus, at the time of the Sweep Amendment, it had vested property rights in the economic value of its Junior Preferred Stock, including the equity and market value of the Junior Preferred Stock, and the expectation of future dividend payments.

90. In addition, Akanthos had vested contractual property rights in the Junior Preferred Stock. The Certificate of Designation for each series of Junior Preferred Stock issued by the Companies grants the holders rights to non-cumulative dividends to be declared

at the discretion of the applicable Company's board of directors. For example, the Certificate of Designation for Fannie Mae's Series O Junior Preferred Stock provides:

> Holders of record of Series O Preferred Stock (each individually a "Holder", or collectively the "Holders") will be entitled to receive, when, as and if declared by the Board of Directors of Fannie Mae, or a duly authorized committee thereof, in its sole discretion out of funds legally available therefor, non-cumulative quarterly dividends which will accrue from and including the date of issuance and will be payable on March 31, June 30, September 30 and December 31 of each year (each, a "Dividend Payment Date"), commencing March 31, 2005.

91. The Certificates of Designation for each series of Junior Preferred Stock also provide for liquidation rights and preferences. For example, the Certificate of Designation for Fannie Mae's Series O Junior Preferred Stock provides in part:

> (a) Upon any voluntary or involuntary dissolution, liquidation or winding up of Fannie Mae, after payment or provision for the liabilities of Fannie Mae and the expenses of such dissolution, liquidation or winding up, the Holders of outstanding shares of the Series O Preferred Stock will be entitled to receive out of the assets of Fannie Mae or proceeds thereof available for distribution to stockholders, before any payment or distribution of assets is made to holders of Fannie Mae's common stock (or any other stock of Fannie Mae ranking, as to the distribution of assets upon dissolution, liquidation or winding up of Fannie Mae, junior to the Series O Preferred Stock), the amount of $50 per share plus an amount, determined in accordance with Section 2 above, equal to the dividend (whether or not declared) for the then-current quarterly Dividend Period accrued to but excluding the date of such liquidation payment, but without accumulation of unpaid dividends on the Series O Preferred Stock for prior Dividend Periods.
>
> (b) If the assets of Fannie Mae available for distribution in such event are insufficient to pay in full the aggregate amount payable to Holders of Series O Preferred Stock and holders of all other classes or series of stock of Fannie Mae, if any, ranking, as to the distribution of assets upon dissolution, liquidation or winding up of Fannie Mae, on a parity with the Series O Preferred Stock, the assets will be distributed to the Holders of Series O Preferred Stock and holders of all such other stock pro rata, based on the full respective preferential amounts to which they are entitled (but

without, in the case of any noncumulative preferred stock, accumulation of unpaid dividends for prior Dividend Periods).

Akanthos Had Reasonable, Investment-Backed Expectations

92. Given the conditions of the market and the Companies, together with the assurances of the Agency in light of its powers as conservator under the Recovery Act (as well as the longstanding record of the Companies, and statements of the United States, before conservatorship), Akanthos reasonably expected that the mortgage market would recover; that the Companies would return as bulwarks in housing; and that the Agency, having ensured the soundness and solvency of the Companies, accordingly would terminate their conservatorships. Moreover, Akanthos reasonably believed that the Companies would soon return to substantial and sustainable profitability, which would trigger a release of the valuation allowance on the Companies' sizeable deferred tax assets.

93. Akanthos further expected that, in any event, the Agency would—as it had assured markets it would do, and as the Recovery Act reasonably indicated it should and would do—act with a view to rehabilitating the Companies and not as an accomplice to Treasury's carnivorous secret plan to seize, for itself, the entire value of the Companies in disregard of the property interests of Akanthos and other shareholders.

94. As such, by early summer of 2012, Akanthos reasonably anticipated that the Companies would soon emerge from conservatorship (as two Directors of the Agency had publicly predicted), from which they would be in a position to redeem the Treasury Senior Preferred Stock and allow Akanthos to realize benefits from its reasonable investment-backed expectations in the property interests represented by the Junior Preferred Stock. Akanthos, in any event, did not reasonably expect the Sweep Amendment or any other action that would make the conservatorship *antithetical* to those goals and in fact make them impossible to

achieve.

95. Indeed, the terms of the Recovery Act's conservatorship provisions (among others) are materially identical to the longstanding ones in FIRREA by which the Federal Deposit Insurance Corporation ("FDIC") acts as conservator of troubled banks. *See* § 1821(d)(2)(D). Until the Sweep Amendment, this language had always been interpreted to mean that FDIC has a mandatory duty to preserve and protect the assets of banks when acting as conservator. Moreover, historically the United States' regulation of the Companies has been less extensive than its regulation of banks. Nor was Akanthos aware of any prior use of a senior preferred stock instrument to strip 100% of a company's profits in perpetuity, to the derogation of the property rights of other holders of stock. Prior to the implementation of the Sweep Amendment, the holders of Junior Preferred Stock could not have reasonably anticipated such a divergence from historical precedent.

96. The Sweep Amendment deprived Akanthos of its economic and contractual property rights with respect to the Junior Preferred Stock. It made it impossible for Akanthos to realize the future value of its property interests in the Companies.

97. One indication of this immediate, severe deprivation was the precipitous drop in the trading price of the Junior Preferred Stock in the over-the-counter market in the first two weeks alone following the enactment of the Sweep Amendment—indeed, by the end of August 2012, the trading price for the Junior Preferred Stock held by Akanthos had decreased by an average of over 51% since August 16. That drop, however, represents only the tip of the iceberg in measuring the true loss of value of the Junior Preferred Stock immediately before versus immediately after the Sweep Amendment. Immediately before the Sweep Amendment, the Junior Preferred Stock did not reflect information—known at Treasury, the

Agency, and the Companies, but not to the public—regarding the financial condition of and prospects for the Companies. Had that information been publicly available, the trading price just prior to the Sweep Amendment would have been far higher, reflecting the true value of the Junior Preferred Stock. Conversely, the Sweep Amendment, by its terms, extinguished any existing market value for the Junior Preferred Stock by eliminating any possible investment return. Any remaining trading value was necessarily attributable to the possibility that litigation success could result in a return on the Junior Preferred Stock.

98. Akanthos has been provided neither just compensation nor any compensation at all in return for the United States' taking of all the economic value associated with its Junior Preferred Stock.

The United States, Which Controls the Companies, Has Through the Sweep Amendment Disproportionately Harmed Shareholders Other than the United States and, In Any Event, Has a Conflict of Interest With Respect to the Rights of the Companies

99. The United States, as the result of the Treasury SPAs as well as its conservatorships of the Companies via the Agency, was a shareholder that controlled the Companies prior to the Sweep Amendment.

100. The Sweep Amendment, in radically altering the Treasury SPAs, effectively created a new security for the United States. Treasury, in obtaining this result by means of its control of the Agency and the Companies did not, in exchange, provide to the Companies anything of the same value, but rather provided (at best) significantly lesser value. Further, Treasury's new rights to receive, every quarter in perpetuity, "dividends" equal to the entire net worth of the Companies increased its rights with respect to the Companies while correspondingly reducing the rights of all other shareholders.

101. In so doing, the United States engaged in self-dealing and breached its fiduciary duty arising from its control of the Companies.

102. As a result, any claim raised by Akanthos that might be considered derivative on behalf of the Company is in fact direct, on behalf of Akanthos itself.

CLAIMS FOR RELIEF

COUNT I
Just Compensation under the Fifth Amendment for the Taking of Private Property for Public Use

103. Akanthos incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

104. The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

105. Akanthos had cognizable property interests in the Junior Preferred Stock, including in its contract rights to dividends, to liquidation rights and preferences, and to voting rights, and in its economic interests in the Junior Preferred Stock, including its proportionate share of the Company's future earnings and the equity and value of the Junior Preferred Stock.

106. Akanthos had investment-backed expectations to participate in the Companies' future earnings and to receive a share of any residual value of the Companies in the event of liquidation, and those expectations were reasonable.

107. By way of the Sweep Amendment, executed under the purported authority of the Recovery Act and by one arm of the federal government (Treasury) imposing its will and dominion over another arm (the Agency) under its control, the United States directly appropriated for itself Akanthos's property interests in the Junior Preferred Stock "to benefit taxpayers." The Sweep Amendment, although unlawful, was an authorized act of the government, done within the general scope of the duties of the agencies and officers who

executed it.

108. The Sweep Amendment immediately diminished the value of Akanthos's Junior Preferred Stock, repudiated Akanthos's contractual property rights, and directly and proximately caused a severe, present, continuing and actual economic injury to the Junior Preferred Shareholders' property interests. Indeed, Akanthos has been deprived of all economically beneficial uses of its Junior Preferred Stock in Fannie Mae and Freddie Mac, while the United States has received payments from the Companies of more than $200 billion in dividends since the Sweep Amendment, without any corresponding reduction in the liquidation preference payable to the United States. Thus, contrary to the United States' position asserted in other litigation, Akanthos's takings claim is clearly ripe.

109. Akanthos is entitled to just compensation for the government's taking of its property.

COUNT II
Illegal Exaction in Violation of the Fifth Amendment

110. Akanthos incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

111. Alternatively, the Sweep Amendment was imposed by the United States without authority. Under the Recovery Act, the Agency "as conservator" was to act to put the Companies "in a sound and solvent condition," to "preserve and conserve [their] assets," and to "carry on" their business. Contrary to these objectives, the Sweep Amendment ensures that the Companies will perpetually be on the verge of insolvency, wastes their assets, and destroys their ability to carry on their mandate as private, shareholder-owned companies. It does the opposite of conserving the Companies, and accomplishes a wind-down in contravention of the Act's separate provisions (and protections) for a receivership. In

addition, Treasury's exertion of control over the Agency was both unlawful and unauthorized pursuant to 12 U.S.C. § 4617(a)(7). Moreover, the Sweep Amendment was *ultra vires* on the part of Treasury as well, because it was executed contrary to the provisions of the Recovery Act (and the Companies' charters) granting Treasury only temporary emergency authority to purchase and determine the terms, conditions, and amounts of securities of the Companies. The Sweep Amendment also was unauthorized due to the Agency's violating constitutional separation of powers principles, including because (1) the Agency's head is a single director, whom the President may remove only for cause; (2) the Agency is allowed to fund itself through assessments; and (3) when the Sweep Amendment was instituted, the Agency was headed by an "acting" director (whom the President had been allowed to designate only from among the deputy directors, themselves appointed by the director) who had held that position for three years.

112. Through the Sweep Amendment, the United States, in obtaining for itself a quarterly payment in perpetuity equal to the Companies' entire net worth, has appropriated to itself the property of Akanthos, holder of Junior Preferred Stock. This appropriation was, in effect, a forced payment of money by Akanthos to the government.

113. To the extent that the United States' violation of a "money mandating" statute is a necessary predicate for this Count, the Recovery Act is such a statute, particularly in the circumstances here, where the United States, in and as the result of assuming control of the Companies, assumed a fiduciary duty whose breach is appropriately remedied by damages.

114. The Sweep Amendment is thus an illegal exaction imposed in violation of the Due Process Clause of the Fifth Amendment.

115. Akanthos is entitled to compensation for its illegally exacted property.

116. For avoidance of doubt, Paragraphs 111 through 115 are pled solely in the alternative to Count I of the Amended Complaint and the remaining allegations in the Amended Complaint.

COUNT III
Breach of Fiduciary Duty

117. Akanthos incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

118. As alleged above, the Treasury SPAs are contracts that gave the United States (via Treasury) control over the Companies and over the Agency as conservator of the Companies, which it exercised; moreover, the Agency as conservator under the Recovery Act controlled the Companies, succeeded to the rights of shareholders, and assumed the obligations of the then-existing contracts of the Companies. The United States thereby assumed fiduciary duties to Akanthos and the other non-controlling shareholders, including (at a minimum) a duty not to manage the Companies for the United States' own pecuniary and policy interests at the expense of the interests of the shareholders other than the United States and not to engage in arbitrary or unreasonable conduct that would prevent non-controlling shareholders from benefitting from the fruit of their bargain with the Companies, such as in the Certificates of Designation of Akanthos's Junior Preferred Stock and the implied-in-fact contract between the United States and the Companies.

119. The United States breached its fiduciary duty to Akanthos by entering into the Sweep Amendment, which was not in the best interests of the Companies' shareholders (other than the United States), but rather was contrary to their interests and arbitrarily and unreasonably provided a windfall to the United States at the expense of non-controlling shareholders. The Agency abdicated its responsibility to Treasury; and Treasury, by virtue of

the Treasury SPAs, was conflicted. The Agency and Treasury acted together as a controlling group to implement their shared goal, the Sweep Amendment, in the interests of the United States rather than the best interests of the Companies and their shareholders, and thus in breach of their fiduciary duties to other shareholders including Akanthos.

120. Akanthos as a result suffered injury and loss of property, and is entitled to damages.

121. To the extent that rescission has been rendered impossible or impracticable, and because this Court may not grant that remedy, Akanthos is entitled (without limitation) to rescissory damages.

122. According to Treasury, any fiduciary duties it owes to plaintiff challenging the Sweep Amendment arise from a contract, such that a claim that it breached its fiduciary duty is in essence a contract action. This confirms that this Count is founded upon a contract with the United States.

COUNT IV
Breach of Implied-in-Fact Contract Between the United States and the Companies

123. Akanthos incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

124. Prior to appointing itself conservator on September 6, 2008, the Agency unambiguously offered to place Fannie Mae and Freddie Mac into conservatorship by consent, under § 4617(a)(3)(I), with certain conditions described below, and the boards of directors of the Companies accepted this offer. The Agency made no finding of insolvency, undercapitalization, or any other ground to impose conservatorship under § 4617(a)(3)(A)-(H) or (J)-(L).

125. The Agency offered, and the boards of Fannie Mae and Freddie Mac accepted,

a conservatorship that would aim to "preserve and conserve the [Companies'] assets and property" and restore the Companies to a "sound and solvent condition." *See* § 4617(b)(2)(D). The offer was also of a conservatorship that would end when that goal was achieved. Neither of these conditions was ambiguous, and both would benefit the known and distinct class of the shareholders of the Companies, on whose behalf the boards of directors of the Companies had a fiduciary duty to act. In fact, the Agency obtained the boards' consent on the ground, in part, that conservatorship would serve the interests of the Companies' shareholders.

126. Underlying the Agency's offer was its promise that the Agency would not, as conservator, wind down or liquidate the Companies. The Agency stated contemporaneously with its offer that it could not, as conservator, place the Companies into liquidation. The Agency stated at the time, and for several years into the conservatorship, that its goal was instead to "restore the [Companies'] assets and property to a sound and solvent condition," which continued course of performance constitutes evidence of the offer's original terms.

127. When consenting to the conservatorship, the boards of the Companies furnished good and valuable consideration to the Agency by agreeing to forbear from a judicial or legislative challenge that the United States feared. *See* § 4617(a)(5). This forbearance was unambiguously furnished in exchange for the Agency's promises to act to restore the Companies to a safe and solvent condition.

128. The United States and the Companies, through the acts described above, entered into an implied-in-fact contract. The terms of that contract, as relevant here, were that the Agency if made conservator would "preserve and conserve the [Companies'] assets and property," that its conservatorship would continue only until the Companies were placed in a

safe and solvent condition, and that, in exchange, the boards of the Companies would consent to, and not challenge or litigate, such a course of action. Both the Agency and the Companies intended that an implied contract would exist. That contract required the Agency to preserve the Companies' assets and property, and forbade it from diminishing or expropriating the Companies' assets and property. This intent was demonstrated through the offer and acceptance detailed above. The Agency's offer was not ambiguous in its terms, and the boards' acceptance was manifested in the Agency's subsequent imposition of conservatorship based on the boards' consent.

129. Under these terms of the implied-in-fact contract, and given the known fiduciary duty of the boards of directors of the Companies, the shareholders of the Companies were intended beneficiaries of the contract.

130. The Agency had actual authority, as an agency of the United States Government, to bind the United States.

131. The Sweep Agreement breached the contract by rendering it impossible for the Companies to build and retain the capital necessary to exit conservatorship and return to normal business operations.

132. Each subsequent Sweep Amendment payment independently breaches that contract by depleting the Companies of capital (rather than "preserv[ing] and conserv[ing]" it), in a manner that the Agency has expressly recognized undermines the goals of conservatorship.

133. Had the United States adhered to the contract, it would have protected the rights of holders of stock (other than itself) in the Companies. Through the Sweep Amendment, however, the United States instead engaged in self-dealing, benefitting itself

while harming the shareholders other than itself.

134. The Sweep Amendment, thus, directly harmed Akanthos, by preventing the termination of the conservatorship; stripping the Companies of their ability to generate and retain funds to ever distribute as dividends to holders of the Junior Preferred Stock; and nullifying Akanthos's contractual right, as a holder of Junior Preferred Stock, to ever receive a liquidation preference upon the dissolution, liquidation, or winding up of the Companies. Akanthos is accordingly entitled to damages.

PRAYER FOR RELIEF

WHEREFORE, Akanthos seeks a judgment as follows:

A. Finding that the United States has taken or illegally exacted Akanthos's private property in violation of the Takings or Due Process clauses of the Constitution;

B. Awarding Akanthos just compensation under the Fifth Amendment for the United States' taking of its property;

C. Determining and awarding to Akanthos the damages sustained by it as a result of the violations set forth above;

D. Awarding rescissory damages, based upon the breach of fiduciary duty that occurred;

E. Awarding to Akanthos the costs and disbursements of this action, including reasonable attorneys' and experts' fees, costs and expenses; and

F. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted:

August 16, 2018

By: *s/ Lawrence D. Rosenberg*

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UNITED STATES COURT OF FEDERAL CLAIMS

APPALOOSA INVESTMENT LIMITED PARTNERSHIP I; PALOMINO FUND LTD.; PALOMINO MASTER LTD.; AND AZTECA PARTNERS LLC,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 18-370
Chief Judge Sweeney

SECOND AMENDED COMPLAINT

Plaintiffs Appaloosa Investment Limited Partnership I, Palomino Fund Ltd., Palomino Master Ltd., and Azteca Partners LLC (collectively, "Appaloosa"[1]), by and through the undersigned attorneys, hereby bring this action against the United States of America seeking (a) compensation for the taking of their property in violation of the Fifth Amendment to the Constitution or (b) in the alternative, the illegal exaction of their property in violation of the Fifth Amendment; (c) breach of fiduciary duty; and (d) breach of implied contract. In support, Appaloosa alleges as follows:

NATURE AND SUMMARY OF THE ACTION

1. This is an action to redress the United States' wiping out of Appaloosa's shares in the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac" and, collectively with Fannie Mae, the "Companies") by seizing for itself all earnings of the solvent Companies in perpetuity.

[1] Where applicable herein, "Appaloosa" includes reference to predecessor funds of Appaloosa Investment Limited Partnership I, Palomino Master Ltd., and Azteca Partners LLC (as alleged in Paragraphs 13-16 hereof).

2. On August 17, 2012, two arms of the United States—the Department of Treasury ("Treasury") and the Federal Housing Finance Agency ("Agency" or "FHFA"), which was purportedly acting as the conservator of the Companies—agreed between themselves to a "Third Amendment to Amended and Restated Senior Preferred Stock Purchase Agreement" (the "Sweep Amendment"). Through the operation of the Sweep Amendment, the United States has expropriated hundreds of billions of dollars in net worth from the Companies, to benefit the government at the expense of the Companies' other shareholders. At the time of the Sweep Amendment, Appaloosa held several series of junior preferred stock issued by the Companies (the "Junior Preferred Stock"), with a "stated value" and/or "liquidation preference" (term varies by stock certificate) in excess of $760 million. As a direct result of the Sweep Amendment, Appaloosa has suffered severe economic loss to its property interests in the Junior Preferred Stock.

3. The Companies are (as Congress has provided) private, for-profit, shareholder-owned corporations whose purpose is to support liquidity, stability, and affordability in the secondary mortgage market by securitizing mortgage loans originated by primary market lenders and selling the bundled loans to investors.

4. In July 2008, amid the financial crisis in the housing and mortgage markets, Congress enacted the Housing and Economic Recovery Act of 2008 (the "Recovery Act"). The Recovery Act created the Agency and granted its director the discretion, under certain circumstances, to place the Companies into conservatorship or receivership. The Recovery Act also granted to Treasury temporary emergency authority to purchase obligations or other securities of the Companies under certain circumstances.

5. On September 6, 2008, the Agency placed the Companies into conservatorship

under itself. In such case, Congress in the Recovery Act expressly charged the Agency, as conservator, to seek to return the Companies to a "sound and solvent condition" and to "preserve and conserve the assets and property" of the Companies.

6. The next day, Treasury, via the Agency, entered into Senior Preferred Stock Purchase Agreements (the "Treasury SPAs") with the Companies. Under the Treasury SPAs, Treasury committed to invest in the Companies in exchange for preferred stock that ranked senior to all series of Junior Preferred Stock (the "Treasury Senior Preferred Stock"). Treasury received for this commitment, among other things, (a) $1 billion of Treasury Senior Preferred Stock, (b) a warrant to purchase up to 79.9% of the common stock of each Company for a nominal price, (c) a liquidation preference equal to the $1 billion initial commitment fee plus the amount invested by Treasury in the applicable Company, and (d) a periodic commitment fee, in an undetermined amount, to be paid beginning in 2010. Through these and other provisions of the Treasury SPAs, Treasury acquired the ability to control the Companies.

7. Consistent with its statutory mandate under the Recovery Act, as well as historical understandings of conservatorship against which Congress had enacted it, the Agency assured the market that same day—and repeatedly for more than three years thereafter—that the goal of the conservatorship was to "return[] the entities to normal business operations"; that the conservatorship would be temporary and would terminate once the Companies had been restored "to a safe and solvent condition"; that the Junior Preferred Stock would remain outstanding and continue to trade; and that stockholders would "continue to retain all rights in the stock's financial worth, as such worth is determined by the market."

8. At least by 2011, Treasury and the Agency recognized that the Companies had stabilized and their financial performance was improving. By the first and second quarters of

2012, Fannie Mae and Freddie Mac, respectively, reported positive net worth and announced that they would not be requesting a further draw under the Treasury SPAs. Moreover, the Companies' renewed profitability suggested that they might well soon recognize sizeable deferred tax assets.

9. On the heels of such news, Treasury and the Agency (as purported conservator of the Companies) on August 17, 2012, entered into the Sweep Amendment, which eliminated the dividend payable under the Treasury Senior Preferred Stock (10% of the outstanding amount drawn, if paid in cash) and imposed a requirement that the Companies each quarter pay to Treasury their entire net worth in perpetuity. Thus, the Sweep Amendment barred the Companies from ever realizing a profit and from ever paying down Treasury's liquidation preference. It thereby eliminated any possibility that Appaloosa could ever receive any value from the Companies based on their property interests in the Junior Preferred Stock.

10. The Sweep Amendment appropriated the Companies' net worth in perpetuity to the benefit of the United States at the expense of the Companies and their shareholders, including Appaloosa. As Treasury admitted, the purpose was to take "every dollar of earnings each firm generates . . . to benefit taxpayers," ensuring that shareholders other than the United States received *no* benefit from those earnings. The United States paid no compensation to holders of the Junior Preferred Stock for this taking of their valuable property rights for the public benefit.

11. Appaloosa purchased Junior Preferred Stock before the Agency capitulated to Treasury's Sweep Amendment, because Appaloosa believed in the future economic prospects of the Companies, reasonably relied upon the Agency's assurances of its intention that Appaloosa and other holders of stock would retain their property rights, and expected the Companies to emerge from conservatorship as the Agency had promised repeatedly. At the time of purchase,

Appaloosa had no reasonable ground to expect that the United States instead would expropriate its investment and force shareholders into years of litigation to recoup their investments. Accordingly, through this action, Appaloosa seeks the just compensation to which it is entitled under the Fifth Amendment to the United States Constitution for the government's taking of its property, as well as remedies under other causes of action detailed below—illegal exaction, breach of fiduciary duty, and breach of implied contract.

JURISDICTION AND VENUE

12. This Court has jurisdiction under 28 U.S.C. § 1491(a)(1) because this suit asserts claims against the United States founded upon the Fifth Amendment and on a contract to which the United States is a party. Venue is proper under 28 U.S.C. § 1491(a)(1).

THE PARTIES

13. Plaintiff Appaloosa Investment L.P. I ("AILP") is a Delaware limited partnership that, as of market close on August 16, 2012, held 1,618,330 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $71,419,500, and 2,691,654 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $115,288,900. Plaintiff AILP also holds, as a successor in interest, claims originally held by a fund—which had been under the same investment manager as AILP—named Thoroughbred Fund L.P. ("TFLP"). As of market close on August 16, 2012, TFLP held 1,289,284 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $57,048,875, and 2,148,342 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $92,055,275.

14. Plaintiff Palomino Master Ltd. ("Palomino Master") is a British Virgin Islands company. Palomino Master was formed at the end of 2015 in connection with the

restructuring of Palomino Fund Ltd. ("Palomino Fund"), pursuant to which Palomino Master succeeded to all assets and liabilities of Palomino Fund, including, by operation of law, all claims. As of market close on August 16, 2012, Palomino Fund held 2,333,332 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $103,084,075, and 3,897,770 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $166,991,350. Plaintiff Palomino Master also holds, as a successor in interest, claims originally held by a fund—which had been under the same investment manager as Palomino Master—named Thoroughbred Master Ltd. ("TML"). As of market close on August 16, 2012, TML held 1,330,878 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $58,797,550, and 2,225,182 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $95,326,175.

15. Plaintiff Palomino Fund (as defined in Paragraph 14) is a British Virgin Islands company. As of market close on August 16, 2012, Palomino Fund held 2,333,332 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $103,084,075, and 3,897,770 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $166,991,350. As alleged in Paragraph 14 above, Palomino Master succeeded to all assets and liabilities of Palomino Fund in connection with a restructuring of Palomino Fund in 2016. Palomino Fund is nevertheless named as a plaintiff out of an abundance of caution, in the event and to the extent that any claims set forth in this complaint are determined not to have been fully transferred to Palomino Master by operation of law in connection with the 2016 restructuring.

16. Plaintiff Azteca Partners LLC ("Azteca") is a Delaware limited liability

company that began operations in January 2018. Azteca was formed in connection with an internal reorganization of the Appaloosa funds. Azteca's assets were received in respect of capital accounts held by certain investors in AILP and Palomino Master, with the ultimate equitable and beneficial ownership of such contributed assets remaining substantially the same.

17. Defendant United States includes Treasury, the Agency, the Secretary and Director thereof, respectively, and agents acting at their direction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

18. Appaloosa's claims for taking (or, in the alternative, illegal exaction) are founded on the Fifth Amendment to the United States Constitution, which provides in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Appaloosa's contract claims are under 28 U.S.C. § 1491(a), which provides for claims founded on a contract with the United States.

FACTUAL ALLEGATIONS

Fannie Mae, Freddie Mac, and their Junior Preferred Stock

19. Fannie Mae is a private stockholder-owned Delaware corporation organized and existing under the Federal National Mortgage Association Charter Act, 12 U.S.C. §§ 1716 *et seq*.[2] It was established in 1938 to promote affordable home ownership by facilitating the financing of home mortgages insured by the Federal Housing Administration. In 1968, Fannie Mae was privatized and reorganized into a government-sponsored entity with access to capital markets. In 1970, it was authorized to purchase conventional mortgages. From 1968

[2] All citations of the U.S. Code are from Title 12 unless otherwise noted.

until 2010, Fannie Mae's stock was traded on the New York Stock Exchange. Its stock continues to trade.

20. Freddie Mac is a private stockholder-owned Virginia corporation organized and existing under the Federal Home Loan Mortgage Corporation Act, §§ 1451 *et seq*. It was established in 1970 to expand the secondary mortgage market. It was initially a wholly owned subsidiary of the Federal Home Loan Bank System, but Congress in 1989 reorganized and privatized it under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Under FIRREA, Freddie Mac became a for-profit corporation owned by private shareholders and had access to capital markets. From 1989 until 2010, Freddie Mac's stock was traded publicly on the New York Stock Exchange. Its stock continues to trade.

21. Three years after enacting FIRREA, Congress established the Office of Federal Housing Enterprise Oversight ("OFHEO"), through the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, to oversee and ensure the capital adequacy and financial safety and soundness of the Companies. OFHEO was authorized to place the Companies into conservatorship in certain circumstances, but did not employ this power.

22. Prior to 2008, Fannie Mae and Freddie Mac issued numerous series of non-cumulative Junior Preferred Stock. These series, respectively as to each Company, are *pari passu* with one another with respect to dividend payments and liquidation preferences, but have priority over the Companies' common stock.

23. Following their privatization, including after the establishment of OFHEO, the Companies operated successfully for decades, raising private capital, generating profits, regularly declaring and paying dividends on their various series of Junior Preferred Stock, and increasing shareholder value. Prior to 2007, Fannie Mae had not reported a full-year loss

since 1985, and Freddie Mac had not since its privatization in 1989. Indeed, the Companies' preferred stock was generally viewed as a conservative and reliable investment—even as of August 8, 2008, after enactment of the Recovery Act and shortly before the imposition of the conservatorship, Fannie Mae's Junior Preferred Stock was rated AA- by S&P, A1 by Moody's, and A+ by Fitch.

The Housing Crisis and the Recovery Act

24. The housing and mortgage markets substantially weakened in 2007, which reduced the value of Fannie Mae and Freddie Mac's guarantee and investment portfolios. Both Companies suffered net losses beginning in 2007. These losses, however, were largely due to credit provisions—which represent *estimates* of future credit losses—that ultimately proved excessive. Actual credit losses from 2007 to 2011 were approximately $140 billion less than anticipated. A significant portion of the losses recorded in that period related to the write-down of deferred tax assets, which the Companies would reverse when they returned to profitability.

25. Notwithstanding these challenges, OFHEO assured the public that the Companies were stable. On March 19, 2008, James Lockhart, then-Director of OFHEO, announced that "both companies. . . have prudent cushions above the OFHEO-directed capital requirements and have increased their reserves," adding that "[w]e believe they can play an even more positive role in providing the stability and liquidity the markets need right now." He also called the idea of a bailout "nonsense in [his] mind," as the Companies were "safe and sound, and they will continue to be safe and sound." *As Crisis Grew, a Few Options Shrank to One*, N.Y. Times (Sept. 7, 2008).

26. Lockhart similarly explained four months later, on July 8, that the Companies were "adequately capitalized, which is our highest criteria." Two days after that, on July 10,

he again confirmed, in a public statement, that Fannie Mae and Freddie Mac were "adequately capitalized, holding capital well in excess of the OFHEO-directed requirement, which exceeds the statutory minimums. They have large liquidity portfolios, access to the debt market and over $1.5 trillion in unpledged assets." This same day, then-Treasury Secretary Henry Paulson testified to the House Financial Services Committee that the Companies' "regulator has made clear that they are adequately capitalized." The then-Chairman of the Federal Reserve, Ben Bernanke, echoed this, also testifying before that committee, on July 16, 2008, that the Companies were adequately capitalized and in no danger of failing. Further, upon information and belief, an August 2008 analysis for the Agency of Freddie Mac's financial condition, by BlackRock, concluded that Freddie Mac's "long-term solvency does not appear endangered—we do not expect Freddie Mac to breach critical capital levels even in stress case."

27. At the end of July 2008, as the decline in the housing and mortgage markets accelerated, Congress passed and President George W. Bush signed the Recovery Act. That Act created FHFA as a new federal agency, replacing OFHEO, and charged it with regulating the Companies. § 4511; § 4513. Mr. Lockhart, who had been running OFHEO, became the Agency's first Director.

28. The Recovery Act gave the Director discretion under certain circumstances to place the Companies into conservatorship or receivership under the Agency. In a sub-section specifying the Agency's "General powers," as either "conservator or receiver," it authorizes the Agency to do a variety of things that include "preserv[ing] and conserv[ing] the assets and property" of the Companies but do not include liquidating them or winding them down. § 4617(b)(2)(B). The Agency as conservator or receiver may repudiate contracts, if done

"within a reasonable period following such appointment," but must in such cases pay damages. § 4617(d)(2).

29. The Recovery Act separately specifies the Agency's "Powers as conservator." It "may, as conservator, take such action as may be" (i) "necessary to put the [Company] in a sound and solvent condition" and (ii) "appropriate to carry on [its] business . . . and preserve and conserve [its] assets and property." § 4617(b)(2)(D). That Act allows a Company to consent to being placed into conservatorship, but also expressly authorizes a non-consenting Company to sue within 30 days to challenge that action. § 4617(a)(3)(I), (a)(5).

30. After specifying the Agency's powers as conservator, the Recovery Act in the next sub-section separately specifies its "Additional powers as receiver." Only here does the Act authorize (indeed, direct) the Agency to wind down a Company, stating that the it "shall place the [Company] in liquidation." § 4617(b)(2)(E). Receivership would terminate any existing conservatorship and trigger an immediate right to judicial review. It also would require numerous other special procedures, including a detailed process for the receiver to determine claims against a Company, which also incorporates an express right of judicial review. § 4617(b)(3); (b)(6).

31. The Recovery Act expressly provides that, even upon appointment of a receiver, the right of the Companies' shareholders "to payment, resolution, or other satisfaction of their claims" is not terminated. § 4617(b)(2)(K).

32. Under the Recovery Act, the Agency in its actions as a conservator or receiver is not to be "subject to the direction or supervision of any other agency of the United States." § 4617(a)(7).

33. In addition to these provisions concerning the Agency's imposition of

conservatorship and receivership, the Recovery Act granted to Treasury the temporary emergency authority—but only until December 31, 2009—to "purchase any obligations and other securities" of the Companies and "determine" those securities' "terms and conditions [and] . . . amounts." § 1455(*l*)(l)(A); § 1455(*l*)(4); § 1719(g).

34. Prior to exercising this temporary authority, the Treasury Secretary was required to "determine that such actions are necessary to: (i) provide stability to the financial markets; (ii) prevent disruptions in the availability of mortgage finance; and (iii) protect the taxpayer." §§ 1455(*l*)(1)(B); 1719(g)(1)(B). He also had to take specified factors into account: (i) the need for preferences or priorities regarding payments to the government; (ii) limits on maturity or disposition of obligations or securities to be purchased; (iii) the Company's plan for the orderly resumption of private market funding or capital market access; (iv) the probability of the Company's fulfilling the terms of any such obligation or other security, including repayment; (v) the need to maintain the Company's status as private and shareholder owned; and (vi) restrictions on the use of Company resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes. §§ 1455(*l*)(1)(C); 1719(g)(1)(C).

The Agency Makes Itself the Companies' Conservator, Enters Into (and Amends) SPAs with Treasury During the Authorized Period, and Reassures the Markets

35. In letters to each Company dated August 22, 2008, the Agency found (consistent with the Director's public statements) that each Company met all relevant capital requirements, including additional capital requirements imposed by the Agency above the statutory minimums and requirements arising from the Agency's risk-based capital stress test.

36. Nevertheless, on information and belief, Treasury and the Agency around the beginning of September 2008 sought the consent of the Companies' boards of directors to

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place the Companies into conservatorship. The Agency obtained such consent on the ground, in part, that conservatorship would serve the interests of the Companies' shareholders. In exchange for the Agency's promise, the Companies agreed not to challenge being put under conservatorship.

37. On September 6, 2008, the Agency did place each of the Companies into conservatorship. As a result, the Agency, "as conservator," succeeded to "all rights, titles, powers, and privileges of the [Companies], and of any stockholder, officer, or director of [a Company] with respect to the [Company]." § 4617(b)(2)(A)(i). Conservatorship, unlike receivership, does not "terminate" any rights of shareholders. *Compare id. with* § 4617(b)(2)(K)(i) (providing for termination of rights of shareholders in event of receivership, "except for their right to payment, resolution or other satisfaction of their claims, as permitted under subsections (b)(9), (c), and (e)").

38. The next day, exercising its temporary authority under the Recovery Act, Treasury entered into the Treasury SPAs with the Companies (acting through the Agency as conservator). Treasury agreed to provide each Company with a commitment of up to $100 billion, as and when necessary for the Companies to maintain a positive net worth. In exchange, Treasury received one million shares of the Treasury Senior Preferred Stock. Treasury also received: (a) an initial liquidation preference of $1000 per share (equal to $1 billion), plus any outstanding amount drawn from the commitment; (b) a dividend of 10% per annum of the outstanding amount provided by Treasury (which also could be paid "in kind" by increasing the liquidation preference, subject to incurring a 12% accrual rate going forward); (c) warrants to buy up to 79.9% of each Company's common stock for $0.00001 per share, and (d) the right to receive payment of a periodic commitment fee, in an undetermined

amount, to be paid by the Companies quarterly beginning on January 31, 2010. The Treasury Senior Preferred Stock was senior to all Junior Preferred Stock, so that no dividends or liquidation distributions on any Junior Preferred Stock could be paid until after Treasury had received its full dividend or liquidation distributions.

39. In addition, covenants in the Treasury SPAs granted Treasury substantial ability to control the Companies and the Agency's conduct of the conservatorship, by restricting the ability to take certain actions without Treasury's prior written consent. This included restricting their ability to: (a) declare dividends on any outstanding common or preferred stock other than the Treasury Senior Preferred Stock; (b) sell or issue equity interests; (c) terminate the conservatorship; (d) transfer assets; (e) incur indebtedness; (f) enter into a merger, reorganization or recapitalization, or make acquisitions; or (g) enter into transactions with affiliates.

40. The Treasury SPAs also prohibited the Companies from owning more than a specified amount of mortgage assets and restricted the Agency from drawing on the Treasury commitment to pay any subordinated liabilities, including "a claim against [a Company] arising from rescission of a purchase or sale of a security issued by [a Company] . . . or for damages arising from the purchase, sale, or retention of such a security."

41. When he imposed the conservatorship and entered into the Treasury SPAs, Mr. Lockhart took pains to assure shareholders that their interests would be protected, stating that, "in order to conserve over $2 billion in capital every year, the common stock and preferred stock dividends will be eliminated, but the common and all preferred stocks will continue to remain outstanding." He added:

> [I]n order to restore the balance between safety and soundness and mission, FHFA has placed Fannie Mae and Freddie Mac into

> conservatorship. *That is a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations*. FHFA will act as the conservator to operate the Enterprises until they are stabilized. (Emphasis added.)

42. The Agency in a fact-sheet at the time further stated that "[s]tockholders will continue to retain all rights in the stock's financial worth; as such worth is determined by the market," and that, "[u]pon the [Agency] Director's determination that the Conservator's plan to restore the Company to a safe and solvent condition has been completed successfully, *the Director will issue an order terminating the conservatorship*." (Emphasis added.)

43. Consistent with these assurances, news reports reflected the view that the conservatorship was motivated more by political considerations than financial need: "[Treasury Secretary] Paulson's decision seems to have been a philosophical one, rather than one forced by imminent crisis. Of course, for stagecraft purposes, it was played as impending disaster." *Paulson's Itchy Finger, on the Trigger of a Bazooka*, N.Y. Times (Sept. 9, 2008).

44. The Treasury SPAs were amended on September 26, 2008, to extend the commencement date for the periodic commitment fee by two months, until March 31, 2010. (The fee was never imposed.) The day before, Director Lockhart had again reaffirmed in public testimony to Congress that conservatorship was "a statutory process designed to stabilize a troubled institution with the objective of maintaining normal business operations and restoring its safety and soundness," and that the Agency would act as conservator only "until the [Companies] are stabilized." He further assured Congress that the Companies remained "private" and that "both the preferred and common shareholders have an economic interest in the companies."

45. The Companies did not exercise their express right under the Recovery Act to sue within thirty days to challenge being placed into conservatorships.

46. Under the Obama Administration, the Treasury SPAs were amended twice more before Treasury's temporary emergency purchase authority expired on December 31, 2009. The first was on May 6, 2009, to provide that Treasury could increase the commitment to $200 billion as needed. That same month, the Agency submitted a report to Congress recognizing that "[c]onservatorship is a statutory process designed to restore safety and soundness while carrying on the business of a regulated entity and preserving and conserving its assets and property." The following month, Director Lockhart in public congressional testimony emphasized that, "[a]s the conservator, FHFA's most important goal is to preserve the assets of Fannie Mae and Freddie Mac over the conservatorship period. That is our statutory responsibility." The month after that, in July 2009, the Agency issued a "Strategic Plan 2009-2014," in which it included the following "strategic goal": "The conservatorship of Fannie Mae and Freddie Mac allows the FHFA to preserve the assets of the [Companies], ensure they focus on their housing mission and are positioned to emerge from conservatorship as financially strong." It again emphasized that the conservatorship was "designed to stabilize troubled institutions with the objective of maintaining normal business operations and restoring financial safety and soundness."

47. The second amendment was executed on December 24, 2009. It provided a formulaic maximum commitment of either $200 billion or the amount of the Companies' negative net worth from 2010 to 2012. Neither of these amendments affected the rights of the Companies' shareholders other than the United States.

48. A contemporaneous Treasury memorandum characterized the latter amendment as a "temporary" measure "to support [the Companies] until Congress determines a more sustainable long-term path." It also confirmed that "*[c]onservatorship . . . preserves*

the status and claims of the preferred and common shareholders." (Emphasis added.) Indeed, Treasury officials, writing to the then-Secretary of the Treasury, explained that the Companies already had "moved from being a source of instability during the early stages of the crisis to a stable and critical source of mortgage financing to the market today," and that Fannie Mae and Freddie Mac had only drawn $60 billion and $51 billion, respectively, of the $200 billion available to each.

49. Treasury officials at the time of the last of these amendments also recognized that, as the text of the Recovery Act provides, the deadline of December 31, 2009, "constrained" Treasury's "ability to make further changes to the [Treasury SPAs]."

The Agency Continues to Reassure the Markets, in the Years After Treasury's Emergency Stock-Purchase Authority Expires and as the Housing Market Rebounds

50. Over the next two years, throughout 2010 and 2011, the Agency continued to assure the markets that its intentions as conservator of the Companies were consistent with its statutorily specified "Powers as conservator" (to make the Companies "sound and solvent," "preserve and conserve" their assets and property, and "carry on" their businesses) and ordinary understandings of a conservator's duty to *conserve* a company. *See* § 4617(b)(2)(D). In February 2010, the Agency's new Acting Director, Edward J. DeMarco, told Senate and House leaders that "FHFA is focused on conserving the [Companies'] assets" and "put[ting] [them] in a sound and solvent condition." And in a report to Congress in June 2011, the Agency touted its goals of "preserv[ing] and conserv[ing] each [Company's] assets and property and restor[ing] the [Companies] to a sound financial condition so they could continue to fulfill their statutory mission of promoting liquidity and efficiency in the nation's housing finance markets."

51. Also in June 2011, the Agency recognized in issuing a final rule that "allowing

capital distributions to deplete [a Company]'s conservatorship assets would be inconsistent with the [A]gency's statutory goals, as they would result in removing capital at a time when *the Conservator is charged with rehabilitating the regulated [Company]*." 76 Fed. Reg. 35724, 35727 (June 20, 2011) (emphasis added). The rule underscored that, under the Recovery Act, "[a] conservator's goal is to continue the operations of a [Company], rehabilitate it and return it to a safe, sound, and solvent condition." *Id*. at 35730. In contrast, "[t]he ultimate responsibility of FHFA as receiver is to resolve and liquidate the [Company]." *Id*.

52. Later, on November 10, 2011, Mr. DeMarco continued this public theme, in a letter to the Senate: "By law, *the conservatorships are intended to rehabilitate the [Companies]* as private firms." (Emphasis added.) On December 1, 2011, he reiterated to Congress—quoting his "powers as conservator" as specified in the Recovery Act—that, "as I have noted, FHFA has a statutory responsibility as conservator of the [Companies] to 'take such action as may be: necessary to put the regulated entity in a sound and solvent condition; and appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.'"

53. By 2011, and consistent with the Agency's repeated assurance that it was seeking as conservator to rehabilitate the Companies, it was obvious that (as Treasury officials had begun to discern as early as December 2009), the Companies were past the trough in their financial performance. The United States recognized this repeatedly:

- As early as June 2011, on information and belief, in a meeting with restructuring experts from Blackstone, Treasury was told that the Companies were "showing improved financial performance and stabilized loss reserves," and that their tax assets (unusable in the event of a loss, but valuable in the event of a profit) could generate significant value.

- In October 2011, the Agency observed, in a report published to the public on its website, that the Companies' "actual results" were "substantially better than projected."
- A November 8, 2011, report prepared for Treasury recognized that, "[f]rom December 31, 2012, through September 30, 2018, Freddie Mac is not projected to draw on the liquidity commitment to make its dividend payments [to Treasury under the SPA] because of increased earnings driven by significantly reduced credit losses in 2012 and 2014."
- Upon information and belief, a December 2011 internal Treasury memorandum noted that "both Fannie Mae and Freddie Mac are expected to be net income positive (before dividends) on a stable, ongoing [basis] after 2012 . . . ."
- Upon information and belief, a presentation sent to senior Treasury officials in February 2012 stated that "Fannie and Freddie could have the earnings power to provide taxpayers with enough value to repay Treasury's net cash investments in the two entities."
- Upon information and belief, in June 2012, Treasury memorialized in an email that "the [Companies] will be generating large revenues over the coming years, thereby enabling them to pay the 10% annual dividend well into the future even with the caps" on Treasury's commitment. According to the email, this point was apparently discussed between then-Treasury Secretary Timothy Geithner and Mr. DeMarco at a June 24, 2012, meeting.

- On July 13, 2012, Agency officials circulated meeting minutes noting that Fannie Mae's Chief Financial Officer had stated at an executive-management meeting four days before that the next eight years would likely be the "golden years of [Company] earnings," that "[c]urrent projections show that cumulative [Company] dividends paid will surpass cumulative [Company] Treasury draws by 2020," and that "[c]umulative 2012-2016 income is now forecast at $56.6 billion, $12.3 billion higher than the last projection."
- In a July 30, 2012, "PSPA Covenant and Timing Proposal" regarding the Sweep Amendment, Treasury acknowledged the "[Companies] will report very strong earnings on August 7, that will be in-excess of the 10% dividend to be paid to Treasury."
- At a meeting between senior Treasury officials and Fannie Mae on August 9, 2012, financial projections were introduced showing that, at no time between 2013 and 2022 would there be less than $116.1 billion of remaining funding available to Fannie Mae, or less than $148.3 billion available to Freddie Mac, under the Treasury SPAs. Furthermore, the projections showed that, even if the 10% dividends remained in place, dividends paid to Treasury would exceed cumulative draws under the Treasury SPAs as of 2020 in the case of Fannie Mae, and as of 2019 in the case of Freddie Mac.
- At the same meeting on August 9, 2012, just days before the Sweep Amendment was implemented, Fannie Mae's Chief Financial Officer, Susan McFarland, told Treasury officials that release of the valuation allowance on the deferred tax assets would likely occur in mid-2013 and would generate profits in the range of

$50 billion.

54. These encouraging projections were well founded. On May 9, 2012, Fannie Mae announced a net worth of $268 million and comprehensive income of $3.1 billion for the quarter ending March 31, 2012, and announced that it would not request a draw from Treasury for the first time since being placed into conservatorship. Similarly, Freddie Mac on August 7, 2012, reported a net worth of $1.1 billion for the quarter ending June 30, 2012, and announced that it too would not request a Treasury draw. Thereafter, on August 8, 2012, Fannie Mae announced net income of $5.1 billion for the second quarter of 2012, more than sufficient to pay its $2.9 billion quarterly dividend to Treasury, and announced, "we expect our financial results in 2012 to be substantially better than the past few years."

55. The Companies also had sizeable deferred tax assets in 2012: Fannie Mae disclosed $64.1 billion on February 29, 2012, and Freddie Mac disclosed $34.7 billion on August 7, 2012. The Companies' renewed profitability suggested that they would soon recognize these massive assets.

Treasury Through the Sweep Amendment Effectively Nationalizes the Companies and Appropriates Appaloosa's Preferred Stock

56. Given the long history of assurances provided by the Agency and others, Appaloosa was shocked when, on August 17, 2012—nearly three years after Treasury's emergency authority to purchase the Companies' stock had expired and the Treasury SPAs had last been amended, but only days after the Companies' highly favorable second-quarter results had been announced—Treasury and the Agency (acting as purported conservator for the Companies) entered into the Sweep Amendment. It transformed the Companies' 10% dividend into a "dividend" of the "total assets of the Company . . . less the total liabilities of the Company" (subject to a capital reserve that diminished over time, initially set to be zero as

of January 1, 2018, but reset to a nominal $3 billion in December 2017). The Sweep Amendment has no termination date. In brief, it requires each of the Companies to turn over its entire net worth to Treasury—every quarter, in perpetuity.

57. Treasury thereby appropriated to itself all future profits of the Companies, effectively nationalizing them. Correspondingly, Treasury kept the Companies from accumulating capital that could ensure their ongoing solvency and ability to operate as private, rehabilitated companies without depending on the government; from having any funds to pay dividends to any other stockholders; and, except in limited circumstances, from being able to pay down the balance on the commitment (the net-worth payments do not reduce this balance) so as to substantially decrease Treasury's liquidation preference over the Junior Preferred and common stockholders.

58. The effect was to extinguish any possibility that any shareholder other than the United States will receive any value from the Companies. The government's action also, while not benefitting but actually harming the Companies, provided Treasury an expected and actual windfall of billions of dollars per year without the need for any appropriation from Congress. And it placed the burden of a public program, designed and intended to benefit the government's purposes, disproportionately upon the relatively small group of shareholders who invested and believed in the Companies' prospects, including Junior Preferred Stockholders, rather than upon the public as a whole.

59. It turns out that, during much of the period that the Agency was assuring Junior Preferred Shareholders that its objective was to stabilize the Companies and terminate the conservatorship, Treasury had quietly been seeking a way to wind-down the Companies, which came to include seeking a way to seize all of their value notwithstanding that its

emergency stock-purchasing authority had expired. An internal memorandum to Treasury Secretary Geithner from the then-Under Secretary of the Treasury for Domestic Finance, Jeffrey Goldstein, dated December 20, 2010, referred to a "commitment" by the Obama Administration to "ensure existing common equity holders *will not have access to any positive earnings from the [Companies] in the future*." (Emphasis added.) And in February 2011 Treasury issued a report expressing its intention to "us[e] a combination of policy levers to wind down Fannie Mae and Freddie Mac," claiming that the Administration would "work with [FHFA]" to this end—all while Mr. DeMarco continued throughout 2011 to assure Congress and the public that his goal was to *rehabilitate* the Companies. At the same time, Treasury stated its belief that, under the current Treasury SPAs, "there is sufficient funding to ensure the orderly and deliberate wind down of Fannie Mae and Freddie Mac, as described in our plan."

60. According to a senior Treasury official, Jeffrey Foster, the idea for a variable dividend payment based on positive net worth originated from a phone conversation between himself and Mario Ugoletti in 2010. Mr. Ugoletti had been appointed in 2009 as a special advisor to the Agency's Acting Director, and served as primary liaison to Treasury with respect to the Treasury SPAs and the amendments thereto. Before 2009, Mr. Ugoletti worked at Treasury for 14 years, from 1995 to 2009, serving as Director of the Office of Financial Institutions Policy during the last five years of his tenure. In that capacity, he participated, on behalf of Treasury, in creating and implementing the Treasury SPAs.

61. Mr. Foster testified that, during the phone call in 2010, he suggested to Mr. Ugoletti that the Treasury SPAs needed to be restructured to avoid the circularity of drawing from Treasury to then pay Treasury (the so-called "death spiral"). This conclusion was

supposedly based upon financial modeling work that Treasury itself had commissioned from Grant Thornton.

62. Mr. Foster found a receptive audience in the 14-year veteran of Treasury. Mr. Ugoletti has testified to his understanding that Treasury "all along" wanted to see a wind-down of the Companies and a new housing finance structure. In his position as special advisor to the Agency's Acting Director on the Treasury SPAs and the amendments thereto, he was in an ideal position to push Treasury's agenda.

63. In addition to his clear understanding of the wind-down objectives of his prior longtime employer, Mr. Ugoletti also understood that Treasury had the ability to control the Agency and dictate whether the Companies would ever emerge from conservatorship. As he explained in deposition, even if the Companies had been able to raise $189.5 billion in equity to pay off Treasury's liquidation preference and become sufficiently well capitalized to get the Agency's "stamp of approval on them," "Treasury still has to approve [the Companies'] coming out of conservatorship." As noted, the Treasury SPAs had given Treasury the right to block certain actions of the Agency as conservator in operating the Companies.

64. Treasury had used that power over the conservatorships to place the general interest of the government's coffers—beyond Treasury's interest in repayment of draws and in receiving dividends—ahead of the interests of shareholders and to hamper the Agency as conservator in preserving the value of the Companies for any shareholders other than Treasury. For example, in September 2009, the Companies had proposed to sell to third-party investors their investments in low-income-housing tax credits, to decrease their draws and dividend payments to Treasury. Treasury withheld its approval, explaining that "the proposed sale would result in *a loss of aggregate tax revenues* that would be greater than the *savings to*

the federal government from a reduction in the capital contribution obligations of Treasury" to the Companies under the Treasury SPAs.

65. Armed with its power to prevent the Agency from allowing the Companies to emerge from the conservatorships, Treasury sought to exert its influence upon the Agency's senior officials to adopt Treasury's bleak vision for the Companies and their shareholders. Upon information and belief, on January 4, 2012, Mary Miller of Treasury transmitted an agenda to Acting Director DeMarco claiming that Treasury and the Agency had "common goals" to "promote a strong housing market recovery, reduce government involvement in the housing market over time and to provide the public and financial markets with a clear *plan to wind down the [Companies]*." (Emphasis added.) One section of this agenda was titled, "Establish meaningful policies that demonstrate *a commitment to winding down the [Companies]*." (Emphasis added.)

66. As the financial condition of the Companies continued to improve dramatically, and the need for the Companies to remain in conservatorship diminished, the efforts of Treasury to implement the Sweep Amendment intensified. On June 13, 2012, Treasury prepared a "sensitive" and "pre-decisional" presentation, which stated that "Treasury would like to modify the [Treasury] SPAs given the challenges and circularity embedded in the current structure." In support of its modification proposal, which essentially mirrored the eventual Sweep Amendment, Treasury offered forecasts prepared by its own consultant, Grant Thornton, which showed a "base case" and a "downside case" that did not properly reflect the performance and prospects of the Companies. For example, under the base cases for Fannie Mae and Freddie Mac, the forecasts (made in June 2012) assumed, for 2012, a combined net comprehensive loss of $6.4 billion—even though their combined net comprehensive income

of $4.9 billion for the first quarter alone exceeded that figure. Indeed, for full year 2012, the Companies reported positive comprehensive income of $34.8 billion—a combined difference of $41.2 billion between the assumptions used by Grant Thornton and actual results. For 2013, the differences were even larger—the base cases projected combined net comprehensive positive income of $14.9 billion for the Companies, whereas their combined actual comprehensive income, excluding any deferred tax assets, was $64.5 billion, more than 425% higher than projected.

67. The need for Treasury to implement the Sweep Amendment took on even greater urgency following the meeting on August 9, 2012, attended by representatives of Treasury and Fannie Mae, at which Ms. McFarland advised Treasury officials that Fannie Mae would deliver sustainable profits over time and benefit from the likely near-term allowance of the deferred tax assets. The promising news conveyed at that meeting did not cause Treasury to reconsider its proposal to implement the Sweep Amendment. To the contrary, the same day as that meeting, Mr. Ugoletti emailed Mr. DeMarco and other Agency officials, advising them that, "[a]s a heads up, there appears to be a renewed push to move forward on [Treasury] SPA amendments." Mr. Ugoletti advised his Agency colleagues that he had not seen the proposed documents yet, but he understood that they were largely the same as previous versions he had reviewed, in terms of net income sweep, eliminating the commitment fee, and faster portfolio wind-down.

68. Treasury made the decision, on behalf of itself and the Agency, to cause the execution of the Sweep Amendment. This is evident from the fact that the Sweep Amendment was designed to promote Treasury's policy objectives. On information and belief, on August 13, 2012, just four days before the Sweep Amendment was executed, a draft

presentation was circulated among Treasury officials, indicating that the Sweep Amendment was "consistent with Treasury's policy to wind-down the [Companies]," and specifically intended to "ensure that the [Companies] will not be able to rebuild capital as they are wound down." Similarly, in an email between Treasury and White House officials on August 15, 2012, which did not copy the Agency or the Companies, Treasury official Adam Chepenik declared that, "[b]y taking all of their profits going forward, we are making clear that the [Companies] will ***not*** ever be allowed to return to profitable entities at the center of our housing finance system," and he confirmed that "taxpayers will receive every dollar of profit the [Companies] make." (Emphasis in original.)

69. While Treasury was pressing the Agency, through its liaison Mr. Ugoletti, to finalize the Sweep Amendments, neither Treasury nor the Agency apprised officials at the Companies about the existence of the Sweep Amendment, let alone invited them to discuss their own future. According to Mr. Ugoletti, representatives of the Companies received the near-final version of the Sweep Amendment not long before its execution and were "not too happy." Susan McFarland (who as Fannie Mae's Chief Financial Officer had met with Treasury on August 9, 2012) testified:

> So when the amendment went into place, part of my reaction was they did that in response to my communication of our forecasts and the implication of those forecasts, that it was probably a desire not to allow capital to build up within the enterprises and not to allow the enterprises to recapitalize themselves.

70. Had the Agency been acting as a conservator for the Companies, rather than as a federal regulator to implement Treasury's policy goals, the Agency would have had good reason to consult with the Companies' boards and management to determine whether the Sweep Amendment was or was not in the best interests of the Companies and their

shareholders. On information and belief, this never happened. This failure of the Agency to consult with the boards and management of the Companies for which it was purporting to act as conservator reinforces that the Agency was not acting as the conservator it had claimed it would be.

71. In short, Treasury orchestrated the Sweep Amendment, and the Agency was, to the extent it had any involvement, merely a federal agency acting at Treasury's direction, under its supervision, and for its purposes.

Treasury Boasts About Its Seizure of the Companies' Profits in Perpetuity

72. After imposing the Sweep Amendment, Treasury made no attempt to hide from the public that Treasury's purpose was to expropriate the entirety of the Companies' shareholders' private property rights for public use and a public purpose. In a press release the day it imposed the Sweep Amendment, Treasury announced that the so-called revised dividend would "replace the 10 percent dividend payments made to Treasury on its preferred stock investments in Fannie Mae and Freddie Mac with a quarterly sweep of every dollar of profit that each firm earns going forward," and "*make sure that every dollar of earnings each firm generates is used to benefit taxpayers*." (Emphasis added.) The press release further stated that the Sweep Amendment was a commitment that "*the [Companies] will be wound down and will not be allowed to retain profits, rebuild capital*, and return to the market in their prior form." (Emphasis added.)

73. Treasury did not indicate that, in entering into the Sweep Amendment, it had taken into consideration the need to maintain the Companies' status as private shareholder-owned companies. *See* § 1719(g)(1)(C)(v), § 1455(*l*)(1)(C)(v). Rather, its overriding concern was the government's own public interests.

74. Treasury made no effort in its press release to justify its authority for entering

into the Sweep Amendment in the face of the expiration—nearly three years before, with no purported amendments since—of its emergency purchasing authority. Nor did it attempt to justify its effective winding down of the Companies without putting them into receivership and providing shareholders the Recovery Act's protections in that event.

75. Furthermore, a White House senior advisor, in an email written to a senior Treasury official on the date of the Sweep Amendment, stated that "we've closed off [the] possibility that [Fannie and Freddie] ever[] go … private again," and forwarded an email expressing the advisor's view that the Sweep Amendment would "ensur[e] that [the Companies] can't recapitalize." The same White House advisor sent another email to Treasury officials that day characterizing the Sweep Amendment as a "policy," stating: "Team T[reasur]y, [y]ou guys did a remarkable job on the [Treasury] SPAs this week. You delivered *a policy change of enormous importance that's actually being recognized as such by the outside world* . . . , and as a credit to the Secretary and the President." (Emphasis added.)

76. These emails confirm that the Sweep Amendment emanated from the highest levels of the Administration, that it was intended to serve a perceived public policy with no regard for the conservation obligations of the Agency, and that the Administration recognized it was sharply diverging from the path that the government had drawn for the Companies and their investors.

In Executing the Sweep Amendment and Becoming a Mouthpiece for Treasury's Policy Objectives, the Agency Abrogated Its Public Commitments to Act as a "Conservator"

77. The Sweep Amendment did not make commercial or economic sense for the Companies (or their non-controlling shareholders), nor did the United States seriously claim otherwise. By contrast, the Sweep Amendment made a lot of sense for the United States Treasury, by expropriating valuable property belonging to Appaloosa for the benefit of the

United States and its coffers, while implementing policy objectives that Treasury had secretly long sought to achieve.

78. Thus, the Agency in "agreeing" to the Sweep Amendment had ceased to act in the best interests of the Companies and as the conservator that it had—repeatedly, for years—assured the markets that it would be, namely that it would act consistent with its "Powers as conservator" under the Recovery Act and with common, settled understandings of a conservator's role.

79. Thereafter, the Agency transformed itself into a mouthpiece for Treasury's policy objectives, which nakedly elevated the interests of "taxpayers" (*i.e.*, Treasury) over the interests of the Companies' soundness and solvency, let alone the Companies' stockholders other than the United States. Various documents and statements subsequent to the Sweep Amendment confirm the Agency's public switch to Treasury's position, notwithstanding Mr. DeMarco's reassurances to the market as recently as December 2011 that his duty as conservator was to rehabilitate the Companies. For example:

- On October 9, 2012, about two months after the Sweep Amendment, the Agency released its Strategic Plan for 2013-2017, which included the strategic goals of "minimiz[ing] taxpayer losses during the Enterprises' conservatorships" and "contract[ing] [Company] operations."
- On October 22, 2012, Timothy J. Mayopoulos, the President and CEO of Fannie Mae, stated that "[t]he [C]ompany is no longer run for the benefit of private shareholders."
- On March 20, 2013, the Agency's Office of Inspector General issued an Analysis of the Sweep Amendments in which it stated that, "[i]n overseeing the

Enterprises, FHFA has to balance its responsibilities for maintaining the viability of the Enterprises and for protecting the interests of taxpayers."

- In April 2013, Mr. DeMarco himself stated that "[t]he Administration has made clear that their preferred course of action is to wind down the [Companies]," and he explained that the "recent changes to the [Treasury SPAs], replacing the 10 percent dividend with a net worth sweep, reinforce the notion that *the [Companies] will not be building capital as a potential step to regaining their former corporate status*." (Emphasis added.)
- In May 2014, Agency Director Melvin L. Watt stated: "I don't lay awake at night worrying about what's fair to the shareholders." He added: "I just don't have time to think about what might happen in the future with the shareholders."

80. After lawsuits were filed challenging the Sweep Amendment, the Agency attempted to offer pre-textual justifications. In a declaration the Agency submitted in proceedings in the United States District Court for the District of Columbia, Mr. Ugoletti claimed that the Agency had agreed to the Sweep Amendment due to concerns that the burden of paying the 10% dividend owed to Treasury might reduce the amount of Treasury's commitment that remained available to the Companies. As noted above, however, Treasury knew that the Companies could pay the dividend "well into the future even with the caps," and projections available to both Treasury and the Agency indicated that the Companies would have more than sufficient funding through 2022. (As of the beginning of 2013, Freddie Mac had over $140 billion still available on its commitment from Treasury, and Fannie Mae had over $117.6 billion.) In fact, in an internal mark-up of a document explaining the reasoning for the sweep, a Treasury official wrote that the argument that the "10 percent

dividend was likely to be unstable as the businesses were reduced" "[d]oesn't hold water." Concerns that the 10% dividends were "circular" were unfounded for the additional reason that the dividends could be paid in-kind at a 12% rate, which would not require a further draw. Indeed, upon information and belief, a Treasury official involved in developing the Sweep Amendment was unable to identify any "problems of the circularity [in dividend payments that] would have remained had the [payment in kind] option been adopted," and internal Treasury documents recognized that, "[t]o the extent that required dividend payments exceed net income, FHFA, as conservator, could consider not declaring dividends pursuant to the certificates of designation for the preferred shares, so that draws on the [Treasury] SPAs are not used to pay dividends, preserving as much funding as possible to cover any unanticipated losses at Fannie Mae and Freddie Mac."

81. Rather than acting as a true conservator, or in the interests of the shareholders whose rights, titles, powers, and privileges with respect to the Companies it had assumed as conservator (§ 4617(b)(2)(A)), the Agency was acting under the de facto authority of, and in collusion, with Treasury.

82. Acting through Treasury—and in the face of Congress's assurance in § 4617(a)(7) that the Agency would *not* "be subject to the direction or supervision of any other agency of the United States" when "acting as conservator"—the United States by means of the Treasury SPAs, as well as through pressure and influence, came to exercise direction and control over the business and affairs of the Companies and caused the Agency to become hopelessly conflicted with respect to its obligations to the Companies and their shareholders, culminating with the Sweep Amendment.

83. In sum, the Agency abdicated its responsibility to act as conservator for the

Companies, and instead, acting in its capacity as regulator and an agency of the United States, acquiesced and succumbed to Treasury's mandate to execute the Sweep Amendment.

The United States' Windfall from the Sweep Amendment at the Companies' Expense

84. Treasury's actions to nationalize the Companies, stripping their shareholders (other than itself) of any benefit from the Companies' improving operations, proved well timed for the United States, in light of the Companies' results and market expectations as of August 2012.

85. In the first quarter of 2012, five months before the Sweep Amendment was announced, the Companies already had reported positive net income of over $3.2 billion and in the fourth quarter of 2012, the first quarter after Treasury imposed the Sweep Amendment, Fannie Mae reported pre-tax income of $7.6 billion. The quarter after that (first quarter of 2013), it reported $8.1 billion—the largest quarterly pre-tax income in the Company's history. In its 10-Q for the first quarter of 2013, Fannie Mae stated that it expected "our annual earnings to remain strong over the next few years" and "to remain profitable for the foreseeable future." For 2017, Fannie Mae reported pre-tax income of approximately $18 billion, and Freddie Mac reported pre-tax income of approximately $17 billion.

86. In addition, and as had been long and widely anticipated, Fannie Mae announced on May 9, 2013, that it would release the valuation allowance on its deferred tax assets, resulting in a benefit for its federal income taxes of $50.6 billion. This would have had the effect of increasing the Company's capital, which would have freed further assets to pay down the Treasury Senior Preferred Stock.

87. Under the Sweep Amendment, all of this went to Treasury. None went to ensuring the soundness and solvency of the Companies.

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88. As shown in the below table, Fannie Mae and Freddie Mac have, as of the end of 2017, handed over to Treasury over $223 billion in "dividends" under the Sweep Amendment. (That is in addition to the $55.2 billion in dividends paid to Treasury between 2008 and 2012.)

Dividend Payments Under the Sweep Amendment (in Billions of Dollars)

	Fannie	**Freddie**	**Combined**
2013	82.5	47.6	130.1
2014	20.6	19.6	40.2
2015	10.3	5.5	15.8
2016	9.6	5.0	14.6
2017	12.0	10.9	22.9
Total	**135**	**88.6**	**223.6**

89. By contrast, had the Companies continued to pay only 10% cash dividends under the earlier (authorized) Treasury SPAs, they would have paid Treasury from 2013 through the end of 2017 a total of approximately $94.7 billion. Alternatively, if they had been permitted to repay principal during this period, they would have had sufficient quarterly profits in excess of the 10% dividend to *fully redeem* the Treasury Senior Preferred Stock and to rebuild capital. The amount paid to Treasury under the Sweep Amendment exceeds by billions of dollars the amount that Treasury provided to the Companies through its commitment under the Treasury SPAs. A February 15, 2018, Freddie Mac presentation on fourth quarter 2017 financial results reveals that Freddie Mac has paid a cumulative total of $112.4 billion in dividends to Treasury, while it had, as of December 31, 2017, only requested

$71.3 billion in draws. In fact, an August 16, 2012, "Sensitive and Pre-Decisional" "[Treasury SPA] Amendment Q&A" answered the question why the Companies could not use profits to buy back Senior Preferred Stock from Treasury by saying that "this would have reduced the amount taxpayers are reimbursed for their substantial contribution to support the [Companies]." This reveals the real intent behind the Sweep Amendment—to benefit the government at the expense of the Junior Preferred stockholders and common stockholders.

90. All told, had the Companies not entered into the Sweep Amendment, they would have retained at least $128.9 billion in capital, which they could have used to protect themselves from future downturns and reassure shareholders of the soundness of their investment. Moreover, if the Agency and Treasury were legitimately concerned about the Companies entering a "death spiral," they could have caused the Companies to elect to pay the dividend "in kind" by adding 12% annually to the liquidation preference of the Treasury Senior Preferred Stock. This would have had the effect of creating an additional $94.7 billion in capital, since cash that would have been paid as dividends would instead have been retained to increase the Companies' safety and soundness. Instead, the United States has forced the Companies to operate on the brink of insolvency (and suffer the attendant economic consequences, such as increased borrowing costs) and thus in perpetual dependency on the government. Meanwhile, the government pockets all of this money for its own purposes.

91. Moreover, because the Companies' dividend payments under the Sweep Amendment do not reduce the liquidation preference (and leave no other funds with which to do so), Treasury's massive liquidation preference under the Treasury SPAs, due to the Companies' having drawn on the commitment prior to 2012, is set in stone—as to Fannie Mae, $117.1 billion; and as to Freddie Mac, $72.3 billion, prior to December 31, 2017. Thus,

in addition to the over $223 billion that Treasury has already expropriated from the Companies, Treasury and the Agency contend that Treasury retains, forever, a further $189.5 billon liquidation preference. Thus, the diversion of profits under the Sweep Amendment also ensures the perpetual nullification of the liquidation rights of all other shareholders, particularly the Junior Preferred holders, who would be first in line but for Treasury's holdings.

The Sweep Amendment Took Appaloosa's Property Rights In And Under Its Junior Preferred Stock Certificates

92. Appaloosa purchased Junior Preferred Stock before the Sweep Amendment. Thus, at the time of the Sweep Amendment, it had vested property rights in the economic value of its Junior Preferred Stock, including the equity and market value of the Junior Preferred Stock, and the expectation of future dividend payments.

93. In addition, Appaloosa had vested contractual property rights in the Junior Preferred Stock. The Certificate of Designation for each series of Junior Preferred Stock issued by the Companies grants the holders rights to non-cumulative dividends to be declared at the discretion of the applicable Company's board of directors. For example, the Certificate of Designation for Fannie Mae's Series O Junior Preferred Stock provides:

> Holders of record of Series O Preferred Stock (each individually a "Holder", or collectively the "Holders") will be entitled to receive, when, as and if declared by the Board of Directors of Fannie Mae, or a duly authorized committee thereof, in its sole discretion out of funds legally available therefor, non-cumulative quarterly dividends which will accrue from and including the date of issuance and will be payable on March 31, June 30, September 30 and December 31 of each year (each, a "Dividend Payment Date"), commencing March 31, 2005.

94. The Certificates of Designation for each series of Junior Preferred Stock also provide for liquidation rights and preferences. For example, the Certificate of Designation for

Fannie Mae's Series O Junior Preferred Stock provides in part:

> (a) Upon any voluntary or involuntary dissolution, liquidation or winding up of Fannie Mae, after payment or provision for the liabilities of Fannie Mae and the expenses of such dissolution, liquidation or winding up, the Holders of outstanding shares of the Series O Preferred Stock will be entitled to receive out of the assets of Fannie Mae or proceeds thereof available for distribution to stockholders, before any payment or distribution of assets is made to holders of Fannie Mae's common stock (or any other stock of Fannie Mae ranking, as to the distribution of assets upon dissolution, liquidation or winding up of Fannie Mae, junior to the Series O Preferred Stock), the amount of $50 per share plus an amount, determined in accordance with Section 2 above, equal to the dividend (whether or not declared) for the then-current quarterly Dividend Period accrued to but excluding the date of such liquidation payment, but without accumulation of unpaid dividends on the Series O Preferred Stock for prior Dividend Periods.
>
> (b) If the assets of Fannie Mae available for distribution in such event are insufficient to pay in full the aggregate amount payable to Holders of Series O Preferred Stock and holders of all other classes or series of stock of Fannie Mae, if any, ranking, as to the distribution of assets upon dissolution, liquidation or winding up of Fannie Mae, on a parity with the Series O Preferred Stock, the assets will be distributed to the Holders of Series O Preferred Stock and holders of all such other stock pro rata, based on the full respective preferential amounts to which they are entitled (but without, in the case of any noncumulative preferred stock, accumulation of unpaid dividends for prior Dividend Periods).

Appaloosa Had Reasonable, Investment-Backed Expectations

95. Given the conditions of the market and the Companies, together with the assurances of the Agency in light of its powers as conservator under the Recovery Act (as well as the longstanding record of the Companies, and statements of the United States, before conservatorship), Appaloosa reasonably expected that the mortgage market would recover; that the Companies would return as bulwarks in housing; and that the Agency, having ensured the soundness and solvency of the Companies, accordingly would eventually be in a position to terminate their conservatorships. Moreover, Appaloosa reasonably believed that the

valuation allowance on the Companies' sizeable deferred tax assets would soon be released.

96. Appaloosa further expected that, in any event, the Agency would—as it had assured markets it would do, and as the Recovery Act reasonably indicated it should and would do—act with a view to rehabilitating the Companies and not as an accomplice to Treasury's carnivorous secret plan to seize, for itself, the entire value of the Companies in disregard of the property interests of Appaloosa and other shareholders.

97. As such, by early summer of 2012, Appaloosa reasonably anticipated that the Companies would eventually be in a position to emerge from conservatorship (as two Directors of the Agency had publicly predicted), from which they would be in a position to redeem the Treasury Senior Preferred Stock and allow Appaloosa to realize benefits from its reasonable investment-backed expectations in the property interests represented by the Junior Preferred Stock. Appaloosa, in any event, did not reasonably expect the Sweep Amendment or any other action that would make the conservatorship *antithetical* to those goals and in fact make them impossible to achieve.

98. Indeed, the terms of the Recovery Act's conservatorship provisions (among others) are materially identical to the longstanding ones in FIRREA by which the Federal Deposit Insurance Corporation ("FDIC") acts as conservator of troubled banks. *See* § 1821(d)(2)(D). Until the Sweep Amendment, this language had always been interpreted to mean that FDIC has a mandatory duty to preserve and protect the assets of banks when acting as conservator. Moreover, historically the United States' regulation of the Companies has been less extensive than its regulation of banks. Nor was Appaloosa aware of any prior use of a senior preferred stock instrument to strip 100% of a company's profits in perpetuity, to the derogation of the property rights of other holders of stock. Prior to the implementation of the

Sweep Amendment, the holders of Junior Preferred Stock could not have reasonably anticipated such a divergence from historical precedent.

99. The Sweep Amendment deprived Appaloosa of its economic and contractual property rights with respect to the Junior Preferred Stock. It made it impossible for Appaloosa to realize the future value of its property interests in the Companies.

100. One indication of this immediate, severe deprivation was the precipitous drop in the trading price of the Junior Preferred Stock in the over-the-counter market in the first two weeks alone following the enactment of the Sweep Amendment—indeed, by the end of August 2012, the trading price for the series of Junior Preferred Stock held by Appaloosa on the date of the Sweep Amendment had decreased by an average of over 61% since August 16. That drop, however, represents only the tip of the iceberg in measuring the true loss of value of the Junior Preferred Stock immediately before versus immediately after the Sweep Amendment. Immediately before the Sweep Amendment, the Junior Preferred Stock did not reflect information—known at Treasury, the Agency, and the Companies, but not to the public—regarding the financial condition of and prospects for the Companies. Had that information been publicly available, the trading price just prior to the Sweep Amendment would have been far higher, reflecting the true value of the Junior Preferred Stock. Conversely, the Sweep Amendment, by its terms, extinguished any existing market value for the Junior Preferred Stock by eliminating any possible investment return. Any remaining trading value was necessarily attributable to the possibility that litigation success could result in a return on the Junior Preferred Stock.

101. Appaloosa has been provided neither just compensation nor any compensation at all in return for the United States' taking of all the economic value associated with its

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Junior Preferred Stock.

The United States, Which Controls the Companies, Has Through the Sweep Amendment Disproportionately Harmed Shareholders Other than the United States and, In Any Event, Has a Conflict of Interest With Respect to the Rights of the Companies

102. The United States, as the result of the Treasury SPAs as well as its conservatorships of the Companies via the Agency, was a shareholder that controlled the Companies prior to the Sweep Amendment.

103. The Sweep Amendment, in radically altering the Treasury SPAs, effectively created a new security for the United States. Treasury, in obtaining this result by means of its control of the Agency and the Companies did not, in exchange, provide to the Companies anything of the same value, but rather provided (at best) significantly lesser value. Further, Treasury's new rights to receive, every quarter in perpetuity, "dividends" equal to the entire net worth of the Companies increased its rights with respect to the Companies while correspondingly reducing the rights of all other shareholders.

104. In so doing, the United States engaged in self-dealing and breached its fiduciary duty arising from its control of the Companies.

105. As a result, any claim raised by Appaloosa that might be considered derivative on behalf of the Company is in fact direct, on behalf of Appaloosa itself.

CLAIMS FOR RELIEF

COUNT I
Just Compensation under the Fifth Amendment for the Taking of Private Property for Public Use

106. Appaloosa incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

107. The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public

use, without just compensation."

108. Appaloosa had cognizable property interests in the Junior Preferred Stock, including in its contract rights to dividends, to liquidation rights and preferences, and to voting rights, and in its economic interests in the Junior Preferred Stock, including its proportionate share of the Company's future earnings and the equity and value of the Junior Preferred Stock.

109. Appaloosa had investment-backed expectations to participate in the Companies' future earnings and to receive a share of any residual value of the Companies in the event of liquidation, and those expectations were reasonable.

110. By way of the Sweep Amendment, executed under the purported authority of the Recovery Act and by one arm of the federal government (Treasury) imposing its will and dominion over another arm (the Agency) under its control, the United States directly appropriated for itself Appaloosa's property interests in the Junior Preferred Stock "to benefit taxpayers." The Sweep Amendment, although unlawful, was an authorized act of the government, done within the general scope of the duties of the agencies and officers who executed it.

111. The Sweep Amendment immediately diminished the value of Appaloosa's Junior Preferred Stock, repudiated Appaloosa's contractual property rights, and directly and proximately caused a severe, present, continuing and actual economic injury to the Junior Preferred Shareholders' property interests. Indeed, Appaloosa has been deprived of all economically beneficial uses of its Junior Preferred Stock in Fannie Mae and Freddie Mac, while the United States has received payments from the Companies of more than $200 billion in dividends since the Sweep Amendment, without any corresponding reduction in the

liquidation preference payable to the United States. Thus, contrary to the United States' position asserted in other litigation, Appaloosa's takings claim is clearly ripe.

112. Appaloosa is entitled to just compensation for the government's taking of its property.

COUNT II
Illegal Exaction in Violation of the Fifth Amendment

113. Appaloosa incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

114. Alternatively, the Sweep Amendment was imposed by the United States without authority. Under the Recovery Act, the Agency "as conservator" was to act to put the Companies "in a sound and solvent condition," to "preserve and conserve [their] assets," and to "carry on" their business. Contrary to these objectives, the Sweep Amendment ensures that the Companies will perpetually be on the verge of insolvency, wastes their assets, and destroys their ability to carry on their mandate as private, shareholder-owned companies. It does the opposite of conserving the Companies, and accomplishes a wind-down in contravention of the Act's separate provisions (and protections) for a receivership. In addition, Treasury's exertion of control over the Agency was both unlawful and unauthorized pursuant to 12 U.S.C. § 4617(a)(7). Moreover, the Sweep Amendment was *ultra vires* on the part of Treasury as well, because it was executed contrary to the provisions of the Recovery Act (and the Companies' charters) granting Treasury only temporary emergency authority to purchase and determine the terms, conditions, and amounts of securities of the Companies. The Sweep Amendment also was unauthorized due to the Agency's violating constitutional separation of powers principles, including because (1) the Agency's head is a single director, whom the President may remove only for cause; (2) the Agency is allowed to fund itself

through assessments; and (3) when the Sweep Amendment was instituted, the Agency was headed by an "acting" director (whom the President had been allowed to designate only from among the deputy directors, themselves appointed by the director) who had held that position for three years.

115. Through the Sweep Amendment, the United States, in obtaining for itself a quarterly payment in perpetuity equal to the Companies' entire net worth, has appropriated to itself the property of Appaloosa, holder of Junior Preferred Stock. This appropriation was, in effect, a forced payment of money by Appaloosa to the government.

116. To the extent that the United States' violation of a "money mandating" statute is a necessary predicate for this Count, the Recovery Act is such a statute, particularly in the circumstances here, where the United States, in and as the result of assuming control of the Companies, assumed a fiduciary duty whose breach is appropriately remedied by damages.

117. The Sweep Amendment is thus an illegal exaction imposed in violation of the Due Process Clause of the Fifth Amendment.

118. Appaloosa is entitled to compensation for its illegally exacted property.

119. For avoidance of doubt, Paragraphs 114 through 118 are pled solely in the alternative to Count I of the Amended Complaint and the remaining allegations in the Amended Complaint.

COUNT III
Breach of Fiduciary Duty

120. Appaloosa incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

121. As alleged above, the Treasury SPAs are contracts that gave the United States (via Treasury) control over the Companies and over the Agency as conservator of the

Companies, which it exercised; moreover, the Agency as conservator under the Recovery Act controlled the Companies, succeeded to the rights of shareholders, and assumed the obligations of the then-existing contracts of the Companies. The United States thereby assumed fiduciary duties to Appaloosa and the other non-controlling shareholders, including (at a minimum) a duty not to manage the Companies for the United States' own pecuniary and policy interests at the expense of the interests of the shareholders other than the United States and not to engage in arbitrary or unreasonable conduct that would prevent non-controlling shareholders from benefitting from the fruit of their bargain with the Companies, such as in the Certificates of Designation of Appaloosa's Junior Preferred Stock and the implied-in-fact contract between the United States and the Companies.

122. The United States breached its fiduciary duty to Appaloosa by entering into the Sweep Amendment, which was not in the best interests of the Companies' shareholders (other than the United States), but rather was contrary to their interests and arbitrarily and unreasonably provided a windfall to the United States at the expense of non-controlling shareholders. The Agency abdicated its responsibility to Treasury; and Treasury, by virtue of the Treasury SPAs, was conflicted. The Agency and Treasury acted together as a controlling group to implement their shared goal, the Sweep Amendment, in the interests of the United States rather than the best interests of the Companies and their shareholders, and thus in breach of their fiduciary duties to other shareholders including Appaloosa.

123. Appaloosa as a result suffered injury and loss of property, and is entitled to damages.

124. To the extent that rescission has been rendered impossible or impracticable, and because this Court may not grant that remedy, Appaloosa is entitled (without limitation)

to rescissory damages.

125. According to Treasury, any fiduciary duties it owes to plaintiffs challenging the Sweep Amendment arise from a contract, such that a claim that it breached its fiduciary duty is in essence a contract action. This confirms that this Count is founded upon a contract with the United States.

COUNT IV
Breach of Implied-in-Fact Contract Between the United States and the Companies

126. Appaloosa incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

127. Prior to appointing itself conservator on September 6, 2008, the Agency unambiguously offered to place Fannie Mae and Freddie Mac into conservatorship by consent, under § 4617(a)(3)(I), with certain conditions described below, and the boards of directors of the Companies accepted this offer. The Agency made no finding of insolvency, undercapitalization, or any other ground to impose conservatorship under § 4617(a)(3)(A)-(H) or (J)-(L).

128. The Agency offered, and the boards of Fannie Mae and Freddie Mac accepted, a conservatorship that would aim to "preserve and conserve the [Companies'] assets and property" and restore the Companies to a "sound and solvent condition." *See* § 4617(b)(2)(D). The offer was also of a conservatorship that would end when that goal was achieved. Neither of these conditions was ambiguous, and both would benefit the known and distinct class of the shareholders of the Companies, on whose behalf the boards of directors of the Companies had a fiduciary duty to act. In fact, the Agency obtained the boards' consent on the ground, in part, that conservatorship would serve the interests of the Companies' shareholders.

129. Underlying the Agency's offer was its promise that the Agency would not, as conservator, wind down or liquidate the Companies. The Agency stated contemporaneously with its offer that it could not, as conservator, place the Companies into liquidation. The Agency stated at the time, and for several years into the conservatorship, that its goal was instead to "restore the [Companies'] assets and property to a sound and solvent condition," which continued course of performance constitutes evidence of the offer's original terms.

130. When consenting to the conservatorship, the boards of the Companies furnished good and valuable consideration to the Agency by agreeing to forbear from a judicial or legislative challenge that the United States feared. *See* § 4617(a)(5). This forbearance was unambiguously furnished in exchange for the Agency's promises to act to restore the Companies to a safe and solvent condition.

131. The United States and the Companies, through the acts described above, entered into an implied-in-fact contract. The terms of that contract, as relevant here, were that the Agency if made conservator would "preserve and conserve the [Companies'] assets and property," that its conservatorship would continue only until the Companies were placed in a safe and solvent condition, and that, in exchange, the boards of the Companies would consent to, and not challenge or litigate, such a course of action. Both the Agency and the Companies intended that an implied contract would exist. That contract required the Agency to preserve the Companies' assets and property, and forbade it from diminishing or expropriating the Companies' assets and property. This intent was demonstrated through the offer and acceptance detailed above. The Agency's offer was not ambiguous in its terms, and the boards' acceptance was manifested in the Agency's subsequent imposition of conservatorship based on the boards' consent.

132. Under these terms of the implied-in-fact contract, and given the known fiduciary duty of the boards of directors of the Companies, the shareholders of the Companies were intended beneficiaries of the contract.

133. The Agency had actual authority, as an agency of the United States Government, to bind the United States.

134. The Sweep Agreement breached the contract by rendering it impossible for the Companies to build and retain the capital necessary to exit conservatorship and return to normal business operations.

135. Each subsequent Sweep Amendment payment independently breaches that contract by depleting the Companies of capital (rather than "preserv[ing] and conserv[ing]" it), in a manner that the Agency has expressly recognized undermines the goals of conservatorship.

136. Had the United States adhered to the contract, it would have protected the rights of holders of stock (other than itself) in the Companies. Through the Sweep Amendment, however, the United States instead engaged in self-dealing, benefitting itself while harming the shareholders other than itself.

137. The Sweep Amendment, thus, directly harmed Appaloosa, by preventing the termination of the conservatorship; stripping the Companies of their ability to generate and retain funds to ever distribute as dividends to holders of the Junior Preferred Stock; and nullifying Appaloosa's contractual right, as holders of Junior Preferred Stock, to ever receive a liquidation preference upon the dissolution, liquidation, or winding up of the Companies. Appaloosa is accordingly entitled to damages.

PRAYER FOR RELIEF

WHEREFORE, Appaloosa seeks a judgment as follows:

A. Finding that the United States has taken or illegally exacted Appaloosa's private property in violation of the Takings or Due Process clauses of the Constitution;

B. Awarding Appaloosa just compensation under the Fifth Amendment for the United States' taking of its property;

C. Determining and awarding to Appaloosa the damages sustained by it as a result of the violations set forth above;

D. Awarding rescissory damages, based upon the breach of fiduciary duty that occurred;

E. Awarding to Appaloosa the costs and disbursements of this action, including reasonable attorneys' and experts' fees, costs and expenses; and

F. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted:

August 16, 2018

By: *s/ Lawrence D. Rosenberg*

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UNITED STATES COURT OF FEDERAL CLAIMS

CSS, LLC, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-371 Chief Judge Sweeney

FIRST AMENDED COMPLAINT

Plaintiff CSS, LLC ("CSS"), by and through the undersigned attorneys, hereby brings this action against the United States of America seeking (a) compensation for the taking of its property in violation of the Fifth Amendment to the Constitution or (b) in the alternative, the illegal exaction of its property in violation of the Fifth Amendment; (c) breach of fiduciary duty; and (d) breach of implied contract. In support, CSS alleges as follows:

NATURE AND SUMMARY OF THE ACTION

1. This is an action to redress the United States' wiping out of CSS's shares in the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac" and, collectively with Fannie Mae, the "Companies") by seizing for itself all earnings of the solvent Companies in perpetuity.

2. On August 17, 2012, two arms of the United States—the Department of Treasury ("Treasury") and the Federal Housing Finance Agency ("Agency" or "FHFA"), which was purportedly acting as the conservator of the Companies—agreed between themselves to a "Third Amendment to Amended and Restated Senior Preferred Stock Purchase Agreement" (the "Sweep Amendment"). Through the operation of the Sweep Amendment, the United States has expropriated hundreds of billions of dollars in net worth from the Companies, to benefit the

government at the expense of the Companies' other shareholders. At the time of the Sweep Amendment, CSS held several series of junior preferred stock issued by the Companies (the "Junior Preferred Stock"), with a "stated value" and/or "liquidation preference" (term varies by stock certificate) in excess of $15.8 million. As a direct result of the Sweep Amendment, CSS has suffered severe economic loss to its property interests in the Junior Preferred Stock.

3. The Companies are (as Congress has provided) private, for-profit, shareholder-owned corporations whose purpose is to support liquidity, stability, and affordability in the secondary mortgage market by securitizing mortgage loans originated by primary market lenders and selling the bundled loans to investors.

4. In July 2008, amid the financial crisis in the housing and mortgage markets, Congress enacted the Housing and Economic Recovery Act of 2008 (the "Recovery Act"). The Recovery Act created the Agency and granted its director the discretion, under certain circumstances, to place the Companies into conservatorship or receivership. The Recovery Act also granted to Treasury temporary emergency authority to purchase obligations or other securities of the Companies under certain circumstances.

5. On September 6, 2008, the Agency placed the Companies into conservatorship under itself. In such case, Congress in the Recovery Act expressly charged the Agency, as conservator, to seek to return the Companies to a "sound and solvent condition" and to "preserve and conserve the assets and property" of the Companies.

6. The next day, Treasury, via the Agency, entered into Senior Preferred Stock Purchase Agreements (the "Treasury SPAs") with the Companies. Under the Treasury SPAs, Treasury committed to invest in the Companies in exchange for preferred stock that ranked senior to all series of Junior Preferred Stock (the "Treasury Senior Preferred Stock"). Treasury

received for this commitment, among other things, (a) $1 billion of Treasury Senior Preferred Stock, (b) a warrant to purchase up to 79.9% of the common stock of each Company for a nominal price, (c) a liquidation preference equal to the $1 billion initial commitment fee plus the amount invested by Treasury in the applicable Company, and (d) a periodic commitment fee, in an undetermined amount, to be paid beginning in 2010. Through these and other provisions of the Treasury SPAs, Treasury acquired the ability to control the Companies.

7. Consistent with its statutory mandate under the Recovery Act, as well as historical understandings of conservatorship against which Congress had enacted it, the Agency assured the market that same day—and repeatedly for more than three years thereafter—that the goal of the conservatorship was to "return[] the entities to normal business operations"; that the conservatorship would be temporary and would terminate once the Companies had been restored "to a safe and solvent condition"; that the Junior Preferred Stock would remain outstanding and continue to trade; and that stockholders would "continue to retain all rights in the stock's financial worth, as such worth is determined by the market."

8. At least by 2011, Treasury and the Agency recognized that the Companies had stabilized and their financial performance was improving. By the first and second quarters of 2012, Fannie Mae and Freddie Mac, respectively, reported positive net worth and announced that they would not be requesting a further draw under the Treasury SPAs. Moreover, the Companies' renewed profitability suggested that they might well soon recognize sizeable deferred tax assets.

9. On the heels of such news, Treasury and the Agency (as purported conservator of the Companies) on August 17, 2012, entered into the Sweep Amendment, which eliminated the dividend payable under the Treasury Senior Preferred Stock (10% of the outstanding amount

drawn, if paid in cash) and imposed a requirement that the Companies each quarter pay to Treasury their entire net worth in perpetuity. Thus, the Sweep Amendment barred the Companies from ever realizing a profit and from ever paying down Treasury's liquidation preference. It thereby eliminated any possibility that CSS could ever receive any value from the Companies based on its property interests in the Junior Preferred Stock.

10. The Sweep Amendment appropriated the Companies' net worth in perpetuity to the benefit of the United States at the expense of the Companies and their shareholders, including CSS. As Treasury admitted, the purpose was to take "every dollar of earnings each firm generates . . . to benefit taxpayers," ensuring that shareholders other than the United States received *no* benefit from those earnings. The United States paid no compensation to holders of the Junior Preferred Stock for this taking of their valuable property rights for the public benefit.

11. CSS purchased Junior Preferred Stock after the Agency imposed the conservatorship, but before it capitulated to Treasury's Sweep Amendment, because CSS believed in the future economic prospects of the Companies, reasonably relied upon the Agency's assurances of its intention that CSS and other holders of stock would retain their property rights, and expected the Companies to emerge from conservatorship as the Agency had promised repeatedly. At the time of purchase, CSS had no reasonable ground to expect that the United States instead would expropriate its investment and force shareholders into years of litigation to recoup their investments. Accordingly, through this action, CSS seeks the just compensation to which it is entitled under the Fifth Amendment to the United States Constitution for the government's taking of its property, as well as remedies under other causes of action detailed below—illegal exaction, breach of fiduciary duty, and breach of implied contract.

JURISDICTION AND VENUE

12. This Court has jurisdiction under 28 U.S.C. § 1491(a)(1) because this suit

asserts claims against the United States founded upon the Fifth Amendment and on a contract to which the United States is a party. Venue is proper under 28 U.S.C. § 1491(a)(1).

THE PARTIES

13. Plaintiff CSS, LLC, is an Illinois limited liability company that, as of market close on August 16, 2012, held 216,852 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of $10,637,550, and 105,628 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of $5,206,400.

14. Defendant United States includes Treasury, the Agency, the Secretary and Director thereof, respectively, and agents acting at their direction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

15. CSS's claims for taking (or, in the alternative, illegal exaction) are founded on the Fifth Amendment to the United States Constitution, which provides in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." CSS's contract claims are under 28 U.S.C. § 1491(a), which provides for claims founded on a contract with the United States.

FACTUAL ALLEGATIONS

Fannie Mae, Freddie Mac, and their Junior Preferred Stock

16. Fannie Mae is a private stockholder-owned Delaware corporation organized and existing under the Federal National Mortgage Association Charter Act, 12 U.S.C. §§ 1716 *et seq.*[1] It was established in 1938 to promote affordable home ownership by facilitating the

[1] All citations of the U.S. Code are from Title 12 unless otherwise noted.

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financing of home mortgages insured by the Federal Housing Administration. In 1968, Fannie Mae was privatized and reorganized into a government-sponsored entity with access to capital markets. In 1970, it was authorized to purchase conventional mortgages. From 1968 until 2010, Fannie Mae's stock was traded on the New York Stock Exchange. Its stock continues to trade.

17. Freddie Mac is a private stockholder-owned Virginia corporation organized and existing under the Federal Home Loan Mortgage Corporation Act, §§ 1451 *et seq*. It was established in 1970 to expand the secondary mortgage market. It was initially a wholly owned subsidiary of the Federal Home Loan Bank System, but Congress in 1989 reorganized and privatized it under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Under FIRREA, Freddie Mac became a for-profit corporation owned by private shareholders and had access to capital markets. From 1989 until 2010, Freddie Mac's stock was traded publicly on the New York Stock Exchange. Its stock continues to trade.

18. Three years after enacting FIRREA, Congress established the Office of Federal Housing Enterprise Oversight ("OFHEO"), through the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, to oversee and ensure the capital adequacy and financial safety and soundness of the Companies. OFHEO was authorized to place the Companies into conservatorship in certain circumstances, but did not employ this power.

19. Prior to 2008, Fannie Mae and Freddie Mac issued numerous series of non-cumulative Junior Preferred Stock. These series, respectively as to each Company, are *pari passu* with one another with respect to dividend payments and liquidation preferences, but have priority over the Companies' common stock.

20. Following their privatization, including after the establishment of OFHEO, the

Companies operated successfully for decades, raising private capital, generating profits, regularly declaring and paying dividends on their various series of Junior Preferred Stock, and increasing shareholder value. Prior to 2007, Fannie Mae had not reported a full-year loss since 1985, and Freddie Mac had not since its privatization in 1989. Indeed, the Companies' preferred stock was generally viewed as a conservative and reliable investment—even as of August 8, 2008, after enactment of the Recovery Act and shortly before the imposition of the conservatorship, Fannie Mae's Junior Preferred Stock was rated AA- by S&P, A1 by Moody's, and A+ by Fitch.

The Housing Crisis and the Recovery Act

21. The housing and mortgage markets substantially weakened in 2007, which reduced the value of Fannie Mae and Freddie Mac's guarantee and investment portfolios. Both Companies suffered net losses beginning in 2007. These losses, however, were largely due to credit provisions—which represent *estimates* of future credit losses—that ultimately proved excessive. Actual credit losses from 2007 to 2011 were approximately $140 billion less than anticipated. A significant portion of the losses recorded in that period related to the write-down of deferred tax assets, which the Companies would reverse when they returned to profitability.

22. Notwithstanding these challenges, OFHEO assured the public that the Companies were stable. On March 19, 2008, James Lockhart, then-Director of OFHEO, announced that "both companies. . . have prudent cushions above the OFHEO-directed capital requirements and have increased their reserves," adding that "[w]e believe they can play an even more positive role in providing the stability and liquidity the markets need right now." He also called the idea of a bailout "nonsense in [his] mind," as the Companies were "safe and sound, and they will continue to be safe and sound." *As Crisis Grew, a Few Options Shrank*

to One, N.Y. Times (Sept. 7, 2008).

23. Lockhart similarly explained four months later, on July 8, that the Companies were "adequately capitalized, which is our highest criteria." Two days after that, on July 10, he again confirmed, in a public statement, that Fannie Mae and Freddie Mac were "adequately capitalized, holding capital well in excess of the OFHEO-directed requirement, which exceeds the statutory minimums. They have large liquidity portfolios, access to the debt market and over $1.5 trillion in unpledged assets." This same day, then-Treasury Secretary Henry Paulson testified to the House Financial Services Committee that the Companies' "regulator has made clear that they are adequately capitalized." The then-Chairman of the Federal Reserve, Ben Bernanke, echoed this, also testifying before that committee, on July 16, 2008, that the Companies were adequately capitalized and in no danger of failing. Further, upon information and belief, an August 2008 analysis for the Agency of Freddie Mac's financial condition, by BlackRock, concluded that Freddie Mac's "long-term solvency does not appear endangered—we do not expect Freddie Mac to breach critical capital levels even in stress case."

24. At the end of July 2008, as the decline in the housing and mortgage markets accelerated, Congress passed and President George W. Bush signed the Recovery Act. That Act created FHFA as a new federal agency, replacing OFHEO, and charged it with regulating the Companies. § 4511; § 4513. Mr. Lockhart, who had been running OFHEO, became the Agency's first Director.

25. The Recovery Act gave the Director discretion under certain circumstances to place the Companies into conservatorship or receivership under the Agency. In a sub-section specifying the Agency's "General powers," as either "conservator or receiver," it authorizes

the Agency to do a variety of things that include "preserv[ing] and conserv[ing] the assets and property" of the Companies but do not include liquidating them or winding them down. § 4617(b)(2)(B). The Agency as conservator or receiver may repudiate contracts, if done "within a reasonable period following such appointment," but must in such cases pay damages. § 4617(d)(2).

26. The Recovery Act separately specifies the Agency's "Powers as conservator." It "may, as conservator, take such action as may be" (i) "necessary to put the [Company] in a sound and solvent condition" and (ii) "appropriate to carry on [its] business . . . and preserve and conserve [its] assets and property." § 4617(b)(2)(D). That Act allows a Company to consent to being placed into conservatorship, but also expressly authorizes a non-consenting Company to sue within 30 days to challenge that action. § 4617(a)(3)(I), (a)(5).

27. After specifying the Agency's powers as conservator, the Recovery Act in the next sub-section separately specifies its "Additional powers as receiver." Only here does the Act authorize (indeed, direct) the Agency to wind down a Company, stating that the it "shall place the [Company] in liquidation." § 4617(b)(2)(E). Receivership would terminate any existing conservatorship and trigger an immediate right to judicial review. It also would require numerous other special procedures, including a detailed process for the receiver to determine claims against a Company, which also incorporates an express right of judicial review. § 4617(b)(3); (b)(6).

28. The Recovery Act expressly provides that, even upon appointment of a receiver, the right of the Companies' shareholders "to payment, resolution, or other satisfaction of their claims" is not terminated. § 4617(b)(2)(K).

29. Under the Recovery Act, the Agency in its actions as a conservator or receiver

is not to be "subject to the direction or supervision of any other agency of the United States." § 4617(a)(7).

30. In addition to these provisions concerning the Agency's imposition of conservatorship and receivership, the Recovery Act granted to Treasury the temporary emergency authority—but only until December 31, 2009—to "purchase any obligations and other securities" of the Companies and "determine" those securities' "terms and conditions [and] . . . amounts." § 1455(*l*)(l)(A); § 1455(*l*)(4); § 1719(g).

31. Prior to exercising this temporary authority, the Treasury Secretary was required to "determine that such actions are necessary to: (i) provide stability to the financial markets; (ii) prevent disruptions in the availability of mortgage finance; and (iii) protect the taxpayer." §§ 1455(*l*)(1)(B); 1719(g)(1)(B). He also had to take specified factors into account: (i) the need for preferences or priorities regarding payments to the government; (ii) limits on maturity or disposition of obligations or securities to be purchased; (iii) the Company's plan for the orderly resumption of private market funding or capital market access; (iv) the probability of the Company's fulfilling the terms of any such obligation or other security, including repayment; (v) the need to maintain the Company's status as private and shareholder owned; and (vi) restrictions on the use of Company resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes. §§ 1455(*l*)(1)(C); 1719(g)(1)(C).

The Agency Makes Itself the Companies' Conservator, Enters Into (and Amends) SPAs with Treasury During the Authorized Period, and Reassures the Markets

32. In letters to each Company dated August 22, 2008, the Agency found (consistent with the Director's public statements) that each Company met all relevant capital requirements, including additional capital requirements imposed by the Agency above the

statutory minimums and requirements arising from the Agency's risk-based capital stress test.

33. Nevertheless, on information and belief, Treasury and the Agency around the beginning of September 2008 sought the consent of the Companies' boards of directors to place the Companies into conservatorship. The Agency obtained such consent on the ground, in part, that conservatorship would serve the interests of the Companies' shareholders. In exchange for the Agency's promise, the Companies agreed not to challenge being put under conservatorship.

34. On September 6, 2008, the Agency did place each of the Companies into conservatorship. As a result, the Agency, "as conservator," succeeded to "all rights, titles, powers, and privileges of the [Companies], and of any stockholder, officer, or director of [a Company] with respect to the [Company]." § 4617(b)(2)(A)(i). Conservatorship, unlike receivership, does not "terminate" any rights of shareholders. *Compare id. with* § 4617(b)(2)(K)(i) (providing for termination of rights of shareholders in event of receivership, "except for their right to payment, resolution or other satisfaction of their claims, as permitted under subsections (b)(9), (c), and (e)").

35. The next day, exercising its temporary authority under the Recovery Act, Treasury entered into the Treasury SPAs with the Companies (acting through the Agency as conservator). Treasury agreed to provide each Company with a commitment of up to $100 billion, as and when necessary for the Companies to maintain a positive net worth. In exchange, Treasury received one million shares of the Treasury Senior Preferred Stock. Treasury also received: (a) an initial liquidation preference of $1000 per share (equal to $1 billion), plus any outstanding amount drawn from the commitment; (b) a dividend of 10% per annum of the outstanding amount provided by Treasury (which also could be paid "in kind"

by increasing the liquidation preference, subject to incurring a 12% accrual rate going forward); (c) warrants to buy up to 79.9% of each Company's common stock for $0.00001 per share, and (d) the right to receive payment of a periodic commitment fee, in an undetermined amount, to be paid by the Companies quarterly beginning on January 31, 2010. The Treasury Senior Preferred Stock was senior to all Junior Preferred Stock, so that no dividends or liquidation distributions on any Junior Preferred Stock could be paid until after Treasury had received its full dividend or liquidation distributions.

36. In addition, covenants in the Treasury SPAs granted Treasury substantial ability to control the Companies and the Agency's conduct of the conservatorship, by restricting the ability to take certain actions without Treasury's prior written consent. This included restricting their ability to: (a) declare dividends on any outstanding common or preferred stock other than the Treasury Senior Preferred Stock; (b) sell or issue equity interests; (c) terminate the conservatorship; (d) transfer assets; (e) incur indebtedness; (f) enter into a merger, reorganization or recapitalization, or make acquisitions; or (g) enter into transactions with affiliates.

37. The Treasury SPAs also prohibited the Companies from owning more than a specified amount of mortgage assets and restricted the Agency from drawing on the Treasury commitment to pay any subordinated liabilities, including "a claim against [a Company] arising from rescission of a purchase or sale of a security issued by [a Company] . . . or for damages arising from the purchase, sale, or retention of such a security."

38. When he imposed the conservatorship and entered into the Treasury SPAs, Mr. Lockhart took pains to assure shareholders that their interests would be protected, stating that, "in order to conserve over $2 billion in capital every year, the common stock and preferred

stock dividends will be eliminated, but the common and all preferred stocks will continue to remain outstanding." He added:

> [I]n order to restore the balance between safety and soundness and mission, FHFA has placed Fannie Mae and Freddie Mac into conservatorship. *That is a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations*. FHFA will act as the conservator to operate the Enterprises until they are stabilized. (Emphasis added.)

39. The Agency in a fact-sheet at the time further stated that "[s]tockholders will continue to retain all rights in the stock's financial worth; as such worth is determined by the market," and that, "[u]pon the [Agency] Director's determination that the Conservator's plan to restore the Company to a safe and solvent condition has been completed successfully, *the Director will issue an order terminating the conservatorship*." (Emphasis added.)

40. Consistent with these assurances, news reports reflected the view that the conservatorship was motivated more by political considerations than financial need: "[Treasury Secretary] Paulson's decision seems to have been a philosophical one, rather than one forced by imminent crisis. Of course, for stagecraft purposes, it was played as impending disaster." *Paulson's Itchy Finger, on the Trigger of a Bazooka*, N.Y. Times (Sept. 9, 2008).

41. The Treasury SPAs were amended on September 26, 2008, to extend the commencement date for the periodic commitment fee by two months, until March 31, 2010. (The fee was never imposed.) The day before, Director Lockhart had again reaffirmed in public testimony to Congress that conservatorship was "a statutory process designed to stabilize a troubled institution with the objective of maintaining normal business operations and restoring its safety and soundness," and that the Agency would act as conservator only "until the [Companies] are stabilized." He further assured Congress that the Companies remained "private" and that "both the preferred and common shareholders have an economic

interest in the companies."

42. The Companies did not exercise their express right under the Recovery Act to sue within thirty days to challenge being placed into conservatorships.

43. Under the Obama Administration, the Treasury SPAs were amended twice more before Treasury's temporary emergency purchase authority expired on December 31, 2009. The first was on May 6, 2009, to provide that Treasury could increase the commitment to $200 billion as needed. That same month, the Agency submitted a report to Congress recognizing that "[c]onservatorship is a statutory process designed to restore safety and soundness while carrying on the business of a regulated entity and preserving and conserving its assets and property." The following month, Director Lockhart in public congressional testimony emphasized that, "[a]s the conservator, FHFA's most important goal is to preserve the assets of Fannie Mae and Freddie Mac over the conservatorship period. That is our statutory responsibility." The month after that, in July 2009, the Agency issued a "Strategic Plan 2009-2014," in which it included the following "strategic goal": "The conservatorship of Fannie Mae and Freddie Mac allows the FHFA to preserve the assets of the [Companies], ensure they focus on their housing mission and are positioned to emerge from conservatorship as financially strong." It again emphasized that the conservatorship was "designed to stabilize troubled institutions with the objective of maintaining normal business operations and restoring financial safety and soundness."

44. The second amendment was executed on December 24, 2009. It provided a formulaic maximum commitment of either $200 billion or the amount of the Companies' negative net worth from 2010 to 2012. Neither of these amendments affected the rights of the Companies' shareholders other than the United States.

45. A contemporaneous Treasury memorandum characterized the latter amendment as a "temporary" measure "to support [the Companies] until Congress determines a more sustainable long-term path." It also confirmed that "*[c]onservatorship . . . preserves the status and claims of the preferred and common shareholders*." (Emphasis added.) Indeed, Treasury officials, writing to the then-Secretary of the Treasury, explained that the Companies already had "moved from being a source of instability during the early stages of the crisis to a stable and critical source of mortgage financing to the market today," and that Fannie Mae and Freddie Mac had only drawn $60 billion and $51 billion, respectively, of the $200 billion available to each.

46. Treasury officials at the time of the last of these amendments also recognized that, as the text of the Recovery Act provides, the deadline of December 31, 2009, "constrained" Treasury's "ability to make further changes to the [Treasury SPAs]."

The Agency Continues to Reassure the Markets, in the Years After Treasury's Emergency Stock-Purchase Authority Expires and as the Housing Market Rebounds

47. Over the next two years, throughout 2010 and 2011, the Agency continued to assure the markets that its intentions as conservator of the Companies were consistent with its statutorily specified "Powers as conservator" (to make the Companies "sound and solvent," "preserve and conserve" their assets and property, and "carry on" their businesses) and ordinary understandings of a conservator's duty to *conserve* a company. *See* § 4617(b)(2)(D). In February 2010, the Agency's new Acting Director, Edward J. DeMarco, told Senate and House leaders that "FHFA is focused on conserving the [Companies'] assets" and "put[ting] [them] in a sound and solvent condition." And in a report to Congress in June 2011, the Agency touted its goals of "preserv[ing] and conserv[ing] each [Company's] assets and property and restor[ing] the [Companies] to a sound financial condition so they could continue

to fulfill their statutory mission of promoting liquidity and efficiency in the nation's housing finance markets."

48. Also in June 2011, the Agency recognized in issuing a final rule that "allowing capital distributions to deplete [a Company]'s conservatorship assets would be inconsistent with the [A]gency's statutory goals, as they would result in removing capital at a time when *the Conservator is charged with rehabilitating the regulated [Company]*." 76 Fed. Reg. 35724, 35727 (June 20, 2011) (emphasis added). The rule underscored that, under the Recovery Act, "[a] conservator's goal is to continue the operations of a [Company], rehabilitate it and return it to a safe, sound, and solvent condition." *Id*. at 35730. In contrast, "[t]he ultimate responsibility of FHFA as receiver is to resolve and liquidate the [Company]." *Id*.

49. Later, on November 10, 2011, Mr. DeMarco continued this public theme, in a letter to the Senate: "By law, *the conservatorships are intended to rehabilitate the [Companies]* as private firms." (Emphasis added.) On December 1, 2011, he reiterated to Congress—quoting his "powers as conservator" as specified in the Recovery Act—that, "as I have noted, FHFA has a statutory responsibility as conservator of the [Companies] to 'take such action as may be: necessary to put the regulated entity in a sound and solvent condition; and appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.'"

50. By 2011, and consistent with the Agency's repeated assurance that it was seeking as conservator to rehabilitate the Companies, it was obvious that (as Treasury officials had begun to discern as early as December 2009), the Companies were past the trough in their financial performance. The United States recognized this repeatedly:

- As early as June 2011, on information and belief, in a meeting with restructuring experts from Blackstone, Treasury was told that the Companies were "showing improved financial performance and stabilized loss reserves," and that their tax assets (unusable in the event of a loss, but valuable in the event of a profit) could generate significant value.
- In October 2011, the Agency observed, in a report published to the public on its website, that the Companies' "actual results" were "substantially better than projected."
- A November 8, 2011, report prepared for Treasury recognized that, "[f]rom December 31, 2012, through September 30, 2018, Freddie Mac is not projected to draw on the liquidity commitment to make its dividend payments [to Treasury under the SPA] because of increased earnings driven by significantly reduced credit losses in 2012 and 2014."
- Upon information and belief, a December 2011 internal Treasury memorandum noted that "both Fannie Mae and Freddie Mac are expected to be net income positive (before dividends) on a stable, ongoing [basis] after 2012 . . . ."
- Upon information and belief, a presentation sent to senior Treasury officials in February 2012 stated that "Fannie and Freddie could have the earnings power to provide taxpayers with enough value to repay Treasury's net cash investments in the two entities."
- Upon information and belief, in June 2012, Treasury memorialized in an email that "the [Companies] will be generating large revenues over the coming years, thereby enabling them to pay the 10% annual dividend well into the future even

with the caps" on Treasury's commitment. According to the email, this point was apparently discussed between then-Treasury Secretary Timothy Geithner and Mr. DeMarco at a June 24, 2012, meeting.

- On July 13, 2012, Agency officials circulated meeting minutes noting that Fannie Mae's Chief Financial Officer had stated at an executive-management meeting four days before that the next eight years would likely be the "golden years of [Company] earnings," that "[c]urrent projections show that cumulative [Company] dividends paid will surpass cumulative [Company] Treasury draws by 2020," and that "[c]umulative 2012-2016 income is now forecast at $56.6 billion, $12.3 billion higher than the last projection."
- In a July 30, 2012, "PSPA Covenant and Timing Proposal" regarding the Sweep Amendment, Treasury acknowledged the "[Companies] will report very strong earnings on August 7, that will be in-excess of the 10% dividend to be paid to Treasury."
- At a meeting between senior Treasury officials and Fannie Mae on August 9, 2012, financial projections were introduced showing that, at no time between 2013 and 2022 would there be less than $116.1 billion of remaining funding available to Fannie Mae, or less than $148.3 billion available to Freddie Mac, under the Treasury SPAs. Furthermore, the projections showed that, even if the 10% dividends remained in place, dividends paid to Treasury would exceed cumulative draws under the Treasury SPAs as of 2020 in the case of Fannie Mae, and as of 2019 in the case of Freddie Mac.
- At the same meeting on August 9, 2012, just days before the Sweep Amendment

was implemented, Fannie Mae's Chief Financial Officer, Susan McFarland, told Treasury officials that release of the valuation allowance on the deferred tax assets would likely occur in mid-2013 and would generate profits in the range of $50 billion.

51. These encouraging projections were well founded. On May 9, 2012, Fannie Mae announced a net worth of $268 million and comprehensive income of $3.1 billion for the quarter ending March 31, 2012, and announced that it would not request a draw from Treasury for the first time since being placed into conservatorship. Similarly, Freddie Mac on August 7, 2012, reported a net worth of $1.1 billion for the quarter ending June 30, 2012, and announced that it too would not request a Treasury draw. Thereafter, on August 8, 2012, Fannie Mae announced net income of $5.1 billion for the second quarter of 2012, more than sufficient to pay its $2.9 billion quarterly dividend to Treasury, and announced, "we expect our financial results in 2012 to be substantially better than the past few years."

52. The Companies also had sizeable deferred tax assets in 2012: Fannie Mae disclosed $64.1 billion on February 29, 2012, and Freddie Mac disclosed $34.7 billion on August 7, 2012. The Companies' renewed profitability suggested that they would soon recognize these massive assets.

Treasury Through the Sweep Amendment Effectively Nationalizes the Companies and Appropriates CSS's Preferred Stock

53. Given the long history of assurances provided by the Agency and others, CSS was shocked when, on August 17, 2012—nearly three years after Treasury's emergency authority to purchase the Companies' stock had expired and the Treasury SPAs had last been amended, but only days after the Companies' highly favorable second-quarter results had been announced—Treasury and the Agency (acting as purported conservator for the Companies)

entered into the Sweep Amendment. It transformed the Companies' 10% dividend into a "dividend" of the "total assets of the Company . . . less the total liabilities of the Company" (subject to a capital reserve that diminished over time, initially set to be zero as of January 1, 2018, but reset to a nominal $3 billion in December 2017). The Sweep Amendment has no termination date. In brief, it requires each of the Companies to turn over its entire net worth to Treasury—every quarter, in perpetuity.

54. Treasury thereby appropriated to itself all future profits of the Companies, effectively nationalizing them. Correspondingly, Treasury kept the Companies from accumulating capital that could ensure their ongoing solvency and ability to operate as private, rehabilitated companies without depending on the government; from having any funds to pay dividends to any other stockholders; and, except in limited circumstances, from being able to pay down the balance on the commitment (the net-worth payments do not reduce this balance) so as to substantially decrease Treasury's liquidation preference over the Junior Preferred and common stockholders.

55. The effect was to extinguish any possibility that any shareholder other than the United States will receive any value from the Companies. The government's action also, while not benefitting but actually harming the Companies, provided Treasury an expected and actual windfall of billions of dollars per year without the need for any appropriation from Congress. And it placed the burden of a public program, designed and intended to benefit the government's purposes, disproportionately upon the relatively small group of shareholders who invested and believed in the Companies' prospects, including Junior Preferred Stockholders, rather than upon the public as a whole.

56. It turns out that, during much of the period that the Agency was assuring Junior

Preferred Shareholders that its objective was to stabilize the Companies and terminate the conservatorship, Treasury had quietly been seeking a way to wind-down the Companies, which came to include seeking a way to seize all of their value notwithstanding that its emergency stock-purchasing authority had expired. An internal memorandum to Treasury Secretary Geithner from the then-Under Secretary of the Treasury for Domestic Finance, Jeffrey Goldstein, dated December 20, 2010, referred to a "commitment" by the Obama Administration to "ensure existing common equity holders *will not have access to any positive earnings from the [Companies] in the future*." (Emphasis added.) And in February 2011 Treasury issued a report expressing its intention to "us[e] a combination of policy levers to wind down Fannie Mae and Freddie Mac," claiming that the Administration would "work with [FHFA]" to this end—all while Mr. DeMarco continued throughout 2011 to assure Congress and the public that his goal was to *rehabilitate* the Companies. At the same time, Treasury stated its belief that, under the current Treasury SPAs, "there is sufficient funding to ensure the orderly and deliberate wind down of Fannie Mae and Freddie Mac, as described in our plan."

57. According to a senior Treasury official, Jeffrey Foster, the idea for a variable dividend payment based on positive net worth originated from a phone conversation between himself and Mario Ugoletti in 2010. Mr. Ugoletti had been appointed in 2009 as a special advisor to the Agency's Acting Director, and served as primary liaison to Treasury with respect to the Treasury SPAs and the amendments thereto. Before 2009, Mr. Ugoletti worked at Treasury for 14 years, from 1995 to 2009, serving as Director of the Office of Financial Institutions Policy during the last five years of his tenure. In that capacity, he participated, on behalf of Treasury, in creating and implementing the Treasury SPAs.

58. Mr. Foster testified that, during the phone call in 2010, he suggested to Mr. Ugoletti that the Treasury SPAs needed to be restructured to avoid the circularity of drawing from Treasury to then pay Treasury (the so-called "death spiral"). This conclusion was supposedly based upon financial modeling work that Treasury itself had commissioned from Grant Thornton.

59. Mr. Foster found a receptive audience in the 14-year veteran of Treasury. Mr. Ugoletti has testified to his understanding that Treasury "all along" wanted to see a wind-down of the Companies and a new housing finance structure. In his position as special advisor to the Agency's Acting Director on the Treasury SPAs and the amendments thereto, he was in an ideal position to push Treasury's agenda.

60. In addition to his clear understanding of the wind-down objectives of his prior longtime employer, Mr. Ugoletti also understood that Treasury had the ability to control the Agency and dictate whether the Companies would ever emerge from conservatorship. As he explained in deposition, even if the Companies had been able to raise $189.5 billion in equity to pay off Treasury's liquidation preference and become sufficiently well capitalized to get the Agency's "stamp of approval on them," "Treasury still has to approve [the Companies'] coming out of conservatorship." As noted, the Treasury SPAs had given Treasury the right to block certain actions of the Agency as conservator in operating the Companies.

61. Treasury had used that power over the conservatorships to place the general interest of the government's coffers—beyond Treasury's interest in repayment of draws and in receiving dividends—ahead of the interests of shareholders and to hamper the Agency as conservator in preserving the value of the Companies for any shareholders other than Treasury. For example, in September 2009, the Companies had proposed to sell to third-party

investors their investments in low-income-housing tax credits, to decrease their draws and dividend payments to Treasury. Treasury withheld its approval, explaining that "the proposed sale would result in *a loss of aggregate tax revenues* that would be greater than the *savings to the federal government* from a reduction in the capital contribution obligations of Treasury" to the Companies under the Treasury SPAs.

62. Armed with its power to prevent the Agency from allowing the Companies to emerge from the conservatorships, Treasury sought to exert its influence upon the Agency's senior officials to adopt Treasury's bleak vision for the Companies and their shareholders. Upon information and belief, on January 4, 2012, Mary Miller of Treasury transmitted an agenda to Acting Director DeMarco claiming that Treasury and the Agency had "common goals" to "promote a strong housing market recovery, reduce government involvement in the housing market over time and to provide the public and financial markets with a clear *plan to wind down the [Companies]*." (Emphasis added.) One section of this agenda was titled, "Establish meaningful policies that demonstrate *a commitment to winding down the [Companies]*." (Emphasis added.)

63. As the financial condition of the Companies continued to improve dramatically, and the need for the Companies to remain in conservatorship diminished, the efforts of Treasury to implement the Sweep Amendment intensified. On June 13, 2012, Treasury prepared a "sensitive" and "pre-decisional" presentation, which stated that "Treasury would like to modify the [Treasury] SPAs given the challenges and circularity embedded in the current structure." In support of its modification proposal, which essentially mirrored the eventual Sweep Amendment, Treasury offered forecasts prepared by its own consultant, Grant Thornton, which showed a "base case" and a "downside case" that did not properly reflect the

performance and prospects of the Companies. For example, under the base cases for Fannie Mae and Freddie Mac, the forecasts (made in June 2012) assumed, for 2012, a combined net comprehensive loss of $6.4 billion—even though their combined net comprehensive income of $4.9 billion for the first quarter alone exceeded that figure. Indeed, for full year 2012, the Companies reported positive comprehensive income of $34.8 billion—a combined difference of $41.2 billion between the assumptions used by Grant Thornton and actual results. For 2013, the differences were even larger—the base cases projected combined net comprehensive positive income of $14.9 billion for the Companies, whereas their combined actual comprehensive income, excluding any deferred tax assets, was $64.5 billion, more than 425% higher than projected.

64. The need for Treasury to implement the Sweep Amendment took on even greater urgency following the meeting on August 9, 2012, attended by representatives of Treasury and Fannie Mae, at which Ms. McFarland advised Treasury officials that Fannie Mae would deliver sustainable profits over time and benefit from the likely near-term allowance of the deferred tax assets. The promising news conveyed at that meeting did not cause Treasury to reconsider its proposal to implement the Sweep Amendment. To the contrary, the same day as that meeting, Mr. Ugoletti emailed Mr. DeMarco and other Agency officials, advising them that, "[a]s a heads up, there appears to be a renewed push to move forward on [Treasury] SPA amendments." Mr. Ugoletti advised his Agency colleagues that he had not seen the proposed documents yet, but he understood that they were largely the same as previous versions he had reviewed, in terms of net income sweep, eliminating the commitment fee, and faster portfolio wind-down.

65. Treasury made the decision, on behalf of itself and the Agency, to cause the

execution of the Sweep Amendment. This is evident from the fact that the Sweep Amendment was designed to promote Treasury's policy objectives. On information and belief, on August 13, 2012, just four days before the Sweep Amendment was executed, a draft presentation was circulated among Treasury officials, indicating that the Sweep Amendment was "consistent with Treasury's policy to wind-down the [Companies]," and specifically intended to "ensure that the [Companies] will not be able to rebuild capital as they are wound down." Similarly, in an email between Treasury and White House officials on August 15, 2012, which did not copy the Agency or the Companies, Treasury official Adam Chepenik declared that, "[b]y taking all of their profits going forward, we are making clear that the [Companies] will *not* ever be allowed to return to profitable entities at the center of our housing finance system," and he confirmed that "taxpayers will receive every dollar of profit the [Companies] make." (Emphasis in original.)

66. While Treasury was pressing the Agency, through its liaison Mr. Ugoletti, to finalize the Sweep Amendments, neither Treasury nor the Agency apprised officials at the Companies about the existence of the Sweep Amendment, let alone invited them to discuss their own future. According to Mr. Ugoletti, representatives of the Companies received the near-final version of the Sweep Amendment not long before its execution and were "not too happy." Susan McFarland (who as Fannie Mae's Chief Financial Officer had met with Treasury on August 9, 2012) testified:

> So when the amendment went into place, part of my reaction was they did that in response to my communication of our forecasts and the implication of those forecasts, that it was probably a desire not to allow capital to build up within the enterprises and not to allow the enterprises to recapitalize themselves.

67. Had the Agency been acting as a conservator for the Companies, rather than as

a federal regulator to implement Treasury's policy goals, the Agency would have had good reason to consult with the Companies' boards and management to determine whether the Sweep Amendment was or was not in the best interests of the Companies and their shareholders. On information and belief, this never happened. This failure of the Agency to consult with the boards and management of the Companies for which it was purporting to act as conservator reinforces that the Agency was not acting as the conservator it had claimed it would be.

68. In short, Treasury orchestrated the Sweep Amendment, and the Agency was, to the extent it had any involvement, merely a federal agency acting at Treasury's direction, under its supervision, and for its purposes.

Treasury Boasts About Its Seizure of the Companies' Profits in Perpetuity

69. After imposing the Sweep Amendment, Treasury made no attempt to hide from the public that Treasury's purpose was to expropriate the entirety of the Companies' shareholders' private property rights for public use and a public purpose. In a press release the day it imposed the Sweep Amendment, Treasury announced that the so-called revised dividend would "replace the 10 percent dividend payments made to Treasury on its preferred stock investments in Fannie Mae and Freddie Mac with a quarterly sweep of every dollar of profit that each firm earns going forward," and "*make sure that every dollar of earnings each firm generates is used to benefit taxpayers*." (Emphasis added.) The press release further stated that the Sweep Amendment was a commitment that "*the [Companies] will be wound down and will not be allowed to retain profits, rebuild capital*, and return to the market in their prior form." (Emphasis added.)

70. Treasury did not indicate that, in entering into the Sweep Amendment, it had taken into consideration the need to maintain the Companies' status as private shareholder-

owned companies. *See* § 1719(g)(1)(C)(v), § 1455(*l*)(1)(C)(v). Rather, its overriding concern was the government's own public interests.

71. Treasury made no effort in its press release to justify its authority for entering into the Sweep Amendment in the face of the expiration—nearly three years before, with no purported amendments since—of its emergency purchasing authority. Nor did it attempt to justify its effective winding down of the Companies without putting them into receivership and providing shareholders the Recovery Act's protections in that event.

72. Furthermore, a White House senior advisor, in an email written to a senior Treasury official on the date of the Sweep Amendment, stated that "we've closed off [the] possibility that [Fannie and Freddie] ever[] go … private again," and forwarded an email expressing the advisor's view that the Sweep Amendment would "ensur[e] that [the Companies] can't recapitalize." The same White House advisor sent another email to Treasury officials that day characterizing the Sweep Amendment as a "policy," stating: "Team T[reasur]y, [y]ou guys did a remarkable job on the [Treasury] SPAs this week. You delivered *a policy change of enormous importance that's actually being recognized as such by the outside world* . . . , and as a credit to the Secretary and the President." (Emphasis added.)

73. These emails confirm that the Sweep Amendment emanated from the highest levels of the Administration, that it was intended to serve a perceived public policy with no regard for the conservation obligations of the Agency, and that the Administration recognized it was sharply diverging from the path that the government had drawn for the Companies and their investors.

In Executing the Sweep Amendment and Becoming a Mouthpiece for Treasury's Policy Objectives, the Agency Abrogated Its Public Commitments to Act as a "Conservator"

74. The Sweep Amendment did not make commercial or economic sense for the

Companies (or their non-controlling shareholders), nor did the United States seriously claim otherwise. By contrast, the Sweep Amendment made a lot of sense for the United States Treasury, by expropriating valuable property belonging to CSS for the benefit of the United States and its coffers, while implementing policy objectives that Treasury had secretly long sought to achieve.

75. Thus, the Agency in "agreeing" to the Sweep Amendment had ceased to act in the best interests of the Companies and as the conservator that it had—repeatedly, for years—assured the markets that it would be, namely that it would act consistent with its "Powers as conservator" under the Recovery Act and with common, settled understandings of a conservator's role.

76. Thereafter, the Agency transformed itself into a mouthpiece for Treasury's policy objectives, which nakedly elevated the interests of "taxpayers" (*i.e.*, Treasury) over the interests of the Companies' soundness and solvency, let alone the Companies' stockholders other than the United States. Various documents and statements subsequent to the Sweep Amendment confirm the Agency's public switch to Treasury's position, notwithstanding Mr. DeMarco's reassurances to the market as recently as December 2011 that his duty as conservator was to rehabilitate the Companies. For example:

- On October 9, 2012, about two months after the Sweep Amendment, the Agency released its Strategic Plan for 2013-2017, which included the strategic goals of "minimiz[ing] taxpayer losses during the Enterprises' conservatorships" and "contract[ing] [Company] operations."
- On October 22, 2012, Timothy J. Mayopoulos, the President and CEO of Fannie Mae, stated that "[t]he [C]ompany is no longer run for the benefit of private

shareholders."

- On March 20, 2013, the Agency's Office of Inspector General issued an Analysis of the Sweep Amendments in which it stated that, "[i]n overseeing the Enterprises, FHFA has to balance its responsibilities for maintaining the viability of the Enterprises and for protecting the interests of taxpayers."
- In April 2013, Mr. DeMarco himself stated that "[t]he Administration has made clear that their preferred course of action is to wind down the [Companies]," and he explained that the "recent changes to the [Treasury SPAs], replacing the 10 percent dividend with a net worth sweep, reinforce the notion that *the [Companies] will not be building capital as a potential step to regaining their former corporate status*." (Emphasis added.)
- In May 2014, Agency Director Melvin L. Watt stated: "I don't lay awake at night worrying about what's fair to the shareholders." He added: "I just don't have time to think about what might happen in the future with the shareholders."

77. After lawsuits were filed challenging the Sweep Amendment, the Agency attempted to offer pre-textual justifications. In a declaration the Agency submitted in proceedings in the United States District Court for the District of Columbia, Mr. Ugoletti claimed that the Agency had agreed to the Sweep Amendment due to concerns that the burden of paying the 10% dividend owed to Treasury might reduce the amount of Treasury's commitment that remained available to the Companies. As noted above, however, Treasury knew that the Companies could pay the dividend "well into the future even with the caps," and projections available to both Treasury and the Agency indicated that the Companies would have more than sufficient funding through 2022. (As of the beginning of 2013, Freddie

Mac had over $140 billion still available on its commitment from Treasury, and Fannie Mae had over $117.6 billion.) In fact, in an internal mark-up of a document explaining the reasoning for the sweep, a Treasury official wrote that the argument that the "10 percent dividend was likely to be unstable as the businesses were reduced" "[d]oesn't hold water." Concerns that the 10% dividends were "circular" were unfounded for the additional reason that the dividends could be paid in-kind at a 12% rate, which would not require a further draw. Indeed, upon information and belief, a Treasury official involved in developing the Sweep Amendment was unable to identify any "problems of the circularity [in dividend payments that] would have remained had the [payment in kind] option been adopted," and internal Treasury documents recognized that, "[t]o the extent that required dividend payments exceed net income, FHFA, as conservator, could consider not declaring dividends pursuant to the certificates of designation for the preferred shares, so that draws on the [Treasury] SPAs are not used to pay dividends, preserving as much funding as possible to cover any unanticipated losses at Fannie Mae and Freddie Mac."

78. Rather than acting as a true conservator, or in the interests of the shareholders whose rights, titles, powers, and privileges with respect to the Companies it had assumed as conservator (§ 4617(b)(2)(A)), the Agency was acting under the de facto authority of, and in collusion, with Treasury.

79. Acting through Treasury—and in the face of Congress's assurance in § 4617(a)(7) that the Agency would *not* "be subject to the direction or supervision of any other agency of the United States" when "acting as conservator"—the United States by means of the Treasury SPAs, as well as through pressure and influence, came to exercise direction and control over the business and affairs of the Companies and caused the Agency to become

hopelessly conflicted with respect to its obligations to the Companies and their shareholders, culminating with the Sweep Amendment.

80. In sum, the Agency abdicated its responsibility to act as conservator for the Companies, and instead, acting in its capacity as regulator and an agency of the United States, acquiesced and succumbed to Treasury's mandate to execute the Sweep Amendment.

The United States' Windfall from the Sweep Amendment at the Companies' Expense

81. Treasury's actions to nationalize the Companies, stripping their shareholders (other than itself) of any benefit from the Companies' improving operations, proved well timed for the United States, in light of the Companies' results and market expectations as of August 2012.

82. In the first quarter of 2012, five months before the Sweep Amendment was announced, the Companies already had reported positive net income of over $3.2 billion and in the fourth quarter of 2012, the first quarter after Treasury imposed the Sweep Amendment, Fannie Mae reported pre-tax income of $7.6 billion. The quarter after that (first quarter of 2013), it reported $8.1 billion—the largest quarterly pre-tax income in the Company's history. In its 10-Q for the first quarter of 2013, Fannie Mae stated that it expected "our annual earnings to remain strong over the next few years" and "to remain profitable for the foreseeable future." For 2017, Fannie Mae reported pre-tax income of approximately $18 billion, and Freddie Mac reported pre-tax income of approximately $17 billion.

83. In addition, and as had been long and widely anticipated, Fannie Mae announced on May 9, 2013, that it would release the valuation allowance on its deferred tax assets, resulting in a benefit for its federal income taxes of $50.6 billion. This would have had the effect of increasing the Company's capital, which would have freed further assets to pay

down the Treasury Senior Preferred Stock.

84. Under the Sweep Amendment, all of this went to Treasury. None went to ensuring the soundness and solvency of the Companies.

85. As shown in the below table, Fannie Mae and Freddie Mac have, as of the end of 2017, handed over to Treasury over $223 billion in “dividends” under the Sweep Amendment. (That is in addition to the $55.2 billion in dividends paid to Treasury between 2008 and 2012.)

Dividend Payments Under the Sweep Amendment (in Billions of Dollars)

	Fannie	**Freddie**	**Combined**
2013	82.5	47.6	130.1
2014	20.6	19.6	40.2
2015	10.3	5.5	15.8
2016	9.6	5.0	14.6
2017	12.0	10.9	22.9
Total	**135**	**88.6**	**223.6**

86. By contrast, had the Companies continued to pay only 10% cash dividends under the earlier (authorized) Treasury SPAs, they would have paid Treasury from 2013 through the end of 2017 a total of approximately $94.7 billion. Alternatively, if they had been permitted to repay principal during this period, they would have had sufficient quarterly profits in excess of the 10% dividend to *fully redeem* the Treasury Senior Preferred Stock and to rebuild capital. The amount paid to Treasury under the Sweep Amendment exceeds by billions of dollars the amount that Treasury provided to the Companies through its

commitment under the Treasury SPAs. A February 15, 2018, Freddie Mac presentation on fourth quarter 2017 financial results reveals that Freddie Mac has paid a cumulative total of $112.4 billion in dividends to Treasury, while it had, as of December 31, 2017, only requested $71.3 billion in draws. In fact, an August 16, 2012, "Sensitive and Pre-Decisional" "[Treasury SPA] Amendment Q&A" answered the question why the Companies could not use profits to buy back Senior Preferred Stock from Treasury by saying that "this would have reduced the amount taxpayers are reimbursed for their substantial contribution to support the [Companies]." This reveals the real intent behind the Sweep Amendment—to benefit the government at the expense of the Junior Preferred stockholders and common stockholders.

87. All told, had the Companies not entered into the Sweep Amendment, they would have retained at least $128.9 billion in capital, which they could have used to protect themselves from future downturns and reassure shareholders of the soundness of their investment. Moreover, if the Agency and Treasury were legitimately concerned about the Companies entering a "death spiral," they could have caused the Companies to elect to pay the dividend "in kind" by adding 12% annually to the liquidation preference of the Treasury Senior Preferred Stock. This would have had the effect of creating an additional $94.7 billion in capital, since cash that would have been paid as dividends would instead have been retained to increase the Companies' safety and soundness. Instead, the United States has forced the Companies to operate on the brink of insolvency (and suffer the attendant economic consequences, such as increased borrowing costs) and thus in perpetual dependency on the government. Meanwhile, the government pockets all of this money for its own purposes.

88. Moreover, because the Companies' dividend payments under the Sweep Amendment do not reduce the liquidation preference (and leave no other funds with which to

do so), Treasury's massive liquidation preference under the Treasury SPAs, due to the Companies' having drawn on the commitment prior to 2012, is set in stone—as to Fannie Mae, \$117.1 billion; and as to Freddie Mac, \$72.3 billion, prior to December 31, 2017. Thus, in addition to the over \$223 billion that Treasury has already expropriated from the Companies, Treasury and the Agency contend that Treasury retains, forever, a further \$189.5 billon liquidation preference. Thus, the diversion of profits under the Sweep Amendment also ensures the perpetual nullification of the liquidation rights of all other shareholders, particularly the Junior Preferred holders, who would be first in line but for Treasury's holdings.

The Sweep Amendment Took CSS's Property Rights In And Under Its Junior Preferred Stock Certificates

89. CSS purchased Junior Preferred Stock after the imposition of the conservatorship but before the Sweep Amendment. Thus, at the time of the Sweep Amendment, it had vested property rights in the economic value of its Junior Preferred Stock, including the equity and market value of the Junior Preferred Stock, and the expectation of future dividend payments.

90. In addition, CSS had vested contractual property rights in the Junior Preferred Stock. The Certificate of Designation for each series of Junior Preferred Stock issued by the Companies grants the holders rights to non-cumulative dividends to be declared at the discretion of the applicable Company's board of directors. For example, the Certificate of Designation for Fannie Mae's Series Q Junior Preferred Stock provides:

> Holders of record of Series Q Preferred Stock (each individually a "Holder", or collectively the "Holders") will be entitled to receive, when, as and if declared by the Board of Directors of Fannie Mae, or a duly authorized committee thereof, in its sole discretion out of funds legally available therefor, non-cumulative quarterly dividends which will accrue from and including the date of

> issuance and will be payable on March 31, June 30, September 30 and December 31 of each year (each, a "Dividend Payment Date"), commencing December 31, 2007[.]

91. The Certificates of Designation for each series of Junior Preferred Stock also provide for liquidation rights and preferences. For example, the Certificate of Designation for Fannie Mae's Series Q Junior Preferred Stock provides in part:

> (a) Upon any voluntary or involuntary dissolution, liquidation or winding up of Fannie Mae, after payment or provision for the liabilities of Fannie Mae and the expenses of such dissolution, liquidation or winding up, the Holders of outstanding shares of the Series Q Preferred Stock will be entitled to receive out of the assets of Fannie Mae or proceeds thereof available for distribution to stockholders, before any payment or distribution of assets is made to holders of Fannie Mae's common stock (or any other stock of Fannie Mae ranking, as to the distribution of assets upon dissolution, liquidation or winding up of Fannie Mae, junior to the Series Q Preferred Stock), the amount of $50 per share plus an amount, determined in accordance with Section 2 above, equal to the dividend (whether or not declared) for the then-current quarterly Dividend Period accrued to but excluding the date of such liquidation payment, but without accumulation of unpaid dividends on the Series Q Preferred Stock for prior Dividend Periods.
>
> (b) If the assets of Fannie Mae available for distribution in such event are insufficient to pay in full the aggregate amount payable to Holders of Series Q Preferred Stock and holders of all other classes or series of stock of Fannie Mae, if any, ranking, as to the distribution of assets upon dissolution, liquidation or winding up of Fannie Mae, on a parity with the Series Q Preferred Stock, the assets will be distributed to the Holders of Series Q Preferred Stock and holders of all such other stock pro rata, based on the full respective preferential amounts to which they are entitled (but without, in the case of any noncumulative preferred stock, accumulation of unpaid dividends for prior Dividend Periods).

CSS Had Reasonable, Investment-Backed Expectations

92. Given the conditions of the market and the Companies, together with the assurances of the Agency in light of its powers as conservator under the Recovery Act (as well as the longstanding record of the Companies, and statements of the United States, before

conservatorship), CSS reasonably expected that the mortgage market would recover; that the Companies would return as bulwarks in housing; and that the Agency, having ensured the soundness and solvency of the Companies, accordingly would terminate their conservatorships. Moreover, CSS reasonably believed that the valuation allowance on the Companies' sizeable deferred tax assets would soon be released.

93. CSS further expected that, in any event, the Agency would—as it had assured markets it would do, and as the Recovery Act reasonably indicated it should and would do—act with a view to rehabilitating the Companies and not as an accomplice to Treasury's carnivorous secret plan to seize, for itself, the entire value of the Companies in disregard of the property interests of CSS and other shareholders.

94. As such, by early summer of 2012, CSS reasonably anticipated that the Companies would soon emerge from conservatorship (as two Directors of the Agency had publicly predicted), from which they would be in a position to redeem the Treasury Senior Preferred Stock and allow CSS to realize benefits from its reasonable investment-backed expectations in the property interests represented by the Junior Preferred Stock. CSS, in any event, did not reasonably expect the Sweep Amendment or any other action that would make the conservatorship *antithetical* to those goals and in fact make them impossible to achieve.

95. Indeed, the terms of the Recovery Act's conservatorship provisions (among others) are materially identical to the longstanding ones in FIRREA by which the Federal Deposit Insurance Corporation ("FDIC") acts as conservator of troubled banks. *See* § 1821(d)(2)(D). Until the Sweep Amendment, this language had always been interpreted to mean that FDIC has a mandatory duty to preserve and protect the assets of banks when acting as conservator. Moreover, historically the United States' regulation of the Companies has

been less extensive than its regulation of banks. Nor was CSS aware of any prior use of a senior preferred stock instrument to strip 100% of a company's profits in perpetuity, to the derogation of the property rights of other holders of stock. Prior to the implementation of the Sweep Amendment, the holders of Junior Preferred Stock could not have reasonably anticipated such a divergence from historical precedent.

96. The Sweep Amendment deprived CSS of its economic and contractual property rights with respect to the Junior Preferred Stock. It made it impossible for CSS to realize the future value of its property interests in the Companies.

97. One indication of this immediate, severe deprivation was the precipitous drop in the trading price of the Junior Preferred Stock in the over-the-counter market in the first two weeks alone following the enactment of the Sweep Amendment—indeed, by the end of August 2012, the trading price for the Junior Preferred Stock held by CSS had decreased by an average of over 60% since August 16. That drop, however, represents only the tip of the iceberg in measuring the true loss of value of the Junior Preferred Stock immediately before versus immediately after the Sweep Amendment. Immediately before the Sweep Amendment, the Junior Preferred Stock did not reflect information—known at Treasury, the Agency, and the Companies, but not to the public—regarding the financial condition of and prospects for the Companies. Had that information been publicly available, the trading price just prior to the Sweep Amendment would have been far higher, reflecting the true value of the Junior Preferred Stock. Conversely, the Sweep Amendment, by its terms, extinguished any existing market value for the Junior Preferred Stock by eliminating any possible investment return. Any remaining trading value was necessarily attributable to the possibility that litigation success could result in a return on the Junior Preferred Stock.

98. CSS has been provided neither just compensation nor any compensation at all in return for the United States' taking of all the economic value associated with its Junior Preferred Stock.

The United States, Which Controls the Companies, Has Through the Sweep Amendment Disproportionately Harmed Shareholders Other than the United States and, In Any Event, Has a Conflict of Interest With Respect to the Rights of the Companies

99. The United States, as the result of the Treasury SPAs as well as its conservatorships of the Companies via the Agency, was a shareholder that controlled the Companies prior to the Sweep Amendment.

100. The Sweep Amendment, in radically altering the Treasury SPAs, effectively created a new security for the United States. Treasury, in obtaining this result by means of its control of the Agency and the Companies did not, in exchange, provide to the Companies anything of the same value, but rather provided (at best) significantly lesser value. Further, Treasury's new rights to receive, every quarter in perpetuity, "dividends" equal to the entire net worth of the Companies increased its rights with respect to the Companies while correspondingly reducing the rights of all other shareholders.

101. In so doing, the United States engaged in self-dealing and breached its fiduciary duty arising from its control of the Companies.

102. As a result, any claim raised by CSS that might be considered derivative on behalf of the Company is in fact direct, on behalf of CSS itself.

CLAIMS FOR RELIEF

COUNT I
Just Compensation under the Fifth Amendment for the Taking of Private Property for Public Use

103. CSS incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

104. The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

105. CSS had cognizable property interests in the Junior Preferred Stock, including in its contract rights to dividends, to liquidation rights and preferences, and to voting rights, and in its economic interests in the Junior Preferred Stock, including its proportionate share of the Company's future earnings and the equity and value of the Junior Preferred Stock.

106. CSS had investment-backed expectations to participate in the Companies' future earnings and to receive a share of any residual value of the Companies in the event of liquidation, and those expectations were reasonable.

107. By way of the Sweep Amendment, executed under the purported authority of the Recovery Act and by one arm of the federal government (Treasury) imposing its will and dominion over another arm (the Agency) under its control, the United States directly appropriated for itself CSS's property interests in the Junior Preferred Stock "to benefit taxpayers." The Sweep Amendment, although unlawful, was an authorized act of the government, done within the general scope of the duties of the agencies and officers who executed it.

108. The Sweep Amendment immediately diminished the value of CSS's Junior Preferred Stock, repudiated CSS's contractual property rights, and directly and proximately caused a severe, present, continuing and actual economic injury to the Junior Preferred Shareholders' property interests. Indeed, CSS has been deprived of all economically beneficial uses of its Junior Preferred Stock in Fannie Mae and Freddie Mac, while the United States has received payments from the Companies of more than $200 billion in dividends

since the Sweep Amendment, without any corresponding reduction in the liquidation preference payable to the United States. Thus, contrary to the United States' position asserted in other litigation, CSS's takings claim is clearly ripe.

109. CSS is entitled to just compensation for the government's taking of its property.

COUNT II
Illegal Exaction in Violation of the Fifth Amendment

110. CSS incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

111. Alternatively, the Sweep Amendment was imposed by the United States without authority. Under the Recovery Act, the Agency "as conservator" was to act to put the Companies "in a sound and solvent condition," to "preserve and conserve [their] assets," and to "carry on" their business. Contrary to these objectives, the Sweep Amendment ensures that the Companies will perpetually be on the verge of insolvency, wastes their assets, and destroys their ability to carry on their mandate as private, shareholder-owned companies. It does the opposite of conserving the Companies, and accomplishes a wind-down in contravention of the Act's separate provisions (and protections) for a receivership. In addition, Treasury's exertion of control over the Agency was both unlawful and unauthorized pursuant to 12 U.S.C. § 4617(a)(7). Moreover, the Sweep Amendment was *ultra vires* on the part of Treasury as well, because it was executed contrary to the provisions of the Recovery Act (and the Companies' charters) granting Treasury only temporary emergency authority to purchase and determine the terms, conditions, and amounts of securities of the Companies. The Sweep Amendment also was unauthorized due to the Agency's violating constitutional separation of powers principles, including because (1) the Agency's head is a single director,

whom the President may remove only for cause; (2) the Agency is allowed to fund itself through assessments; and (3) when the Sweep Amendment was instituted, the Agency was headed by an "acting" director (whom the President had been allowed to designate only from among the deputy directors, themselves appointed by the director) who had held that position for three years.

112. Through the Sweep Amendment, the United States, in obtaining for itself a quarterly payment in perpetuity equal to the Companies' entire net worth, has appropriated to itself the property of CSS, holder of Junior Preferred Stock. This appropriation was, in effect, a forced payment of money by CSS to the government.

113. To the extent that the United States' violation of a "money mandating" statute is a necessary predicate for this Count, the Recovery Act is such a statute, particularly in the circumstances here, where the United States, in and as the result of assuming control of the Companies, assumed a fiduciary duty whose breach is appropriately remedied by damages.

114. The Sweep Amendment is thus an illegal exaction imposed in violation of the Due Process Clause of the Fifth Amendment.

115. CSS is entitled to compensation for its illegally exacted property.

116. For avoidance of doubt, Paragraphs 111 through 115 are pled solely in the alternative to Count I of the Amended Complaint and the remaining allegations in the Amended Complaint.

COUNT III
Breach of Fiduciary Duty

117. CSS incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

118. As alleged above, the Treasury SPAs are contracts that gave the United States

(via Treasury) control over the Companies and over the Agency as conservator of the Companies, which it exercised; moreover, the Agency as conservator under the Recovery Act controlled the Companies, succeeded to the rights of shareholders, and assumed the obligations of the then-existing contracts of the Companies. The United States thereby assumed fiduciary duties to CSS and the other non-controlling shareholders, including (at a minimum) a duty not to manage the Companies for the United States' own pecuniary and policy interests at the expense of the interests of the shareholders other than the United States and not to engage in arbitrary or unreasonable conduct that would prevent non-controlling shareholders from benefitting from the fruit of their bargain with the Companies, such as in the Certificates of Designation of CSS's Junior Preferred Stock and the implied-in-fact contract between the United States and the Companies.

119. The United States breached its fiduciary duty to CSS by entering into the Sweep Amendment, which was not in the best interests of the Companies' shareholders (other than the United States), but rather was contrary to their interests and arbitrarily and unreasonably provided a windfall to the United States at the expense of non-controlling shareholders. The Agency abdicated its responsibility to Treasury; and Treasury, by virtue of the Treasury SPAs, was conflicted. The Agency and Treasury acted together as a controlling group to implement their shared goal, the Sweep Amendment, in the interests of the United States rather than the best interests of the Companies and their shareholders, and thus in breach of their fiduciary duties to other shareholders including CSS.

120. CSS as a result suffered injury and loss of property, and is entitled to damages.

121. To the extent that rescission has been rendered impossible or impracticable, and because this Court may not grant that remedy, CSS is entitled (without limitation) to

rescissory damages.

122. According to Treasury, any fiduciary duties it owes to plaintiff challenging the Sweep Amendment arise from a contract, such that a claim that it breached its fiduciary duty is in essence a contract action. This confirms that this Count is founded upon a contract with the United States.

<u>COUNT IV</u>

Breach of Implied-in-Fact Contract Between the United States and the Companies

123. CSS incorporates by reference and re-alleges each allegation set forth above, as though fully set forth herein.

124. Prior to appointing itself conservator on September 6, 2008, the Agency unambiguously offered to place Fannie Mae and Freddie Mac into conservatorship by consent, under § 4617(a)(3)(I), with certain conditions described below, and the boards of directors of the Companies accepted this offer. The Agency made no finding of insolvency, undercapitalization, or any other ground to impose conservatorship under § 4617(a)(3)(A)-(H) or (J)-(L).

125. The Agency offered, and the boards of Fannie Mae and Freddie Mac accepted, a conservatorship that would aim to "preserve and conserve the [Companies'] assets and property" and restore the Companies to a "sound and solvent condition." *See* § 4617(b)(2)(D). The offer was also of a conservatorship that would end when that goal was achieved. Neither of these conditions was ambiguous, and both would benefit the known and distinct class of the shareholders of the Companies, on whose behalf the boards of directors of the Companies had a fiduciary duty to act. In fact, the Agency obtained the boards' consent on the ground, in part, that conservatorship would serve the interests of the Companies' shareholders.

126. Underlying the Agency's offer was its promise that the Agency would not, as conservator, wind down or liquidate the Companies. The Agency stated contemporaneously with its offer that it could not, as conservator, place the Companies into liquidation. The Agency stated at the time, and for several years into the conservatorship, that its goal was instead to "restore the [Companies'] assets and property to a sound and solvent condition," which continued course of performance constitutes evidence of the offer's original terms.

127. When consenting to the conservatorship, the boards of the Companies furnished good and valuable consideration to the Agency by agreeing to forbear from a judicial or legislative challenge that the United States feared. *See* § 4617(a)(5). This forbearance was unambiguously furnished in exchange for the Agency's promises to act to restore the Companies to a safe and solvent condition.

128. The United States and the Companies, through the acts described above, entered into an implied-in-fact contract. The terms of that contract, as relevant here, were that the Agency if made conservator would "preserve and conserve the [Companies'] assets and property," that its conservatorship would continue only until the Companies were placed in a safe and solvent condition, and that, in exchange, the boards of the Companies would consent to, and not challenge or litigate, such a course of action. Both the Agency and the Companies intended that an implied contract would exist. That contract required the Agency to preserve the Companies' assets and property, and forbade it from diminishing or expropriating the Companies' assets and property. This intent was demonstrated through the offer and acceptance detailed above. The Agency's offer was not ambiguous in its terms, and the boards' acceptance was manifested in the Agency's subsequent imposition of conservatorship based on the boards' consent.

129. Under these terms of the implied-in-fact contract, and given the known fiduciary duty of the boards of directors of the Companies, the shareholders of the Companies were intended beneficiaries of the contract.

130. The Agency had actual authority, as an agency of the United States Government, to bind the United States.

131. The Sweep Agreement breached the contract by rendering it impossible for the Companies to build and retain the capital necessary to exit conservatorship and return to normal business operations.

132. Each subsequent Sweep Amendment payment independently breaches that contract by depleting the Companies of capital (rather than "preserv[ing] and conserv[ing]" it), in a manner that the Agency has expressly recognized undermines the goals of conservatorship.

133. Had the United States adhered to the contract, it would have protected the rights of holders of stock (other than itself) in the Companies. Through the Sweep Amendment, however, the United States instead engaged in self-dealing, benefitting itself while harming the shareholders other than itself.

134. The Sweep Amendment, thus, directly harmed CSS, by preventing the termination of the conservatorship; stripping the Companies of their ability to generate and retain funds to ever distribute as dividends to holders of the Junior Preferred Stock; and nullifying CSS's contractual right, as a holder of Junior Preferred Stock, to ever receive a liquidation preference upon the dissolution, liquidation, or winding up of the Companies. CSS is accordingly entitled to damages.

PRAYER FOR RELIEF

WHEREFORE, CSS seeks a judgment as follows:

A. Finding that the United States has taken or illegally exacted CSS's private property in violation of the Takings or Due Process clauses of the Constitution;

B. Awarding CSS just compensation under the Fifth Amendment for the United States' taking of its property;

C. Determining and awarding to CSS the damages sustained by it as a result of the violations set forth above;

D. Awarding rescissory damages, based upon the breach of fiduciary duty that occurred;

E. Awarding to CSS the costs and disbursements of this action, including reasonable attorneys' and experts' fees, costs and expenses; and

F. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted:

August 16, 2018

By: *s/ Lawrence D. Rosenberg*

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