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 OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

PATRICIA M. McCARTHY
Director

ELIZABETH M. HOSFORD
Assistant Director

ANTHONY F. SCHIAVETTI
Senior Trial Counsel
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 305-7572
anthony.f.schiavetti@usdoj.gov

Attorneys for Defendant

OF COUNSEL:

FRANKLIN E. WHITE, JR.
Assistant Director

RETA E. BEZAK
Senior Trial Counsel

MARIANA T. ACEVEDO
Trial Attorney

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DEFENDANT'S OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Pursuant to the Court's order dated March 6, 2023 (ECF No. 24), defendant, the United States, respectfully submits this opposition to the request of plaintiffs, Michael E. Kelly, FBOP Corporation, and River Capital Advisors, Inc., for leave to file an amended complaint.

ARGUMENT

The complaint amendments that plaintiffs propose are futile because the proposed amended complaint could not survive a motion to dismiss, for the reasons we previously explained in our motion to dismiss the original complaint, ECF No. 16, and further explain below. Plaintiffs' claims are barred by the Tucker Act's six-year statute of limitations and cannot benefit from class action tolling. Moreover, plaintiffs, who allege that they were shareholders of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises), lack standing to bring the claims asserted in their complaint because they are substantively derivative and, thus, belong to the Enterprises. Finally, even if the Court could entertain plaintiffs' claims, binding precedent requires dismissal of the claims on the merits. The Court, therefore, should deny plaintiffs leave to amend their complaint because amendment is futile.

In October 2021, plaintiffs filed this case challenging the 2008 decision of the Federal Housing Finance Agency (FHFA) to place the Enterprises into conservatorship. Plaintiffs alleged that the imposition of the conservatorships constituted a taking or an illegal exaction of their property. Compl., ECF No. 1, ¶ 106-27. Plaintiffs further asserted a derivative claim on behalf of the Enterprises, alleging that the imposition of the conservatorships constituted a taking of the Enterprises' net worth. *Id.* ¶¶ 121-27. Finally, plaintiffs alleged that the imposition of the conservatorships constituted a breach of an "implied regulatory contract" stemming from Government "incentives to encourage banks to purchase [Enterprise] preferred stocks." *Id.* ¶¶ 129, *see also* 128-35.

On December 16, 2022, we filed a motion to dismiss plaintiffs' complaint for lack of subject matter jurisdiction and failure to state a claim on which relief may be granted. Def. Mot. to Dismiss, ECF No. 16. In that motion, we demonstrated that (1) plaintiffs' complaint was barred by this Court's six-year statute of limitations; (2) plaintiffs' claims are substantively derivative and they lack standing to assert them directly; (3) plaintiffs likewise lack standing to assert derivative claims; (4) plaintiffs failed to state claims for illegal exaction or takings; (5) plaintiffs' claims for illegal exaction and takings are precluded; and (6) plaintiffs failed to plausibly allege a contract with the United States. *See generally id.*

On March 6, 2023, plaintiffs sought leave of the Court to file an amended complaint. According to plaintiffs' motion, the amended complaint would (1) remove the illegal exaction claim and "allegations related to illegality of conservatorship"; (2) add "factual specificity related to [the] implied regulatory contract"; and (3) clarify the takings claims "to establish standing." Pl. Mot. for Leave to File Am. Compl. (Pl. Mot.), ECF No. 25, at 6. The amended

complaint replaces plaintiffs' single, direct taking claim with two separate, purportedly direct claims, the first alleging that the imposition of the conservatorships constituted a taking of plaintiffs' capital and assets, Proposed Am. Compl., ECF No. 25-1, ¶¶ 138-56, and the second alleging that the conservatorship constituted a taking of plaintiffs' shareholder rights, *id.* ¶¶ 157-80. The amended complaint maintains the derivative takings claim, although it adds certain allegations. *Id.* ¶¶ 181-91. Finally, in addition to the claim for breach of an implied regulatory contract pleaded in the original complaint, the amended complaint seeks to add a claim alleging breach of implied covenants in the Enterprises' bylaws and preferred shares. *Id.* ¶¶ 192-212.

These proposed changes do not rectify the deficiencies in plaintiffs' complaint. Because the proposed amendments would not survive a motion to dismiss, they are futile, and plaintiffs' motion for leave should be denied.

I. Standard Of Review

Under Rule 15(a)(1) of the Rules of the Court of Federal Claims (RCFC), a "party may amend its pleadings once as a matter of course" in two instances. First, when an amendment is filed "within . . . 21 days after service of the pleading." RCFC 15(a)(1)(A). Second, a party seeking to amend a pleading "to which a responsive pleading is required" may do so within "21 days after service of a responsive pleading or 21 days after service of a motion under RCFC 12(b), (e), or (f), whichever is earlier," RCFC 15(a)(1)(B). "In all other cases, a party may amend its pleading only with . . . the court's leave." RCFC 15(a)(2).

Although Rule 15(a) of the Federal Rules of Civil Procedure—and its Court of Federal Claims analogue—"declares that leave to amend 'shall be freely given when justice so requires,'" that mandate is not absolute. *Foman v. Davis*, 371 U.S. 178, 182 (1962) (quoting

Fed. R. Civ. P. 15(a)). The Supreme Court has explained that leave to amend should be denied when amendment would be futile. *Id.* "A motion to amend may be deemed futile if a claim added by the amendment would not withstand a motion to dismiss." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 71 Fed. Cl. 172, 176 (2006); *Marchena v. United States*, 128 Fed. Cl. 326, 330 (2016), *aff'd*, 702 F. App'x 988 (Fed. Cir. 2017) (same). The party seeking leave "must proffer sufficient facts supporting the amended pleading that the claim could survive a dispositive pretrial motion." *Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A. de C.V.*, 464 F.3d 1339, 1355 (Fed. Cir. 2006).

II. Plaintiffs' Proposed Amended Complaint Is Futile

The proposed amended complaint does not rectify the numerous fatal deficiencies in the original complaint. First, it cannot turn back the clock on the statute of limitations. In addition, despite plaintiffs' attempt at creative reframing, the takings claims (now three of them) remain substantively derivative and plaintiffs lack standing to bring derivative claims on behalf of Fannie Mae and Freddie Mac. Plaintiffs' proposed amendments are therefore futile. Moreover, even if plaintiffs could establish standing, their takings claims fail on the merits as a matter of law, as the Federal Circuit has already conclusively determined.

A. The Proposed Amended Complaint—Like The Original Complaint—Is Barred By This Court's Statute Of Limitations

In their motion for leave to file an amended complaint, plaintiffs acknowledge—at least for purposes of the motion—that their claims accrued on September 6, 2008, and that their original complaint was filed in 2021, more than six years after accrual. Pl. Mot. at 12 n.5; *see also* 28 U.S.C. § 2501 ("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."). Plaintiffs argue, however, that the statute of limitations was tolled by *Washington Federal v. United States*, No. 13-385C, a putative class action filed in 2013. *Id.* at 8-12. Plaintiffs' tolling argument should be rejected because class action tolling is unavailable here. Moreover, even if it were available, such tolling would not apply to plaintiffs' contract claims.

1. Tolling Is Unavailable Where, As Here, Class Certification Was Not Sought Or Granted Prior To Expiration Of The Statute Of Limitations

Plaintiffs' tolling argument derives from a misreading of the decision of the United States Court of Appeals for the Federal Circuit in *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010). Pl. Mot. at 9-11. In that case, nine days prior to the expiration of the six-year statute of limitations period set forth in section 2501, the plaintiffs filed a putative class action complaint in this Court under the Tucker Act, alleging Fifth Amendment takings. *Id*. at 1276. The *Bright* plaintiffs also filed a motion for class certification a few days before the limitations period expired. *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 the 20 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 complaint satisfied the statute of limitations for all putative members of the class. *Id*. at 1283. However, the Federal Circuit concluded that, where class certification is sought prior to the expiration of the statute of limitations, putative class members may opt in after the expiration of the statute of limitations period. *Id*. at 1290. The Federal Circuit expressly left unanswered "whether tolling would be allowed where class certification was sought after expiration of the limitations period." *Id.* at 1290 n.9.

Drawing on two of this Court's decisions interpreting *Bright*, plaintiffs here argue that the filing of the *Washington Federal* class action complaint was sufficient to toll the statute of limitations for all putative class members. Pl. Mot. at 11-12. In *Toscano v. United States*, plaintiffs filed a class action complaint prior to expiration of the statute of limitations, but did not separately move for class certification until after the expiration of that period. 98 Fed. Cl. 152, 153 (2011). The Court nevertheless concluded that the complaint tolled the statute of limitations for all putative class members, relying on the Federal Circuit's statements that the limitations period was tolled where plaintiffs "sought" class certification prior to the expiration of the limitations period. *Id.* at 154 (citing *Bright*, 603 F.3d at 1274). The Court determined that plaintiffs "sought" class certification by requesting it in their complaint and, although the plaintiffs in *Bright* also separately moved for certification before the limitations period expired, such additional action was not explicitly required by the Federal Circuit's *Bright* decision. *Toscano*, 98 Fed. Cl. at 154. In a subsequent case, *Geneva Rock Products, Inc. v. United States*, 100 Fed. Cl. 778, 783 (2011), the Court, finding "the logic of *Toscano* persuasive," again concluded that a class action complaint tolled the statute of limitations even where the plaintiff moved for class certification after the limitations period had expired.

This Court, however, has since rejected the application of tolling solely based on a request for class certification in a complaint filed before the limitations period expired. *Big Oak Farms, Inc. v. United States*, 141 Fed. Cl. 482, 493 (2019).[1] In *Big Oak Farms*, the plaintiffs filed a class action complaint prior to expiration of the statute of limitations period, but

[1] Plaintiffs ignore this case in their motion for leave to amend their complaint, despite our reliance on it in our motion to dismiss their initial complaint. *See* Pl. Mot. to Amend, ECF No. 25, at 9-12; Def. Mot. to Dismiss, ECF No. 16, at 17-19.

subsequently (after the limitations period expired) amended their complaint to remove the class allegations and instead add numerous individual plaintiffs. *Id.* at 486-88. In granting the Government's motion to dismiss the additional plaintiffs added after the limitations period expired, the Court noted that, unlike the plaintiffs in *Bright*, the *Big Oak Farms* plaintiffs never filed a motion for class certification and class certification was not granted prior to the expiration of the statute of limitations. *Id.* at 493. The Court, therefore, found that plaintiffs could not rely on *Bright*. *Id.* Moreover, the Court pointed out that *Bright* explicitly "rejected the 'contention that the filing of the original complaint satisfied the limitations requirement of section 2501 outright for all putative members of the class.'" *Big Oak Farms*, 141 Fed. at 493 (quoting *Bright*, 603 F.3d at 1283). The Court also explained that, "under the holding in *Bright* a class complaint is not sufficient to toll the statute of limitations." *Id.*

Critically, in reaching this conclusion, 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.

Like the plaintiffs in *Big Oak Farms*, the *Washington Federal* plaintiffs never filed a motion for class certification, and the statute of limitations for other putative class members was therefore not tolled. Permitting tolling in this case 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—or even the subject of a motion for

certification—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.

2. In Any Event, Equitable Tolling Is Unavailable For Section 2501

Although plaintiffs attempt to rebut our demonstration in our motion to dismiss that their claims are barred by the statute of limitations, they did not address our argument that class action tolling is unavailable to toll Section 2501. *See* Def. Mot. to Dismiss at 14-16. As we explained in that motion, Supreme Court precedent calls into question whether the Court's statute of limitations may be subject to class action tolling.

In *Bright*, the Federal Circuit concluded that class action tolling was statutory in nature and distinct from equitable tolling and, thus, "that equitable tolling is barred under [28 U.S.C. § 2501] does not mean that class action statutory tolling also is barred." 603 F.3d at 1287. The Supreme Court, however, in its subsequent decision in *California Public Employees' Retirement System (CalPERS) v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), determined that class action tolling *is* equitable in nature, finding that "the source of the tolling rule" announced in *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974), is "the judicial power to promote equity, rather than to interpret and enforce statutory provisions." 137 S. Ct. at 2051. 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 address 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. The Supreme Court conclusively determined that class action tolling is equitable in nature and not statutory. *CalPERS*, 137 S. Ct. at 2051. The Supreme Court concluded that a rule based in equity, like class action tolling, could not toll a statute of repose, in which Congress intended to offer defendants full and final security after a specific amount of time. *Id.* at 2052. 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, like the statute of repose that the Supreme Court examined in *CalPERS*, not subject to equitable tolling. Thus, regardless of whether the plaintiffs in this case fall within the bounds of *Bright*, the Court's statute of limitations is not tolled for putative class members because class action tolling is equitable in nature and unavailable to toll Section 2501.

3. Even If Tolling Of The Statute Of Limitations Were Available, Plaintiffs' Contract Claims Are Nevertheless Barred

Finally, plaintiffs argue that "[c]lass action tolling applies to Plaintiffs' claims even if they were not asserted in *Washington Federal*." Pl. Mot. at 12. As we have demonstrated, class action tolling is not available to plaintiffs at all. Even if it were, however, it would not apply to plaintiffs' new, proposed claim for breach of implied covenant or their claim for breach of regulatory contract because those claims were not advanced by the *Washington Federal* plaintiffs and rest on different factual premises from the claims in *Washington Federal*.

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 of the plaintiffs' preferred or common stock in the Enterprises. *Washington Federal v.*

United States, No. 13-385C, Compl. ¶¶ 200-09. In this case, plaintiffs also advance takings claims substantively identical to the claim in *Washington Federal* that was previously dismissed by this Court, as affirmed by the Federal Circuit, alleging that placing the Enterprises into conservatorship was unlawful. Compl. ¶¶ 106-27; Proposed Am. Compl. ¶¶ 138-91. However, plaintiffs in this case advance, for the first time, an additional claim alleging that Government incentives encouraged community banks to purchase preferred shares in the Enterprises and that these incentives created an implied contract between the United States and plaintiffs. Compl. ¶¶ 29-33, 129-134; *see also* Proposed Am. Compl. ¶¶ 213-21. Further, in the amended complaint, plaintiffs also seek to allege, for the first time, a breach of implied covenants in connection with an alleged contract. Proposed Am. Compl. ¶¶ 192-212. 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 some similar claims, no such tolling would apply to plaintiffs' contract claims. Plaintiffs argue that they are not required to allege claims identical to those in the class action complaint they rely on for tolling purposes because a common factual basis between their complaint and the Washington Federal complaint is all that is required for tolling to apply. Pl. Mot. at 12-13. Plaintiffs' position is not persuasive, even under the test plaintiffs identify, which requires a commonality of evidence and witnesses to permit class action tolling.

The standard plaintiffs cite cautions that the purpose of ensuring that subsequent claims "concern the same evidence, memories, and witnesses as the subject matter of the original class suit" before permitting tolling is to ensure that the defendant will not be prejudiced. *Crown,*

Cork & Seal Co. v. Parker, 462 U.S. 345, 355 (1983) (Powell, J., concurring). Plaintiffs' complaint—and amended complaint—does some allege facts similar to those alleged by the *Washington Federal* plaintiffs. However, the *Washington Federal* takings claim does not "evoke the same 'evidence, memories, and witnesses' as those implicated by Plaintiffs' implied contract claim." Pl. Mot. at 13 (quoting *Crown, Cork & Seal*, 462 U.S. at 355 (1983)). The elements of a contract claim are fundamentally different from those of a takings claim, and require proof of different elements based on different facts—namely, the existence of a contract with the United States, a factual predicate completely distinct from a showing of reasonable, investment-backed expectations. The *Washington Federal* complaint did not put the United States on notice that it would need to address the elements of a breach of contract or implied covenants claim; plaintiffs therefore may not rely on *Washington Federal* to toll the statute of limitations for such claims.

Finally, the cases plaintiffs cite do not support tolling of the statute of limitations in this case. *See* Pl. Mot. at 13. In *In re Community Bank of Northern Virginia*, the Third Circuit stated:

> [Some] [c]ourts have reasoned that, where claims brought in a subsequent suit share a common factual and legal nexus with those brought in the prior class action, there is no persuasive reason for refusing to apply class action tolling, as the defendant will already have received adequate notice of the substantive nature of the claims against it and likely would rely on the same evidence and witnesses in mounting a defense.

622 F.3d 275, 300 (3d Cir. 2010). The court observed (without reaching any conclusion) that, under this theory, the plaintiffs' claims "appear to share a common factual and legal nexus" with claims advanced by class action plaintiffs because "both claims are predicated on defendants' alleged predatory lending scheme and the charging of fraudulent and excessive closing fees." *Id.*

As demonstrated above, the factual and legal predicates for takings claims are different from those of contract claims. Thus, the Third Circuit's observation does not support plaintiffs' argument here that similar factual allegations justify tolling.

In *Tosti v. City of Los Angeles*, the Ninth Circuit permitted tolling where a plaintiff opted out of a prior class action in order to bring her own claims of discrimination. 754 F.2d 1485, 1489 (9th Cir. 1985). Unremarkably, the court determined that the subsequent suit need not "be identical in every respect to the class suit for the statute to be tolled." *Id.* In that case, both the individual and class plaintiffs brought a claim under 42 U.S.C. § 1983 involving "the same allegations that were made in the class suit of a City policy to discriminate against women in the police department during the years 1970 to 1973." *Id.* The court found no prejudice to the defendants. Again, the *Tosti* case does not support plaintiffs' argument here, seeking tolling for claims requiring different evidence, proof of different facts, and completely distinct legal premises.

Finally, in *Cullen v. Margiotta*, the Second Circuit addressed the question of tolling where plaintiffs originally filed a state court class action complaint that was dismissed because it did not set forth a cause of action under state law and because state law did not support class actions. 811 F.2d 698, 704 (2d Cir. 1987). Plaintiffs subsequently alleged the same conduct in a Federal court complaint. *Id.* The Second Circuit determined that any differences between the state law and Federal causes of action were "peripheral." *Id.* at 720-21 (explaining that "peripheral" elements like those that have a bearing on what statute of limitations applies to a claim and that do not require different factual proofs do not undermine the purpose of tolling). Again, this case does not support a finding that a takings claim and a breach of contract claim

"concern the same evidence, memories, and witnesses." *Crown, Cork & Seal*, 462 U.S. at 355 (Powell, J., concurring).

For all of these reasons, plaintiffs' claims are barred by the Court's statute of limitations, and their proposed amended complaint is therefore futile.

B. Plaintiffs' Proposed Takings Claims Suffer From The Same Deficiencies As Those In The Original Complaint

Plaintiffs assert that the amended complaint clarifies their takings claim to establish standing. Pl. Mot. at 6. Plaintiffs' original first count alleged that the imposition of the conservatorships constituted a taking of plaintiffs' shares in the enterprises. Compl. ¶¶ 106-20. In the amended complaint, plaintiffs replace the original takings claim with two new, purportedly direct takings claims: the first alleges that the imposition of the conservatorships constituted a taking of plaintiffs' capital and assets, Proposed Am. Compl. ¶¶ 138-56; and the second alleges that the imposition of the conservatorship constituted a taking of plaintiffs' shareholder rights, protections, and investment-backed expectations, *id.* ¶¶ 157-80. The amended complaint maintains the derivative takings claim on behalf of the Enterprises as Count 3. *Id.* ¶¶ 181-91.

As we demonstrated in our motion to dismiss, plaintiffs failed to allege cognizable takings claims, whether direct or derivative, and the takings claims in the amended complaint suffer from the same deficiency. Moreover, plaintiffs contend that their first two counts are direct claims that assert harm distinct from that of the Enterprises. *Id.* ¶¶ 155, 179. These new takings claims, however, remain substantively derivative claims despite their direct labels, and plaintiffs lack standing to pursue them. Plaintiffs similarly lack standing to pursue their derivative takings claim because the claim belongs to the Enterprises. Finally, plaintiffs' takings claims are barred by the doctrine of issue preclusion.

1. The Proposed Amended Complaint Fails To Allege Cognizable Takings Claims

The amended complaint fails to cognizably state takings claims—whether direct or derivative—as a matter of law. Indeed, the Federal Circuit in *Washington Federal* rejected as a matter of law takings claims substantively identical to those advanced by plaintiffs here. *Washington Federal v. United States*, 26 F.4th 1253, 1265-66 (Fed. Cir. 2022). In *Washington Federal*, the Federal Circuit explained that the plaintiffs could not bring a takings claim that was based on the Government's allegedly unlawful conduct. *Id.* Plaintiffs' takings claims here 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, Inc. v. United States*, 247 F.3d 1355, 1366 (Fed. Cir. 2001)). "[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. Although plaintiffs attempt to soften their allegations of illegality in the amended complaint, the takings claims continue to rest on the premise that the appointment of FHFA as conservator was coerced and unlawful. *See* Proposed Am. Compl. ¶¶ 5, 65, 147-49, 158. 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 [the Housing and Economic Recovery Act of 2008 (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 v. Yellen*, 141 S. Ct. 1761, 1776 (2021); 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. Therefore, plaintiffs' takings claims must be dismissed.

2. The Two "Direct" Takings Claims Are Derivative In Nature And Plaintiffs Lack Standing To Assert Them Directly

In addition, the two direct takings claims pleaded in the amended complaint, like the direct takings claim in the original complaint, are based on the decision to place the Enterprises into conservatorships, and are thus based on alleged harm to the Enterprises. *See* Proposed Am. Compl. ¶¶ 5-7, 149-52, 165-78. They are, therefore, derivative claims that belong to the Enterprises. As the Federal Circuit correctly determined when examining this exact issue in its binding decision in *Washington Federal*, shareholders such as plaintiffs lack standing to bring takings claims on their own behalf based on the imposition of the conservatorships on the Enterprises. 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, as we demonstrated above, plaintiffs' central allegation, even in the amended complaint, is that the *Enterprises* were unlawfully coerced into conservatorships. *See* Proposed Am. Compl. ¶¶ 5-7. Although the value of plaintiffs' shares may have declined as a result of the decision to place the Enterprises into conservatorships, and that decline may have led to plaintiffs' insolvency, that is nevertheless a derivative harm that does not transform their claims into direct claims.

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." *Washington Fed.*, 26 F.4th 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).[2] "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 the 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.; Tooley*, 845 A.2d at 1035-1039.

[2] Because Fannie Mae and Freddie Mac have chosen Delaware and Virginia, respectively, as the applicable state laws, courts have applied the laws of Delaware and Virginia. *See 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).

Here, like the *Washington Federal* plaintiffs, whose factual allegations were nearly identical to those plaintiffs advance in support of their takings claims,[3] plaintiffs' takings 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* Proposed Am. Compl. ¶¶ 152 ("As a direct result of HERA, the conservatorship, and the SPSPAs, the United States destroyed the reasonable investment-backed expectations of the FBOP Subsidiaries and, effectively 'took' the Tier 1 Capital represented by the investments in the GSEs."); 165 ("When the conservatorship was imposed, a succession clause was triggered that took for a public purpose all voting rights, liquidation preferences, and dividend rights that the FBOP Subsidiaries and River Capital obtained by virtue of their ownership of the preferred shares…"). 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

[3] By contrast, as we explain above, plaintiffs' contract claims rest on factual allegations not similar to those advanced in *Washington Federal*.

assert their substantively derivative claim as a direct takings claim." *Washington Fed.*, 26 F.4th at 1268.

Plaintiffs' attempts to reframe their claims and allege that they suffered harms distinct from those suffered by the Enterprises, Proposed Am. Compl. ¶¶ 155, 179, are unavailing. Moreover, 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.").

In the amended complaint, plaintiffs continue to 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[.]" Proposed Am. Compl. ¶ 179. The allegation itself admits that the source of the alleged harm is the diminution in share value. That this diminution in share value led plaintiffs' subsidiaries into receivership is of no moment to the legal analysis of whether the reduced share value itself was direct or derivative. Diminution in the share value is an indirect

harm to shareholders and, thus, they may not bring direct claims based thereon. *Gaff*, 814 F.2d at 318.

Plaintiffs "direct" takings claims are thus derivative in nature, and plaintiffs lack standing to pursue them.

3. Preclusion Bars Plaintiffs' Takings Claims

As we have explained above, the Federal Circuit has already found that takings claims substantively identical to those plaintiffs present here fail on the merits as a matter of law. *Washington Fed.*, 26 F.4th at 1263-66. Plaintiffs here, 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.

"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 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 claims in plaintiffs' amended complaint 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' proposed takings 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, the Federal Circuit concluded that the takings and illegal exaction claims in *Washington Federal*, which are substantively identical to the takings claims in this case, failed on the merits as a matter of law. *Id*. at 1265-66; *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."). In *Washington Federal*, the plaintiffs alleged that the imposition of the conservatorships "destroyed the rights and value of the property interests tied to the common and preferred stock of the [Enterprises] held by Plaintiffs and the Classes, [and] nullified their reasonable, investment-backed expectations[.]" *Washington*

Federal v. United States, No. 13-385C, Compl. ¶ 201. They further alleged that the Government improperly took all of the Enterprises net worth. *Id.* ¶ 206. Similarly, here, plaintiffs allege that the Government, through imposition of the conservatorships, destroyed the investment-backed expectations of the shareholders, took their capital (represented by their shares), took all of the rights associated with those shares, and took the net worth of the Enterprises. *see* Proposed Am. Compl. ¶¶ 152, 158, 190.

Because plaintiffs' takings 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 1299-1300; *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.").

4. Plaintiffs Lack Standing To Assert Derivative Claims

Finally, plaintiffs also lack standing to assert their derivative takings claim. HERA 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)(i). 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 Capital LLC v. Mnuchin*, 864 F.3d 591, 623 (D.C. Cir. 2017) (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).

Plaintiffs here allege that they have standing to bring derivative claims on behalf of the Enterprises because a conflict of interest prevents the Enterprises from bringing suit themselves. Proposed Am. Compl. ¶ 182. In *Fairholme Funds, Inc. v. United States*, this Court read into HERA's Succession Clause a conflict-of-interest exception permitting a derivatively-pled challenge to 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. 1, 49-51 (2019), *aff'd in part and rev'd in part*, 26 F.4th 1274 (Fed. Cir. 2019). Respectfully, the Court was mistaken, for two principal reasons.

First, 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 FHFA, 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). 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). The inclusion of an "express exception"

generally precludes the recognition of additional "implicit" exceptions. *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 844 (2018). 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.

Because the Succession Clause's language and purpose are "clear and absolute," *Roberts*, 889 F.3d at 409, an implied 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 is focused on the conservatorship or receivership of the two Enterprises central to the United States housing market, which were themselves created by Congress and 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).

Second, issue preclusion bars 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 of 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," and bars 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. Plaintiffs therefore lack standing to pursue derivative claims on behalf of the Enterprises.

For all of these reasons, plaintiffs proposed takings claims would not survive a motion to dismiss.

C. Plaintiffs' Proposed Claims For Breach Of Implied Covenants And Breach Of Implied Regulatory Contract Fail Because The Proposed Amended Complaint Fails To Plausibly Allege A Contract With The United States

Finally, plaintiffs' claims for breach of implied covenants and breach of implied regulatory contract fail to plausibly allege the existence of contracts with the United States.

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). The amended complaint seeks to add a claim for breach of implied covenants based on a purported contract between shareholders and the Enterprises based on the Enterprises' bylaws and plaintiffs' shares. Proposed Am. Compl. ¶ 195.

Plaintiffs allege that "the imposition of the conservatorship put the Government in privity with the FBOP Subsidiaries with respect to the GSE bylaws and preferred share certificates." *Id.* ¶ 196; *see also id.* ¶ 207. However, the Federal Circuit has already rejected this "creative" argument. *Fairholme*, 26 F.4th at 1295.

In *Fairholme*, one plaintiff presented claims nearly identical to those plaintiffs seek to add here, alleging that "his stock certificates established a contract between shareholders and the Enterprises guaranteeing him certain rights to dividends, liquidation preferences, and voting rights, and contained an implied covenant of good faith and fair dealing." *Id.* at 1294-95. The plaintiff further argued that "[b]ecause HERA states that FHFA 'shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of [the Enterprises],' . . . the conservatorship caused the FHFA to succeed to the Enterprises' contractual obligations." *Id.* at 1295.

In rejecting this argument, the Federal Circuit explained that FHFA "retains its governmental character whenever it interprets federal law to undertake an action," but not where it undertakes private commercial activity. *Id.* The Federal Circuit concluded that "FHFA does not retain its governmental character" in succeeding to the Enterprises' contractual obligations. *Id.* The court further explained that the plaintiff's allegations confirmed that "FHFA's succession to the Enterprises' obligations only involves interpreting contractual terms, not federal law." *Id.* at 1296. Thus, the plaintiff shareholder was not in privity of contract with the United States. *Id.*

In the final count of the amended complaint, plaintiffs maintain their claim from the original complaint alleging the existence of an "implied regulatory contract" with the United

States. Proposed Am Compl. ¶¶ 213-21. This claim fails as a matter of law, as we demonstrated in our motion to dismiss. Def. Mot. to Dismiss, ECF No. 16, at 32-36.

"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). Therefore, to the extent plaintiffs allege a contract implied in law, the Court lacks jurisdiction to consider it.

To the extent that plaintiffs allege a contract implied in fact, they have failed to allege a plausible contract with the United States. "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.* at 193-94.

Plaintiffs offer no support for their "implied regulatory contract" theory in their amended complaint or motion for leave to amend. 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).

In addition, 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 "regulatory 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 asks this Court to infer that the regulations governing Enterprise stock were so favorable that they amounted to a "promise that the [Enterprises'] preferred shares would be as safe as secure as cash[.]" Proposed Am. Compl. ¶ 216. Such "[t]hreadbare recitals" of the Government's "offer" and the plaintiffs' alleged "acceptance" are not assumed to be true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). 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.").

As demonstrated, plaintiffs' contract claims would not survive a motion to dismiss, and are therefore futile.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny plaintiffs' motion for leave to file an amended complaint.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

PATRICIA M. McCARTHY
Director

OF COUNSEL:

s/ Elizabeth M. Hosford
ELIZABETH M. HOSFORD
Assistant Director

FRANKLIN E. WHITE, JR.
Assistant Director

RETA E. BEZAK
Senior Trial Counsel

s/ Anthony F. Schiavetti
ANTHONY F. SCHIAVETTI
Senior Trial Counsel
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
PO Box 480, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 305-7572
anthony.f.schiavetti@usdoj.gov

MARIANA T. ACEVEDO
Trial Attorney

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Attorneys For Defendant