No. 21-1949C
(Judge Kathryn C. Davis)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL E. KELLY, *et al.,*

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS

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DEFENDANT'S MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court dismiss the complaint filed by plaintiffs, Michael E. Kelly, FBOP Corporation, and River Capital Advisors, Inc., for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. In support of this motion, the United States relies upon the complaint and the following brief.

INTRODUCTION

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

conservator immediately entered into agreements with Treasury to secure the financial lifeline that the Enterprises needed.

In October 2021, plaintiffs filed this case challenging the decision to place the Enterprises into conservatorships, more than 13 years after that decision was implemented. The suit is one of the most recent in a long line of cases filed in this Court and in district courts around the country, challenging either the conservatorships, the actions of the conservator, or both. To date, these cases have met with little success. Indeed, the United States Court of Appeals for the Federal Circuit recently rejected claims substantively indistinguishable from the claims asserted here, brought by shareholders represented by the same counsel that filed this complaint, in its binding decision in *Washington Federal v. United States*, 26 F.4th 1253 (Fed. Cir. 2022). Moreover, the Federal Circuit, other Courts of Appeals, and the United States Supreme Court have rejected alternative legal theories that would be critical to the success of plaintiffs' case. As a consequence, plaintiffs' claims have already been rejected.

Plaintiffs' claims are barred by the Tucker Act's six-year statute of limitations, as they were brought more than 13 years after they accrued. Plaintiffs cannot rely on class action tolling to avoid dismissal because equitable tolling is not available to toll 28 U.S.C. § 2501 and because the plaintiffs in *Washington Federal*, the case on which plaintiffs here rely, never sought class certification. In any event, the *Washington Federal* plaintiffs did not allege facts similar to those that plaintiffs allege in support of their breach of implied contract claim, which therefore could not benefit from tolling.

Even if their claims were not barred, as shareholders in the Enterprises, plaintiffs lack standing to bring their takings and illegal exaction claims because these claims are derivative in

nature and, thus, belong to the Enterprises. Moreover, HERA bars shareholders such as plaintiffs from bringing derivative suits.

Even if the Court could entertain plaintiffs' claims, the claims would fail on the merits as a matter of law, as the Federal Circuit found when considering Washington Federal's substantively identical claims. Plaintiffs cannot state a claim for illegal exaction because HERA prescribes the exclusive process for challenging a decision to place the Enterprises into conservatorship, and plaintiffs chose not to pursue that process. Binding law prevents them from instead challenging the conservatorships in this Court via either an illegal exaction or a takings claim. Moreover, the Supreme Court and Federal Circuit have held already held that, assuming as they must that the Enterprises were lawfully placed into conservatorship, shareholders lack a cognizable property interest that could support a takings claim. Preclusion principles also bar plaintiffs from asserting their takings and illegal exaction claims.

Finally, plaintiffs' claim for the breach of an "implied regulatory contract" fails as a matter of law. Plaintiffs fail to plausibly allege the existence of a contract, relying merely on loosely described Government incentives that provided favorable treatment for investments in the Enterprises. Plaintiffs' allegations fail to plausibly allege the elements of a contract with the United States and, therefore, fail to state a claim upon which this Court may grant relief. The Court should dismiss plaintiffs' complaint with prejudice.

QUESTIONS PRESENTED

1. Whether, pursuant to the jurisdictional timeliness restrictions imposed by 28 U.S.C. § 2501, the Court possesses jurisdiction to entertain plaintiffs' complaint when it was filed more than six years after the claims accrued.

2. Whether plaintiffs possess standing to assert direct takings claims when any injuries they allege were purportedly suffered by the Enterprises, and when the Enterprises would receive the benefit of any recovery.

3. Whether plaintiffs possess standing to assert derivative takings claims when HERA bars shareholders from bringing derivative suits.

4. Whether the complaint states a claim for illegal exaction when HERA prescribes a different and exclusive process for challenging a decision to place the Enterprises into conservatorship.

5. Whether the complaint states a claim for a taking when: (1) it impermissibly rests on the premise that the imposition of the conservatorship was unlawful; and (2) the Supreme Court and Federal Circuit have held that shareholders lack a cognizable property interest when the Enterprises were lawfully placed into conservatorship.

6. Whether preclusion principles bar plaintiffs from litigating their takings and illegal exaction claims.

7. Whether the complaint states a claim for breach of contract when it fails to plausibly allege the existence of a contract between plaintiffs and the United States.

STATEMENT OF THE CASE

I. Background

A. The Enterprises

Congress created the Federal National Mortgage Association (Fannie Mae) in 1938 and the Federal Home Loan Mortgage Corporation (Freddie Mac) in 1970. Compl. ¶ 25; *see also Collins v. Yellen*, 141 S. Ct. 1761, 1770 (2021). The Enterprises operate as for-profit

corporations with private shareholders, though they serve a public mission. Compl. ¶ 26; *see also Collins*, 141 S. Ct. at 1770. The Enterprises purchase residential loans from banks and other lenders, facilitating the ability of lenders to make additional loans. Compl. ¶ 25; *see also Collins*, 141 S. Ct. at 1771. These activities increase the liquidity of the national home lending market and promote access to mortgage credit. Compl. ¶ 25; *see also Collins*, 141 S. Ct. at 1771.

Over the years, both Enterprises issued multiple series of preferred and common stock. Compl. ¶ 26. Although the Enterprises are Government-sponsored, the statute that has governed regulation of the Enterprises since 1992 contains two separate provisions specifying that their securities are not guaranteed by the Federal Government:

> The Congress finds that . . . neither the enterprises . . . , nor any securities or obligations issued by the enterprises . . . , are backed by the full faith and credit of the United States.

12 U.S.C. § 4501(4).

> This chapter may not be construed as implying that any such enterprise . . . , or any obligations or securities of such an enterprise . . . , are backed by the full faith and credit of the United States.

Id. § 4503.

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

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

In response to this crisis, Congress enacted HERA, Pub. L. No. 110-289, 122 Stat. 2654

(2008) (12 U.S.C. §§ 4501-4642). HERA created FHFA to regulate and supervise the Enterprises. 12 U.S.C. § 4511; Compl. ¶ 45.

HERA also authorized FHFA's Director to appoint FHFA as conservator or receiver of the Enterprises. 12 U.S.C. § 4617(a); Compl. ¶ 48. FHFA exercised this authority on September 6, 2008, placing both Fannie Mae and Freddie Mac into conservatorship. Compl. ¶¶ 51, 56; *Collins*, 141 S. Ct. at 1772. The board of directors for each Enterprise consented to the conservatorship. Compl. ¶ 57. In HERA, Congress provided a specific and exclusive means for the Enterprises to challenge FHFA's appointment as conservator: by an action in United States district court within 30 days of the appointment. 12 U.S.C. § 4617(a)(5).

HERA provides that, upon its appointment as the conservator or receiver, FHFA will "immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity [*i.e.*, Fannie Mae and Freddie Mac], and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i).

HERA separately authorized the Department of the Treasury to "purchase any obligations and other securities" issued by the Enterprises. 12 U.S.C. § 1455(*l*)(1)(A). That authorization "made it possible for Treasury to buy large amounts of Fannie and Freddie stock, and thereby infuse them with massive amounts of capital to ensure their continued liquidity and stability." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 600 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 978 (2018). On September 7, 2008, FHFA, as conservator, entered into Senior Preferred Stock Purchase Agreements (PSPAs) with the Department of Treasury, under which Treasury

committed to provide $100 billion to each Enterprise. Compl. ¶ 68; *Collins*, 141 S. Ct. at 1773.[1] In return for this massive and continuing commitment, Treasury received a comprehensive bundle of rights—including (1) a senior liquidation preference that started at $1 billion per Enterprise and would increase dollar-for-dollar whenever the Enterprises drew Treasury funds, (2) a requirement that the Enterprises pay Treasury a 10 percent annual dividend, assessed quarterly, based on the total amount of the liquidation preference, (3) an annual fee (known as the "periodic commitment fee") intended to compensate Treasury for its ongoing commitment, and (4) warrants to acquire up to 79.9 percent of the Enterprises' common stock. *See* PSPA §§ 1, 3.1, 3.2; Certificate of Designation of Terms of Variable Liquidation Preference Senior Preferred Stock, Series 2008-2 § 2(c);[2] *see also Collins,* 141 S. Ct. at 1773*;* Compl. ¶ 68. The PSPAs suspended the payment of dividends to any entity other than Treasury without Treasury's prior approval. Compl. ¶ 74; PSPA § 5.1.

FHFA as conservator and Treasury subsequently amended the PSPAs several times. These amendments are not at issue in this case. Compl. ¶ 4.

II. Procedural History

Plaintiffs filed this suit on October 1, 2021, over 13 years after the Enterprises were placed into conservatorships. On November 24, 2021, the parties filed a joint motion to stay proceedings in the case pending the final disposition of *Washington Federal v. United States*,

[1] When that commitment later proved inadequate, FHFA and Treasury amended their agreements, first to increase the commitment to $200 billion per Enterprise, then to make the commitment unlimited through 2012. *Collins*, 141 S. Ct. at 1773.

[2] The Senior Preferred Stock Certificates of Designation are available at https://go.usa.gov/xUyNA (Fannie Mae) and https://go.usa.gov/xUyN6 (Freddie Mac).

No. 20-2190, an appeal then pending in the United States Court of Appeals for the Federal Circuit. ECF No. 7. The Court granted the motion on November 29, 2021. ECF No. 8.

Washington Federal was an appeal from a judgment of the Court of Federal Claims dismissing a complaint alleging that placement of the Enterprises into conservatorships was either a taking or illegal exaction – essentially the same claims asserted here by plaintiffs. It was one of more than a dozen lawsuits regarding the Enterprises filed in this Court since 2013, along with many more filed in United States District Courts. On February 22, 2022, the Federal Circuit issued its unanimous panel opinion affirming the judgment of the Court of Federal Claims's dismissal of the challenges to the conservatorships. *Washington Fed. v. United States*, 26 F.4th 1253 (Fed. Cir. 2022).

Washington Federal includes several holdings that are binding in this case. The Federal Circuit held that the *Washington Federal* plaintiffs' illegal exaction claim failed to state a claim upon which relief could be granted because binding precedent establishes that the plaintiffs could not challenge the propriety of FHFA's appointment as conservator through an illegal exaction claim in this Court. *Id*. at 1263 (citing *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1366 (Fed. Cir. 2001)). Instead, "where Congress mandates the review process for the allegedly unlawful agency action, a plaintiff must litigate on the assumption that the agency action is authorized and lawful, i.e., that the government took its property *regardless of* whether the agency acted consistently with its statutory and regulatory mandate." *Washington Fed.*, 26 F.4th at 1263. Accordingly, the Court held that the *Washington Federal* plaintiffs' illegal exaction claim, which was premised on the alleged unlawfulness of the agency action, was not plausible as a matter of law because the plaintiffs had foregone the opportunity to challenge the

conservatorships via the process provided by Congress in HERA. *Id*. at 1263-64.

The Federal Circuit likewise held that the *Washington Federal* plaintiffs' takings claim also "rest[ed] on the premise that the appointment of the FHFA as conservator was unlawful" and, therefore, was also "not plausible under *Rith Energy*." *Id*. at 1265. Because plaintiffs could not plausibly allege that the appointment of FHFA as conservator was unlawful, the takings claim was narrowed to "whether, upon lawful imposition of the conservatorships, the shareholders retained any investment-backed expectation that the value of their shares would not be diluted and the rights otherwise attendant to share ownership would not be temporarily suspended." *Id*. at 1266. The Federal Circuit held that the decision of the United States Supreme Court in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), resolved that issue against the plaintiffs. *Id*. The Court found that FHFA's authority under HERA is extremely broad and permits FHFA to take actions for the benefit of the public. *Id*. The Court held that where, as here, "shareholders hold shares in such highly regulated entities—entities that the government has the authority to place into conservatorship—where the conservator's powers are extremely broad, and where the entities were lawfully placed into such a conservatorship, shareholders lack a cognizable property interest in the context of a takings claim. *Id*. (citing *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1073–75 (Fed. Cir. 1994)).

Moreover, the Federal Circuit, as an independent ground, affirmed the Court of Federal Claim's finding that the *Washington Federal* plaintiffs lacked standing to bring their claims, which the Court held were substantively derivative, not direct. *Washington Fed.*, 26 F.4th at 1267. The Court concluded that "the Washington Federal Plaintiffs' takings claim is derivative in nature because the Washington Federal Plaintiffs' alleged injuries are not independent of

alleged harms to the Enterprises." *Id*. at 1268.

The appellants in *Washington Federal* did not seek further review.[3] The mandate issued on April 15, 2022, and the decision is final, binding, and not subject to further appellate review. Following the Federal Circuit's decision in *Washington Federal*, this Court lifted its stay of proceedings in this case. ECF No. 11. Pursuant to the Court's amended schedule, ECF No. 14, the United States files this motion to dismiss plaintiffs' complaint.

The complaint contains three counts. The first two counts are substantively indistinguishable from those brought by the *Washington Federal* plaintiffs: they allege that placing the Enterprises into conservatorship was unlawful and constituted a taking or illegal exaction of plaintiffs' property. Compl. ¶¶ 106-27. The first count is purportedly direct but, as explained below, it is substantively derivative under binding law. Plaintiffs purport to bring the second count, in the alternative, derivatively on behalf of the Enterprises, though they acknowledge that they have submitted no pre-suit demand to initiate a derivative action. Compl. ¶ 103. Plaintiffs' third count alleges a claim not advanced by the *Washington Federal* plaintiffs: that placing the Enterprises into conservatorship breached an alleged "implied regulatory contract." Compl. ¶¶ 128-35.

[3] On the same day that it issued its decision in *Washington Federal*, the Federal Circuit issued its unanimous opinion resolving eight companion appeals in favor of the United States. *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (Fed. Cir. 2022). These appeals concerned shareholder challenges to the third amendment to the PSPAs, which Treasury and FHFA as conservator adopted four years into the conservatorship. In *Fairholme*, the Federal Circuit held that derivative takings and illegal exaction claims challenging the third amendment failed as a matter of law. *Id*. at 1301-04. The Court determined that, at the time of the third amendment, "the Enterprises lack any cognizable property interest on which [plaintiff] may base a derivative Fifth Amendment takings claim." *Id*. at 1303 (citing *Golden Pac.*, 15 F.3d at 1074). The appellants in *Fairholme* did seek review by the Supreme Court; their petition for a writ of certiorari remains pending. *Fairholme Funds v. United States*, *cert. docketed*, No. 22-100 (U.S.).

ARGUMENT

I. Standards Of Review

A. Rule 12(b)(1)

"Jurisdiction is a threshold issue and a court must satisfy itself that it has jurisdiction to hear and decide a case before proceeding to the merits." *Ultra-Precision Mfg., Ltd. v. Ford Motor Co.*, 338 F.3d 1353, 1356 (Fed. Cir. 2003) (quoting *PIN/NIP, Inc. v. Platte Chem. Co.*, 304 F.3d 1235, 1241 (Fed. Cir. 2002)); RCFC 12(b)(1). If the Court determines that "it lacks jurisdiction over the subject matter, it must dismiss the claim." *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006); RCFC 12(h)(3).

"[C]laims brought in the Court of Federal Claims under the Tucker Act are 'barred unless the petition thereon is filed within six years after such claim first accrues.' The six-year statute of limitations . . . is a jurisdictional requirement for a suit in the Court of Federal Claims." *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354 (Fed. Cir. 2006) (quoting 28 U.S.C. § 2501).

B. Rule 12(b)(6)

Rule 12(b)(6) requires dismissal when a complaint does not plausibly give rise to an entitlement to relief. RCFC 12(b)(6). To avoid dismissal for failure to state a claim under Rule 12(b)(6), "a complaint must allege facts 'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). The Court should dismiss if the complaint fails to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A claim is facially

implausible if it does not permit the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). Allegations "that are 'merely consistent with' a defendant's liability" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*.

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

II. Plaintiffs' Claims Are Barred By This Court's Statute Of Limitations

The complaint in this case was filed more than six years after the claims it advances accrued. Plaintiffs concede that absent tolling, their claims are untimely and barred by this Court's statute of limitations. Contrary to plaintiffs' allegations, however, the statute of limitations was not tolled during the pendency of the *Washington Federal* case in this Court, *Washington Federal v. United States*, No. 13-385C. Plaintiffs' complaint, therefore, should be dismissed because it is barred by this Court's statute of limitations.

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

"Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. The Tucker Act statute of limitations is jurisdictional and not subject to equitable tolling. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 135 (2008);

FloorPro, Inc. v. United States, 680 F.3d 1377, 1382 (Fed. Cir. 2012) ("Because section 2501's time limit is jurisdictional, the six-year limitations period cannot be extended even in cases where such an extension might be justified on equitable grounds."). "A takings claim accrues when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1355-56 (Fed. Cir. 2006), *aff'd* 552 U.S. 130 (2008).

The complaint "seeks relief solely for the Government's actions as regulator in imposing the conservatorships, and not for its actions as conservator after placing the GSEs into conservatorship on September 6, 2008." Compl. ¶ 4. By their own allegations, plaintiffs' claims all stem from the FHFA Director's decision to place the Enterprises into conservatorships. These claims, therefore, accrued when that decision was executed on September 6, 2008. To comply with the Tucker Act's statute of limitations, claims challenging the imposition of the conservatorships had to be filed by September 5, 2014. *See Washington Fed.*, 26 F.4th at 1263. Plaintiffs, however, filed the complaint on October 1, 2021, more than seven years after the limitations period expired. The Court, therefore, does not possess jurisdiction to entertain these claims, which are barred by section 2501's jurisdictional statute of limitations.

B. *Washington Federal* Did Not Toll The Statute Of Limitations For Plaintiffs' Claims

Plaintiffs tacitly acknowledge that they bring their claims outside the limitations period, but allege that the period was tolled while another case, *Washington Federal v. United States*, No. 13-385C, was pending in this Court. Compl. ¶ 102. Plaintiffs are wrong, for several reasons. First, recent Supreme Court decisions make clear that class action tolling is equitable in nature. Class action tolling, therefore, cannot apply to the section 2501 statute of limitations,

which is jurisdictional and not subject to equitable tolling. Second, even if the pendency of a class action could toll section 2501, this Court has made clear that no tolling applies where, as here, the Court had never ruled, or even been asked to rule, on the issue of class certification. Third, even if tolling could apply, plaintiffs' breach of implied contract claim cannot be tolled by *Washington Federal*, as the *Washington Federal* plaintiffs did not bring any similar claim.

1. Equitable Tolling Is Not Available For Section 2501

Plaintiffs allege that their claims were tolled while *Washington Federal* was pending in this Court, although class certification was never sought in that case. Compl. ¶ 102.

In *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974), and *Crown, Cork & Seal Co., Inc. v. Parker,* 462 U.S. 345 (1983), the Supreme Court permitted the filing of a timely class-action complaint in district court, under the opt-out class procedures of Federal Rule of Civil Procedure 23, to toll the applicable statute of limitations for putative members of the class. *Bright v. United States*, 603 F.3d 1273, 1277 (Fed. Cir. 2010).

In *Bright v. United States*, the Federal Circuit examined whether such tolling is also available under the opt-in procedures of RCFC 23. *Id*. at 1281. In that case, nine days prior to the expiration of the six-year statute of limitations period in section 2501, the plaintiffs had filed a putative class action complaint in this Court under the Tucker Act, alleging Fifth Amendment takings. *Id*. at 1276. Also prior to the expiration of the limitations period, those plaintiffs immediately moved for class certification. *Id.* After the limitations period expired, the plaintiffs filed an amended complaint, seeking to add 20 additional class members. *Id*. at 1276-77. This Court dismissed the claims of additional purported class members as barred by the statute of limitations. *Id*. at 1277-78.

The Federal Circuit reversed. The Court first expressly rejected appellants' contention that the filing of a putative class action satisfied the statute of limitations for all putative members of the class. *Id*. at 1283. Answering a question of first impression, however, the Federal Circuit concluded that:

> When . . . a class action complaint is filed within the six-year limitations period of 28 U.S.C. § 2501 as to one named plaintiff, putative class members are permitted to opt in under RCFC 23 after expiration of the limitations period, when class certification is sought prior to expiration of the period, but the complaint is not amended to add other named plaintiffs as putative class members until after expiration of the period.

Id. at 1290. The Court concluded that class action tolling was statutory and distinct from equitable tolling and, thus, "the fact that equitable tolling is barred under section 2501 does not mean that class action statutory tolling also is barred." *Id*. at 1287.

Since the Federal Circuit rendered its decision in *Bright*, however, the Supreme Court has held that class action tolling is indeed a form of equitable tolling. In *California Public Employees' Retirement System (CalPERS) v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), the Supreme Court examined whether class action tolling under *American Pipe* was statutory or equitable in nature. *Id*. at 2051. The Supreme Court determined that class action tolling is equitable in nature, finding that "the source of the tolling rule" announced in *American Pipe* is "the judicial power to promote equity, rather than to interpret and enforce statutory provisions." *Id*. The Supreme Court, therefore, held that class action tolling could not apply to toll a three-year statute of repose. *Id*. at 2052.

Although the Supreme Court's decision in *CalPERS* did not expressly overrule *Bright* or deal with the Tucker Act's statute of limitations, its analysis plainly calls into question *Bright*'s

continued vitality. The Federal Circuit in *Bright* expressly relied on a distinction between equitable tolling, which it acknowledged was unavailable to toll section 2501 under binding Supreme Court precedent, and class action tolling, which it found to be statutory in nature. *Bright*, 603 F.3d at 1287. The Supreme Court, however, analyzing the same question regarding the nature of class action tolling, came to the opposite conclusion, holding that it is equitable in nature and not statutory and, thus, unavailable in another context in which, like for section 2501, equitable tolling is unavailable. *CalPERS*, 137 S. Ct. at 2051. It logically follows that class action tolling is also unavailable to toll section 2501, which the Federal Circuit, including in *Bright*, has repeatedly acknowledged is not subject to equitable tolling.

2. Class Action Tolling Is Inapplicable Under These Facts

Even if class action tolling remains available to toll the Tucker Act's statute of limitations, no such tolling applies under the facts of this case. As described above, the Federal Circuit in *Bright* held only that when a class action complaint *and motion for class certification* are filed in this Court prior to the expiration of the statute of limitations, putative class members *may opt in to that class*, if certified, after the limitations period has expired. *Bright*, 603 F.3d at 1287. That holding is inapposite here, where the *Washington Federal* plaintiffs never filed a motion for class certification, either before the statute of limitations expired or at any time thereafter.

The Federal Circuit in *Bright* expressly limited its holding to permit class action tolling only "when a class action complaint is filed and class certification is sought prior to the expiration of section 2501's limitations period." *Id*. at 1290. In a footnote, the Court indicated that it would "leave for another day the question of whether tolling would be allowed where class

certification was sought after expiration of the limitations period." *Id*. at 1290 n.9.

The Court of Federal Claims, however, has recently answered this question, under facts similar to those in this case, in the negative. In *Big Oak Farms, Inc. v. United States*, 141 Fed. Cl. 482 (2019), this Court held that "a claim for a class action does not toll the statute of limitations where, as here, the court has never ruled on or has been asked to rule on class certification." *Id*. at 485. The Court examined *Bright*, finding that had the plaintiffs "timely sought a ruling on class certification and the court had granted certification, they could rely on *Bright*" but, since plaintiffs "did not follow the court's class action procedure . . . *Bright* does not apply." *Id*. at 493. The Court expressed concern that "[i]f by simply filing a class action complaint a party could unilaterally toll the statute of limitations," parties would have little reason to seek class certification, and "would create a major jurisdictional loophole." *Id*. The Court accordingly rejected such an approach.

Similarly, here, because the *Washington Federal* plaintiffs never even filed a class certification motion, the statute of limitations was not tolled. A contrary ruling would create exactly the jurisdictional loophole that the Court correctly rejected in *Big Oak Farms*, allowing the mere filing of a purported class complaint by the *Washington Federal* plaintiffs to toll the statute of limitations for any purported member of a class that was never certified, for a total of over seven additional years, on top of the six years that the Tucker Act provides. The Court should again reject the creation of such a loophole.

Moreover, the question the Federal Circuit left unanswered in *Bright* was "whether tolling would be allowed where class certification was sought after expiration of the limitations period." *Bright*, 603 F.3d at 1290 n.9. But the *Washington Federal* plaintiffs *never* sought class

certification at all. The United States is not aware of any case in this circuit in which a court has permitted class action tolling under such circumstances.[4]

3. Plaintiffs' Contract Claim Is Barred In Any Event

Finally, even if plaintiffs' takings and illegal exaction claims could benefit from class action tolling based on the pendency of the *Washington Federal* plaintiffs' similar claims, plaintiffs here assert a claim, for breach of an alleged "implied regulatory contract," that the *Washington Federal* plaintiffs did not advance. This contract claim alleges facts unrelated to those advanced by the complaint filed in *Washington Federal* and, thus, cannot benefit from tolling based on that case.

The complaint in *Washington Federal* consisted of a single count, alleging that placing the Enterprises into conservatorship was illegal and constituted an "illegal taking" or illegal exaction. *Washington Federal v. United States*, No. 13-385C, Compl. ¶¶ 200-09. In this case, plaintiffs advance the same takings and illegal exaction claims, previously dismissed by this Court and affirmed by the Federal Circuit, alleging that placing the Enterprises into conservatorship was unlawful. Compl. ¶¶ 106-27. Plaintiffs here, however, advance a third claim alleging that Government incentives encouraged community banks to purchase preferred shares in the Enterprises and that somehow these incentives created an implied contract between

[4] This Court has, many years before *Big Oak Farms*, previously relied on *Bright* in allowing class action tolling where plaintiffs, after filing a complaint before the statute of limitations expired, filed a class certification motion just after the limitations period expired. *See Toscano v. United States*, 98 Fed. Cl. 152, 154 (2011); *Geneva Rock Prods., Inc. v. United States*, 100 Fed. Cl. 778, 783 (2011). In both of those cases, however, the plaintiffs eventually filed class certification motions and the courts certified the classes. *Toscano*, 98 Fed. Cl. at 155; *Geneva Rock*, 100 Fed. Cl. at 783. The *Washington Federal* plaintiffs, by contrast, never sought certification and the Court never certified a class.

the United States and plaintiffs. Compl. ¶¶ 29-33, 129-134. The *Washington Federal* plaintiffs made no similar allegations.

Even if plaintiffs in this case could avail themselves of class action tolling for their takings and illegal exaction claims based on the *Washington Federal* plaintiffs having filed a purported class action advancing similar claims, no such tolling would apply to plaintiffs' contract claim. *See Big Oak Farms*, 141 Fed. Cl. at 489-92 (finding that claims asserted by additional plaintiffs do not relate back to claims in original complaint).

III. Plaintiffs' Claims Are Derivative And They Lack Standing To Assert Them Directly

Plaintiffs' claims challenging the decision to place the Enterprises into conservatorships are derivative claims that belong to the Enterprises and, by explicit Congressional mandate under HERA, now belong solely to FHFA as conservator. As the Federal Circuit correctly determined when examining that exact issue in its binding decision in *Washington Federal*, shareholders such as plaintiffs lack standing to bring these claims on their own behalf. *Washington Fed.*, 26 F.4th at 1267-70. Although pleaded as direct, plaintiffs' claims turn on alleged harm to the Enterprises and, thus, are classic derivative claims. Indeed, plaintiffs' central allegation is that the *Enterprises* were unlawfully coerced into conservatorships. Although the value of plaintiffs' shares may have declined as a result of the decision to place the Enterprises into conservatorships, leading to plaintiffs' insolvency, that is nevertheless a derivative harm that does not transform their claims into direct ones.

To possess standing to bring suit, "[a] litigant generally must assert its own legal rights and interests; it cannot rest its claim to relief on the legal rights or interests of third parties." *Id.* at 1267 (citing *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004); *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). In general, "the proper party to bring a suit on behalf of a corporation is the

corporation itself, acting through its directors or a majority of its shareholders." *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 542 (1984). Individual shareholders may bring direct claims on their own behalf, but they ordinarily have no right to sue "to enforce the rights of the corporation." *Franchise Tax Board* v. *Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990).

Federal law governs the standing inquiry, including the determination whether a particular claim against a federally chartered institution is direct or derivative. *Washington Fed.*, 26 F.4th at 1267. However, "there is a presumption that state law should be incorporated into federal common law unless doing so would frustrate specific objectives of federal programs." *Id*. (citations omitted).[5] "Consistent with federal law, Delaware courts consider two questions when determining whether a shareholder's claim is derivative or direct." *Id*. (citations omitted). These questions ask: (1) "who suffered the alleged harm" and (2) "who would receive the benefit of any recovery." *Id*. (citing *Tooley* v. *Donaldson*, *Lufkin & Jenrette*, 845 A.2d 1031, 1032 (Del. 2004) (en banc)). Moreover, the Delaware Supreme Court recently overruled the "dual nature doctrine" and confirmed "that a suing shareholder's claims must be completely independent from the harm to the corporation before they may be asserted directly." *Washington Fed.*, 26 F.4th at 1267 (citing *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1267, 1272–73 (Del. 2021) (en banc)). Accordingly, if the corporation suffered the harm and would receive the recovery, the claim is derivative; if the shareholder suffered the harm independently of any injury to the corporation and would receive the recovery, the suit is direct. *See id.;*

[5] Because Fannie Mae is a Delaware Corporation and Freddie Mac is a Virginia Corporation, courts have applied the laws of Delaware and Virginia. *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1, 40 n. 26 (2019), *aff'd in part, rev'd in part,* 26 F.4th 1274 (Fed. Cir. 2022).

Tooley, 845 A.2d at 1035-1039.

Here, like the *Washington Federal* plaintiffs, whose factual allegations were nearly identical, plaintiffs' takings and illegal exaction claims are derivative in nature. *See Washington Fed.*, 26 F.4th at 1268. Indeed, the Federal Circuit's analysis in *Washington Federal* highlights factual allegations that are repeated nearly verbatim in plaintiffs' complaint here. *Compare id*. ("[A]s a result of the Government's legally unsubstantiated imposition of the conservatorships, the Government destroyed the value of the stock held by Plaintiffs"; "imposing the conservatorships upon the Companies, under false pretenses and without a statutory basis, causing the value of the Companies' shares to plummet, and destroying all shareholder rights and property interests") *with* Compl. ¶ 108 ("In imposing the conservatorships over the GSEs . . .the Government destroyed the rights and value of the property interests tied to the common and preferred stock of the GSEs held by Plaintiffs"). But "diminution in the value of stock is merely indirect harm to a shareholder and does not bestow upon a shareholder the standing to bring a direct cause of action." *Gaff v. Federal Deposit Ins. Corp.*, 814 F.2d 311, 318 (6th Cir. 1987). Accordingly, as in *Washington Federal*, because "Plaintiffs' alleged injuries, as pled, depend on an alleged injury to the Enterprises, . . . Plaintiffs lack standing to assert their substantively derivative claim as a direct takings claim." *Washington Fed.*, 26 F.4th at 1268.

Plaintiffs' ancillary claim that they suffered harms distinct from those suffered by the Enterprises, Compl. ¶ 119, is also unavailing. As explained in greater detail below, even if certain ancillary allegations of harm, such as the loss of voting rights, could be construed as direct, the Federal Circuit has squarely rejected the notion that the Government's appointment of a conservator or receiver can give rise to a takings claim. *Washington Fed.*, 26 F.4th at 1266;

(citing *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1073-75 (Fed. Cir. 1994)); *see also California Hous. Sec., Inc. v. United States*, 959 F.2d 955, 959 (Fed. Cir. 1992) (concluding that the Resolution Trust Corporation's appointment as conservator and receiver of a failed bank did not give rise to a takings claim given the "long history of government regulation of savings and loan associations"); *Branch v. United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995) (It has long been "established that it is not a taking for the government to close an insolvent bank and appoint a receiver to take control of the bank's assets.").

Plaintiffs' claim that they "were directly harmed by the destruction of their share value because FBOP Subsidiaries and River Capital were placed into receivership as a direct result of the Government's taking of their property rights in the GSE preferred shares," Compl. ¶ 119, fares no better. Even the allegation itself admits that the source of the alleged harm is the diminution in share value. That plaintiffs' financial situation meant that this diminution in value led them into receivership is of no moment to the legal analysis of whether the reduced share value itself was direct or derivative. As demonstrated, diminution in the share value is an indirect harm to shareholders, who may not bring direct claims based thereon. *Gaff*, 814 F.2d at 318.

IV. Plaintiffs Lack Standing To Assert Derivative Claims

Plaintiffs likewise lack standing to assert derivative claims, whether they style those claims as direct or derivative. HERA's Succession Clause provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A). The right to bring derivative suits on behalf of the corporation in

appropriate circumstances is a well-established right of corporate shareholders. *See Koster* v. *(American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 522 (1947). The succession clause, therefore, "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits." *Perry Cap.*, 864 F.3d at 623 (quoting *Kellmer v. Raines*, 674 F.3d 848 (D.C. Cir. 2012) (alterations in *Perry*)); *see also, e.g.*, *Roberts v. Fed. Housing Finance Agency*, 889 F.3d 397, 408 (7th Cir. 2018) (Succession Clause transfers to FHFA the sole right to bring derivative actions on behalf of the Enterprises).

In *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1 (2019), this Court found itself compelled to read into HERA's Succession Clause a conflict-of-interest exception permitting different derivative claims, challenging the Third Amendment to the PSPAs, based on the Federal Circuit's decision in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999). 147 Fed. Cl. at 49-51. The Court was mistaken, for two principal reasons.

First, as we discuss in greater detail in Section VII below, principles of issue preclusion bar plaintiffs from advancing such an argument. In *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014), shareholder class plaintiffs litigated the question whether the succession clause contains an implied conflict-of-interest exception—and they lost. *Id*. at 229-230. Plaintiffs, therefore, may not relitigate that issue here. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). The Federal Circuit concluded that this *Perry Capital* holding "applies to any shareholder attempting to bring a derivative claim on the Enterprises' behalf," barring all non-constitutional derivative claims. *Fairholme*, 26 F.4th at 1301. Although the Federal Circuit found the doctrine of issue preclusion inapplicable to constitutional just-compensation claims

because the court in *Perry Capital* did not have occasion to decide such claims, *id.*, issue preclusion applies "even if the issue recurs in the context of a different claim." *Taylor*, 553 U.S. at 892.

Second, the broad and unqualified language of HERA' Succession Clause leaves no room for an implied conflict-of-interest exception. *See United States v. Gonzales*, 520 U.S. 1, 5, 10 (1997). The clause states categorically that the Agency, as conservator, "immediately succeed[s]" to "*all* rights, titles, powers, and privileges . . . of *any* stockholder . . . with respect to the [Enterprises]." 12 U.S.C. § 4617(b)(2)(A)(i) (emphases added). The Succession Clause, moreover, includes an express exception under which the Enterprises may challenge the Agency's appointment as conservator. *See* 12 U.S.C. § 4617(a)(5)(A). The inclusion of an "express exception" generally precludes the recognition of additional "implicit" exceptions. *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 844 (2018).

The Federal Circuit's decision in *First Hartford*, which addressed the statutory receivership authority of the Federal Deposit Insurance Corporation (FDIC) under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), should not be extended to apply to HERA. The HERA Succession Clause's language and purpose are "clear and absolute," *Roberts*, 889 F.3d at 409, and implying a conflict-of-interest exception would be flatly at odds with its purpose. *Perry Capital*, 864 F.3d at 625 (explaining that it "makes little sense" to adopt an exception at odds with the "purpose" of the Succession Clause and inconsistent with its "plain statutory text").

Moreover, whereas FIRREA applies broadly to a range of potential receiverships for a variety of financial institutions, HERA addresses the conservatorship or receivership of the two

Enterprises central to the United States housing market, who were themselves created by Congress and who required an extraordinary commitment of taxpayer funds. When Congress enacted HERA and its Succession Clause, it was fully aware that the conservator would likely turn to Treasury for essential capital, and it authorized Treasury to invest in the Enterprises. *See* 12 U.S.C. § 1455(*l*)(1)(B)(i), (iii), 1719(g)(1)(B)(i), (iii). If Congress believed that these dealings created a conflict of interest that should permit suit by shareholders, it would have said so. Instead, it did the opposite; it transferred "all rights, titles, powers, and privileges" of the Enterprises' shareholders to FHFA. 12 U.S.C. § 4617(b)(2)(A)(i).

Congress's intention to bar all shareholder suits is confirmed by other statutory provisions, including the narrow, express exception that provides the Enterprises with a 30-day window to file a lawsuit challenging FHFA's appointment as conservator or receiver. 12 U.S.C. § 4617(a)(5). Another narrow exception permits shareholder participation in the statutory claims process in the event of the Enterprises' liquidation. 12 U.S.C. § 4617(b)(2)(K)(i). That Congress expressly granted shareholders and the Enterprises these narrow post-conservatorship rights only underscores that the Enterprises and their shareholders do not otherwise retain the right to bring suit on behalf of the Enterprises during a conservatorship.

In *Fairholme*, the Federal Circuit found it unnecessary to rely on the Succession Clause, instead rejecting the constitutional derivative claims on the merits. 26 F.4th at 1302-04. Likewise, here, even if the Succession Clause did contain an implied conflict-of-interest exception, plaintiffs' claims fail as a matter of law.

V. Plaintiffs Fail To State A Claim For Illegal Exaction

Under binding Federal Circuit precedent, plaintiffs "may not challenge the propriety of the FHFA's appointment as conservator through an illegal exaction claim in the Claims

Court." *Washington Fed.*, 26 F.4th at 1263 (citing *Rith Energy*, 247 F.3d at 1366). Plaintiffs' illegal exaction claims seek to advance exactly such a challenge and, therefore, should be dismissed under RCFC 12(b)(6).

The Federal Circuit has made clear that "an uncompensated taking and an unlawful agency action constitute separate wrongs that give rise to separate causes of action." *Washington Fed.*, 26 F.4th at 1263 (citations omitted). Where, as here, "Congress mandates the review process for an allegedly unlawful agency action, a plaintiff may not separately litigate the issue of whether the agency acted in violation of statute or regulation in a takings (or illegal exaction) action." *Id*. (citation omitted). "In other words, the plaintiff may not claim that it is entitled to prevail *because* the agency acted in violation of statute or regulation." *Id*. Accordingly, "an illegal exaction claim predicated on the alleged unlawfulness of the agency action is not plausible as a matter of law." *Id*.

Considering substantively identical claims under this standard in *Washington Federal*, the Federal Circuit held that, as a matter of law, "the Washington Federal Plaintiffs' illegal exaction claim, which requires showing that the FHFA's imposition of the conservatorships was unlawful, is not plausible." *Id*. To begin, "there is no dispute that Congress provided the exclusive means to challenge the grounds of the FHFA's appointment as conservator in 12 U.S.C. § 4617(a)(5): the Enterprises may challenge the FHFA's appointment in district court within 30 days of the appointment." *Id*. at 1264. However, "[t]he Enterprises did not bring such a challenge, nor did their shareholders bring a derivative challenge on their behalf." *Id*. The Federal Circuit held that, "having forgone [their] challenge to the FHFA's decision to appoint itself as conservator over the Enterprises . . . , the Washington Federal Plaintiffs must litigate

their claims on the assumption that the administrative action was both authorized and lawful." *Id*. (internal quotation marks and citation omitted).

The Federal Circuit held that "the Washington Federal Plaintiffs' illegal exaction claim requires showing that the FHFA's appointment as conservator over the Enterprises was unlawful under HERA," and, thus, failed to state a claim. *Id*. Here, plaintiffs' illegal exaction claims, whether styled as direct or derivative, are substantively identical and likewise fail as a matter of law. Plaintiffs' illegal exaction claims depend on their allegations that "[t]he conservatorships were not lawfully imposed," and that "[t]he conditions required for conservatorship delineated in HERA were not satisfied." Compl. ¶ 111. The Federal Circuit has made clear that, having forgone their opportunity to challenge the appointment of FHFA as conservator within 30 days as prescribed in HERA, plaintiffs may not now challenge its lawfulness through an illegal exaction claim in this Court. *Washington Fed.*, 26 F.4th at 1263-65. Plaintiffs' illegal exaction claims, therefore, should be dismissed.

VI. Plaintiffs Fail To State A Takings Claim

Similarly, in addition to finding that shareholders lack standing to bring them directly, the Federal Circuit recently rejected as a matter of law takings claims substantively identical to those advanced by plaintiffs here. *Washington Fed.*, 26 F.4th at 1265-66. Plaintiffs' takings claims likewise impermissibly "rest[] on the premise that the appointment of the FHFA as conservator was unlawful." *Id*. at 1265. And plaintiffs, like the *Washington Federal* plaintiffs, lack a cognizable property interest that could support a takings claim under these facts. *See id*. at 1266.

"[W]here Congress mandates the review process for an allegedly unlawful agency action, a plaintiff may not assert a takings claim in the Claims Court claiming entitlement to prevail *because* the agency acted in violation of a statute or regulation." *Id*. at 1265-66 (citing

Rith Energy, 247 F.3d at 1366). "[A] plaintiff does not have the right to litigate the issue of whether an agency's action is unlawful under the guise of a takings claim, rather than through the congressionally mandated review process." *Washington Fed.*, 26 F.4th at 1266. Plaintiffs' takings claims, like their illegal exaction claims, rest on the premise that the appointment of FHFA as conservator was unlawful. *See* Compl. ¶¶ 1, 4, 11, 51-67, 111-12. Such a claim is not plausible under binding law.

Because plaintiffs may not challenge the legality of the conservatorships, the question for the Court is limited to whether lawfully imposed conservatorships themselves constitute a taking. *Washington Fed.*, 26 F.4th at 1266. This question requires the determination of "whether, upon lawful imposition of the conservatorships, the shareholders retained any investment-backed expectation that the value of their shares would not be diluted and the rights otherwise attendant to share ownership would not be temporarily suspended." *Id.* As the Federal Circuit recognized, the Supreme Court's decision in *Collins* makes clear that shareholders did not retain any such investment-backed expectations. *Id*.

"As the *Collins* court explained, the FHFA's authority under HERA is both unusual and extremely broad; the FHFA as conservator 'may' act in the interests of the Enterprises but is not required to do so." *Id*. (citing 12 U.S.C. § 4617(b)(2)(J); *Collins*, 141 S. Ct. at 1776; additional citations omitted). "Under HERA, the FHFA may act in ways that are *not* in the best interests of either the Enterprises or the shareholders, and, instead, are beneficial to the FHFA and the public it serves." *Id*. (citing *Collins*, 141 S. Ct. at 1776; additional citations omitted). "Where shareholders hold shares in such highly regulated entities—entities that the government has the authority to place into conservatorship—where the conservator's powers are extremely broad,

and where the entities were lawfully placed into such a conservatorship, shareholders lack a cognizable property interest in the context of a takings claim." *Id*. (citing *Golden Pac. Bancorp*, 15 F.3d at 1073–75; additional citations omitted). Accordingly, like the *Washington Federal* plaintiffs, plaintiffs here "cannot assert a cognizable takings claim regarding actions taken in connection with the imposition of the conservatorships in 2008." *Washington Fed.*, 26 F.4th at 1266. Plaintiffs' takings claims, therefore, should be dismissed.[6]

VII. Preclusion Bars Plaintiffs' Takings And Illegal Exaction Claims

As we have explained above, the Federal Circuit, in binding precedent dismissing substantively identical claims, has already found that plaintiffs' takings and illegal exaction claims fail on the merits as a matter of law. *Washington Fed.*, 26 F.4th at 1263-66. Plaintiffs, like the *Washington Federal* plaintiffs, are shareholders advancing the same substantively derivative claims, via the same counsel and in the same Court. These claims, however, have already been rejected and cannot be relitigated here. Moreover, as stated above, issue preclusion bars Enterprise shareholders like plaintiffs from relitigating whether HERA's Succession Clause is subject to a conflict-of-interest exception because that issue has already been decided against shareholders in the United States District Court for the District of Columbia.

"Under the doctrine of claim preclusion, a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the

[6] In addition to failing as a matter of law, plaintiffs' taking claims are barred by 12 U.S.C. § 4617(a)(5), which requires challenges to FHFA's appointment as conservator to be brought within 30 days. Because, as noted, plaintiffs' takings claims are predicated on their allegation that FHFA's decision to appoint itself conservator was unlawful, their claim is governed by § 4617(a)(5). The United States acknowledges that the Federal Circuit concluded that § 4617(a)(5) does not directly bar takings claims like plaintiffs', *Washington Federal*, 26 F.4th at 1262-63, but preserves the argument here in the event of further review.

earlier suit.'" *Taylor v. Sturgell*, 553 U.S. at 892 (quoting *New Hampshire v. Maine,* 532 U.S. 742, 748 (2001)). "Claim preclusion requires (1) an identity of parties or their privies, (2) a final judgment on the merits of the first suit, and (3) the later claim to be based on the same set of transactional facts as the first claim such that the later claim should have been litigated in the prior case." *Bowers Inv. Co., LLC v. United States,* 695 F.3d 1380, 1384 (Fed. Cir. 2012) (citation omitted). Similarly, issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor*, 553 U.S. at 892. "[A] judgment rendered in a shareholder-derivative lawsuit will preclude subsequent litigation [of that issue] by the corporation and its shareholders." *Cottrell v. Duke*, 737 F.3d 1238, 1243 (8th Cir. 2013); *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) ("Furthermore, in shareholder derivative actions arising under Federal Rule of Civil Procedure 23.1, parties and their privies include the corporation and all nonparty shareholders."); *Sonus Networks, Inc. v. Ahmed*, 499 F.3d 47, 63 (1st Cir. 2007) (rejecting assertion that plaintiffs lacked privity with plaintiffs in a prior derivative action because "[i]t is a matter of black-letter law that the plaintiff in a derivative suit represents the corporation, which is the real party in interest"); *United States v. LTV Corp.*, 746 F.2d 51, 53 n.5 (D.C. Cir. 1984).

The takings and illegal exaction claims plaintiffs bring in this case have already been resolved against shareholders on the merits as a matter of law in a prior suit, and may not be relitigated here. Considering substantively identical claims in *Washington Federal*, the Federal Circuit determined that these claims are derivative in nature and, therefore, belong to the Enterprises. *Washington Fed.*, 26 F.4th at 1268. Plaintiffs' takings and illegal exaction claims

are also substantively derivative and, thus, belong to the Enterprises—the same party that already litigated these claims and lost in *Washington Federal*. Moreover, although the Federal Circuit affirmed this Court's dismissal of *Washington Federal* for lack of standing as an alternative ground, it concluded that the takings and illegal exaction claims in *Washington Federal*, which are substantively identical to those in this case, failed on the merits as a matter of law. *Id*. at 1263-66; *see Gould, Inc. v. United States*, 67 F.3d 925, 929 (Fed. Cir. 1995) ("A dismissal for failure to state a claim . . . is a decision on the merits which focuses on whether the complaint contains allegations, that, if proven, are sufficient to entitle a party to relief."). Because plaintiffs' takings and illegal exaction claims belong to the same party, the Enterprises; stem from the same transactional facts; and were finally adjudicated on the merits against shareholders in a substantively derivative suit in *Washington Federal*, plaintiffs are precluded from relitigating these claims in this case. *See Fairholme*, 26 F.4th at 1299-301; *Cottrell*, 737 F.3d at 1243 ("[A] judgment rendered in a shareholder-derivative lawsuit will preclude subsequent litigation [of that issue] by the corporation and its shareholders."); *Sonus Networks*, 499 F.3d at 63-64 (finding preclusion where threshold issue decided against shareholder plaintiff "would have been the same no matter which shareholder served as nominal plaintiff.").

Moreover, issue preclusion also bars the relitigation of legal issues that have been resolved against Enterprise shareholders in prior suits. The question whether HERA's Succession Clause includes a conflict-of-interest exception was litigated and resolved against all Enterprise shareholders in *Perry Capital*. 70 F. Supp. 3d at 229-30. Addressing an expressly derivative breach of fiduciary duty claim brought by Enterprise shareholders, the district court in *Perry Capital* concluded that (1) HERA's Succession Clause bars derivative suits; and (2) no

conflict-of-interest exception to that provision exists. *Id.* Those conclusions, both of which were necessary to the court's dismissal of the relevant derivative claims, were affirmed by the court of appeals. *See Perry Capital*, 864 F.3d at 625 ("We therefore conclude the Succession Clause does not permit shareholders to bring derivative suits on behalf of the Companies even where the FHFA will not bring a derivative suit due to a conflict of interest."). The Federal Circuit found that this *Perry Capital* holding "applies to any shareholder attempting to bring a derivative claim on the Enterprises' behalf," *Fairholme*, 26 F.4th at 1301, and bars any shareholder from relitigating "whether HERA's Succession Clause bars his non-constitutional derivative claims," *id*. at 1300.

The United States acknowledges that the Federal Circuit declined to apply issue preclusion to constitutional just-compensation claims. *Id*. at 1301 ("Because the *Perry II* court never decided any constitutional claims and expressly pointed out that it had no occasion to do so, we decline to dismiss these claims on the ground that Barrett is collaterally estopped from asserting them."). It is irrelevant, however, that the derivative claims that the court addressed in *Perry Capital* were not takings or illegal exaction claims, because issue preclusion applies "even if the issue recurs in the context of a different claim." *Taylor*, 553 U.S. at 892. Because the issue of whether section 4617(b)(2)(A)(i) includes a conflict-of-interest exception was fully litigated and decided on the merits against Enterprise shareholders in previous derivative litigation, plaintiffs cannot relitigate the issue in pursuit of their derivative claims here.

VIII. Plaintiffs Fail To Plausibly Allege The Existence Of A Contract With The United States

Finally, plaintiffs fail to state a claim for the breach of an "implied regulatory contract" because their factual allegations fail to plausibly allege the existence of any contract between plaintiffs and the United States, or that the United States breached any such contract.

To state a claim for a breach of contract, plaintiffs must plausibly allege "(1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach." *San Carlos Irrigation & Drainage Dist. v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989). Plaintiffs allege the existence of an "implied regulatory contract" with the United States. Compl. ¶¶ 128-35. "The Court of Federal Claims' jurisdiction over claims founded on an express or implied contract with the United States extends only to contracts either express or implied in fact, and not to claims on contracts implied in law." *Perri v. United States*, 340 F.3d 1337, 1343 (Fed. Cir. 2003) (internal quotation marks and citations omitted).

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

Plaintiffs offer no legal support for their "implied regulatory contract" theory in their complaint. The Federal Circuit has established that "[a]n agency's performance of its regulatory or sovereign functions does not create contractual obligations." *Mola Dev. Corp. v. United States*, 516 F.3d 1370, 1378 (Fed. Cir. 2008) (quoting *D & N Bank v. United States*, 331 F.3d

1374, 1378-79 (Fed. Cir. 2003). Moreover, "[t]he Supreme Court 'has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Brooks v. Dunlop Mfg.*, 702 F.3d 624, 630 (Fed. Cir. 2012) (quoting *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985)). "This well-established presumption is grounded in the elementary proposition that the principal function of the legislature is not to make contracts, but to make laws that establish the policy of the state." *Id.* (quoting *Atchison*, 470 U.S. at 466). Accordingly, "the party asserting the creation of a contract must overcome this well-founded presumption and [courts should] proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." *Id.* at 630-31 (quoting *Atchison*, 470 U.S. at 466).

Moreover, to establish an implied contract a plaintiff must point to "something more than a cloud of evidence that could be consistent with a contract." *Mola Dev. Corp.*, 516 F.3d at 1378 (quoting *D & N Bank*, 331 F.3d at 1377); *see also Grady v. United States*, 656 F. App'x 498, 499-500 (Fed. Cir. 2016). Indeed, a plaintiff must allege facts establishing a "clear indication" of intent to contract and the other elements of a contract. *Mola Dev. Corp.*, 516 F.3d at 1378 (quoting *D & N Bank*, 331 F.3d at 1378).

Plaintiffs have failed to allege even a "cloud of evidence" supporting the existence of a contract, let alone the "clear indication" required by this Court to establish an implied-in-fact contract. Indeed, no allegation remotely supports the proposition that the United States intended any unspecified "incentives" to constitute an open offer to any prospective investor to enter into

a contract with the United States under which the United States would guarantee their investment. Moreover, plaintiffs do not specify how Government policies providing favorable treatment for investment in the Enterprises evidence a clear intent by the United States to enter into a contract with prospective shareholders, or that any official with authority to bind the Government in contract issued such an offer. Plaintiffs merely make the conclusory assertion that "GSE preferred stock came with the strongly implied guarantee that the Government would not allow them to fail and would ensure that the investments rendered the investing banks secure." Compl. ¶ 130. Such "[t]hreadbare recitals" of the Government's "offer" and the plaintiffs' alleged "acceptance" are not assumed to be true. *Iqbal*, 556 U.S. at 678-79. Nothing in the complaint provides any "clear indication" that the United States intended to contract with Enterprise shareholders. *See Mola Dev. Corp.*, 516 F.3d at 1378. On the contrary, HERA expressly states that neither the Enterprises nor their securities are guaranteed by the United States. 12 U.S.C. § 4501(4) ("[N]either the enterprises . . . nor any securities or obligations issued by the enterprises . . . are backed by the full faith and credit of the United States;"); 12 U.S.C. § 4503 ("This chapter may not be construed as implying that any such enterprise . . . or any obligations or securities of such an enterprise . . . are backed by the full faith and credit of the United States.").

To the extent that plaintiffs allege that their stock certificates themselves provide contractual guarantees, the Federal Circuit has already determined that the stock certificates are not contracts with the United States, foreclosing such an argument. *See Fairholme*, 26 F.4th at 1293-96. Shareholders are neither in privity with the United States via their stock certificates, *id.* at 1295-96, nor are they third party beneficiaries of any implied contract between FHFA and the

Enterprises, *id*. at 1294.

Accordingly, plaintiffs have failed to plausibly allege the existence of a contract between themselves and the United States and, thus, fail to state a claim for breach of contract as a matter of law.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court dismiss plaintiffs' claims, both for lack of subject matter jurisdiction and for failure to state claims upon which relief may be granted.

Respectfully submitted,

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