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 AMENDED COMPLAINT

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DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

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 amended complaint filed by plaintiffs, Michael E. Kelly, FBOP Corporation, River Capital Advisors, Inc., *et al*., 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 amended 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. The Director of 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 their original complaint in 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 last year rejected takings claims substantively indistinguishable from the takings claims asserted here 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 contract claims or facts similar to those that plaintiffs allege in support of their breach of contract claims, which therefore could not benefit from tolling.

Even if their claims were not barred, 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 conservatorships, 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 conservatorships, 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.

Moreover, 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. HERA bars shareholders such as plaintiffs from bringing derivative suits.

Finally, plaintiffs' contract claims fail 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' amended 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' claims when they were filed more than six years after the claims accrued.

2. Whether the amended complaint states a claim for a taking when: (1) it impermissibly rests on the premise that the imposition of the conservatorships 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 conservatorships.

3. 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.

4. Whether preclusion principles bar plaintiffs from litigating their takings claims.

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

6. Whether the amended 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 Fannie Mae in 1938 and Freddie Mac in 1970. Amended Compl., ECF No. 30, ¶ 24; *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. Am. Compl. ¶¶ 24, 25; *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. Am. Compl. ¶ 24; *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. Am. Compl. ¶ 24; *see also Collins*, 141 S. Ct. at 1771.

Over the years, both Enterprises issued multiple series of preferred and common stock. Am. 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. *Id.*; Am. Compl. ¶ 52. 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; Am. Compl. ¶ 61.

HERA also authorized FHFA's Director to appoint FHFA as conservator or receiver of the Enterprises. 12 U.S.C. § 4617(a); Am. Compl. ¶ 61. FHFA exercised this authority on September 6, 2008, placing both Fannie Mae and Freddie Mac into conservatorships. Am. Compl. ¶ 63; *Collins*, 141 S. Ct. at 1772. The board of directors for each Enterprise consented to the conservatorships. Am. Compl. ¶ 70. 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. Am. Compl. ¶ 89; *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

[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.

Senior Preferred Stock, Series 2008-2 § 2(c);[2] *see also Collins,* 141 S. Ct. at 1773*;* Am. Compl. ¶ 89. The PSPAs suspended the payment of dividends to any entity other than Treasury without Treasury's prior approval. Am. Compl. ¶ 100; PSPA § 5.1.

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

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*, 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 this Court'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

[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).

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* resolved that issue against the plaintiffs. *Washington Fed.*, 26 F.4th at 1266. 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 Federal Circuit 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, and set a schedule for further proceedings, ECF No. 14.

In their original complaint, plaintiffs challenged the 2008 decision of the Director of

[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), *cert. denied sub nom. Barrett v. United States*, 143 S. Ct. 562 (2023), and *cert. denied sub nom. Owl Creek Asia I, L.P. v. United States*, 143 S. Ct. 563 (2023), and *cert. denied sub nom. Cacciapalle v. United States*, 143 S. Ct. 563 (2023), and *cert. denied,* 143 S. Ct. 563 (2023). These appeals concerned shareholder challenges to the third amendment to the PSPAs, which Treasury and FHFA as conservator adopted four years into the conservatorships. 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. Bancorp*, 15 F.3d at 1074). The appellants in *Fairholme* did seek review by the Supreme Court; their petition for a writ of certiorari was denied on January 9, 2023. *Id.*; 143 S. Ct. 563 (2023).

FHFA to place the Enterprises into conservatorships. 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, the United States filed a motion to dismiss plaintiffs' original complaint for lack of subject matter jurisdiction and failure to state a claim on which relief can be granted. 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 United States opposed the filing of an amended complaint on the grounds that amendment would be futile, as the amended complaint could not survive a motion to dismiss. ECF No. 26. On May 11, 2023, the Court granted plaintiffs' motion, "without prejudice to the Government's

dispositive arguments on futility grounds in opposition to the Motion to Amend the Complaint which are best left for a renewed motion to dismiss." Order, ECF No. 29. On the same day, plaintiffs filed the amended complaint. ECF No. 30.

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, Am. Compl., ECF No. 30, ¶¶ 138-56, and the second alleging that the conservatorships 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, *id*. ¶¶ 213-221, the amended complaint adds a claim alleging breach of implied covenants in the Enterprises' bylaws and preferred shares, *id.* ¶¶ 192-212.

ARGUMENT

I. Standard 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. The 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 acknowledged—at least for purposes of that 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 argued, 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.

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.*, 457 F.3d at 1355-56.

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 their original complaint in this case 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 first brought 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. Am. Compl. ¶ 12. Plaintiffs are wrong, for several reasons. First, recent Supreme Court precedent makes 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. Am. Compl. ¶ 12. 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. 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 members to the class. *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. The Federal Circuit, however, 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 Court expressly left unanswered "whether tolling would be allowed where class certification was sought after expiration of the limitations period." *Id.* at 1290 n.9.

Explaining its conclusions, the Federal Circuit explained that class action tolling was statutory in nature 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 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.

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

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 in the negative, under facts similar to those in this case. *Big Oak Farms, Inc. v. United States*, 141 Fed. Cl. 482, 493 (2019). In *Big Oak Farms*, the plaintiffs filed a class action complaint prior to expiration of the statute of limitations period, but 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.*

In their motion for leave to amend their complaint, plaintiffs ignore entirely the Court's decision in *Big Oak Farms*. Plaintiffs instead draw on two of this Court's much earlier decisions interpreting *Bright* to 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. to Amend, ECF No. 25, 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.

In both of those cases, however, the plaintiffs eventually filed class certification motions and the Court 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.

Moreover, in the Court's more recent decision in *Big Oak Farms*, it 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." *Big Oak Farms*, 141 Fed. at 493. 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.

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

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 conservatorships 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 conservatorships was unlawful. Am. Compl. ¶¶ 138-91. However, plaintiffs in this case advance 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. Am. Compl. ¶¶ 213-21. Further, in the amended complaint, plaintiffs also allege, for the first time, a breach of implied covenants in connection with an alleged contract. 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 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. to Amend, ECF No. 25, 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*, 462 U.S. at 355 (Powell, J., concurring). Plaintiffs' amended complaint does allege some 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. to Amend at 13 (quoting *Crown, Cork & Seal*, 462 U.S. at 355). 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 cited in their motion for leave to amend their complaint do not support tolling of the statute of limitations in this case. *See* Pl. Mot. to Amend 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 should be dismissed.

III. Plaintiffs Fail 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. 26 F.4th at 1265-66. 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*, 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. 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* Am. Compl. ¶¶ 5, 65, 147-49, 158. Such a claim is not plausible under binding law.

Moreover, 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*, 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.

IV. The Two Purportedly 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* 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. 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).[4] "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

[4] 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).

of any injury to the corporation and would receive the recovery, the suit is direct. *See id.; Tooley*, 845 A.2d at 1035-1039.

Here, like the *Washington Federal* plaintiffs, whose factual allegations were nearly identical to those plaintiffs advance in support of their takings claims,[5] 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* 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

[5] 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' allegations that they suffered harms distinct from those suffered by the Enterprises, 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*, 15 F.3d at 1073-75); *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[.]" 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.

V. 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, 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. 880, 892 (2008) (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' 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. 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; *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.").

VI. Plaintiffs Lack Standing To Assert Derivative Claims

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*, 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).

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. Am. Compl. ¶ 182. In *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1 (2019), 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).[6] 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.

[6] The Federal Circuit reversed this finding of the Court of Federal Claims with regard to non-constitutional claims, holding that a shareholder was "collaterally estopped from re-litigating whether HERA's Succession Clause bars his non-constitutional derivative claims." *Fairholme*, 26 F.4th at 1300. The Federal Circuit declined to extend collateral estoppel to the constitutional derivative claims in that case, but did not substantively reach the issue of whether the Succession Clause bars shareholders from bringing derivative constitutional claims. *Id*. at 1301-04. Instead, it held that those claims failed as a matter of law on other grounds. *Id*.

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. 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 229-30. Plaintiffs, therefore, may not relitigate that issue here. *See Taylor*, 553 U.S. at 892. 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.

We acknowledge that 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.* Respectfully, however, and to preserve this issue in the event of further review, we disagree. Issue preclusion applies "even if the issue recurs in the context of a different claim." *Taylor*, 553 U.S. at 892. The legal "issue" in question is whether HERA's Succession Clause bars shareholders from bringing derivative claims on behalf of the Enterprises. The district court in *Perry Capital* held that it does, barring relitigation of that question by shareholders here. 70 F. Supp. 3d at 229-30. The legal issue is the same whether it arises in the context of a constitutional or non-constitution claim, so preclusion applies in either instance. Plaintiffs, therefore, lack standing to pursue derivative claims on behalf of the Enterprises.

VII. Plaintiffs' Claims For Breach Of Implied Covenants And Breach Of Implied Regulatory Contract Fail Because The 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 adds 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. 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. The Federal Circuit, however, has already rejected this "creative" argument. *Fairholme*, 26 F.4th at 1295.

In *Fairholme*, one plaintiff presented claims nearly identical to those plaintiffs advance 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. Am Compl. ¶¶ 213-21. This claim fails as a matter of law.

"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. 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[.]" Am. Compl. ¶ 216. 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.").

Plaintiffs' contract claims, therefore, should be dismissed.

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 can be granted.

Respectfully submitted,

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