IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL E. KELLY, *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

No. 21-1949C
Judge Kathryn C. Davis

HEARING REQUESTED

PLAINTIFFS' OPPOSITION TO GOVERNMENT'S MOTION TO DISMISS AMENDED COMPLAINT

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I. INTRODUCTION

The Government "taking" at the heart of this case is unique. It is unlike any of the GSE shareholder cases that have come before, including *Washington Federal v. U.S.,* 26 F.4th 1253 (Fed. Cir. 2022). And its magnitude is unprecedented.

Mere months before a growing economic calamity reared its head in the summer of 2008, the Government encouraged, induced, and financially incentivized Plaintiff Banks to invest upwards of $900 million of their Tier 1 Capital cash reserves into Fannie Mae and Freddie Mac (the GSEs). This investment was made in exchange for the Government's continued treatment of those stock holdings as each bank's regulatory Tier 1 Capital, as good as gold—the same as cash and U.S. Treasury bonds. Without the Government's guarantee of such treatment, the investments in the GSEs simply could not have—and would not have—been made. To do so would have been suicidal: the exposed risk of losing not just the Tier 1 Capital they invested, but the entirety of the banks' assets and the banks themselves by insolvency.

Periodic Government reviews, time and again, confirmed that the Plaintiffs' ownership interest in the GSEs was Tier 1 Capital for purposes of regulatory and solvency valuations. Government regulators continued to treat it as such, and, counting the GSE stock as Tier 1 Capital, certified that each Plaintiff Bank met solvency requirements. Never once was a concern expressed by Government regulators. The Plaintiff Banks received unqualified approval from the prudential Government supervisors mandated to ensure America's banks operate in a safe, sound, and compliant manner. Thus, Plaintiffs' investments in the GSEs were not merely the equivalent of, but *were*, in fact, Tier 1 Capital for purposes of complying with federal banking solvency requirements.

By September 2008, facing the worst financial crisis since the Great Depression—brought upon by the avalanche of distressed mortgage assets plaguing the banking industry and threatening massive bank failures—the Government, including the U.S. Secretary of the Treasury, the Chairman of the Federal Reserve, and the Director of the Federal Housing Finance Agency (FHFA), took direct action, specifically approved by the President of the United States, to alleviate the crisis and preserve the U.S. banking system and economy.

That plan included a complete Government takeover of the solvent and profitable GSEs—using a conservatorship as the manner and mechanism. The Government then managed and used the GSEs to avert an economic meltdown by keeping mortgage financing available, which stabilized markets and protected taxpayers: a Government taking for the benefit of a critical and clearly public purpose. However, when the Government assumed control of the GSEs, it seized Plaintiffs' Tier 1 Capital as well, leaving the Plaintiff Banks insolvent. Once insolvent, the Government put the banks into receivership, thereby taking all of the remaining assets of the Plaintiff Banks as well.

But no matter how benevolent the public purpose, the Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela Nav. Co. v. U.S.*, 148 U.S. 312, 325 (1893).

Despite singlehandedly—and involuntarily—forfeiting their privately owned property for the greater public good to save the U.S. economy, Plaintiffs have yet to be justly compensated for their sacrifice. The glaring injustice here is that Plaintiff Banks were solvent, and held no distressed assets or failing sub-prime mortgages, because they never engaged in such risky

practices. Yet, the Government took them, and caused them to sacrifice everything, to save a financial system on the brink of ruin caused by others who lacked the same moral and fiscal responsibility.

This case exemplifies the Fifth Amendment of the Bill of Rights. Neither this Court—nor *any* court for that matter—has encountered a case like this.[1]

The Government's Motion to Dismiss must be viewed in light of these facts and under the appropriate legal standards. When applied, the Motion fails in several respects.

First, as a threshold matter, the Government attempts to twist and turn Plaintiffs' allegations to shoehorn them into the Federal Circuit's decision in *Washington Federal.* Like *Washington Federal*, Plaintiffs' claims are foundationally rooted in the Government's assumption of control and ownership of the GSEs. But Plaintiffs' unique regulatory relationship with the Government—one that predated the imposition of the conservatorship takeover—means that Plaintiffs' claims are different and distinct and are not bound by the findings made by the *Washington Federal* court. This case is about direct harm to the Plaintiffs, not to the GSEs. And, contrary to the Government's inaccurate conclusions, Plaintiffs are not alleging that the imposed conservatorship was illegal. *Washington Federal* does not preclude this action.

Second, the Government argues that all of Plaintiffs' claims are untimely under the Tucker Act's six-year statute of limitations. But Plaintiffs' claims were tolled during the pendency of a putative class action that was dismissed prior to class certification; the instant action was timely filed upon dismissal of that unsuccessful case, well within the limitations

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[1] Plaintiffs can find no comparable set of facts where the Government has approved, encouraged and financially incentivized a bank to contribute its critical Tier 1 Capital to an investment in another entity, and then later takes over ownership of that entity and all of its assets, making the bank's Tier 1 Capital worthless, thereby driving the bank into insolvency.

period. This concept, known as "class action tolling," was solidified by, and has been widely accepted in the wake of, the Supreme Court's decision in *American Pipe & Constr. Co. v. Utah* and its progeny. This action is timely filed.

Third, the Government ignores Plaintiffs' direct taking claim, which plainly alleges a violation of their Fifth Amendment right to just compensation for the taking of their private property for public purposes. Plaintiffs' Amended Complaint clearly and properly alleges the factual precepts for the taking of a compensable private property interest as confirmed by the United States Supreme Court, most specifically and directly on point in *Armstrong v. U.S.*, 364 U.S. 40 (1960).

Fourth, the Government relies upon factually intensive arguments inappropriate at this stage, and its Motion reads as one for summary judgment. Plaintiffs need not definitively prove their case (or disprove all of the Government's possible defenses) at this juncture; they merely need to plausibly plead harm as a result of the Government's conduct. *See Tyler v. Hennepin Cnty., MN*, __ U.S. __, 143 S. Ct. 1369, 1374-75 (2023). Fifth, the Government treats the Amended Complaint as claiming a shareholder's derivative action, which it does not. The Government again relies almost entirely on *Washington Federal*, which is a very different case with very different claims. Applying the proper facts and law, Plaintiffs' takings claims are direct and not derivative, and Plaintiffs have standing to bring them.

Sixth, the Government argues that Plaintiffs have failed to show that it was a counterparty to an implied-in-fact contract and have failed to establish that the Government was in privity with the GSEs. In doing so, the Government ignores the detailed facts in the Amended Complaint that establish that the Government was indeed a counterparty to an implied-in-fact contract and, by governmental actions, placed itself in privity under the GSEs' charters and

bylaws and by its actions that were governmental in character. The Government fails to address these facts, but cannot evade them.

II. SUMMARY OF RELEVANT FACTUAL ALLEGATIONS

The Government's motion, unsurprisingly, focuses on Plaintiffs' allegations related to the creation of the GSEs and the 2008 conservatorship; it conveniently omits Plaintiffs' allegations related to the background and structure of the Plaintiff Banks, and the Government's actions prior to the imposition of the conservatorship. But those allegations are crucial to understanding the taking and implied contract alleged by Plaintiffs.

A. Plaintiffs Michael Kelly, FBOP Corporation and FBOP Subsidiaries

In 1981, Plaintiff Michael Kelly formed an investment group that acquired First Bank of Oak Park, and he became its President and CEO. ECF 30, Amended Complaint ("FAC") ¶ 18. Five years later, Mr. Kelly formed FBOP Corporation ("FBOP"), a community bank holding company with Mr. Kelly as the sole common shareholder. *Id.* By that point, First Bank of Oak Park's worth had doubled, and it was frequently rated first in Illinois based upon its return on assets and equity. *Id.* FBOP acquired 100% of First Bank of Oak Park. *Id.*

Plaintiff River Capital Advisors, Inc. ("River Capital") is a non-bank subsidiary wholly owned by FBOP. FAC ¶ 15. Mr. Kelly was and remains the sole common shareholder of FBOP, which was sole common shareholder of the FBOP subsidiaries and River Capital. FAC ¶ 14.

In the 1990s, FBOP expanded and developed significant expertise in restructuring loans during economic crises. FAC ¶ 19. FBOP purchased failed assets from banks that the FDIC closed and worked with individual loan holders to create realistic payment plans. *Id.* Through these successful workout strategies, FBOP helped rehabilitate communities struggling with economic crises. *Id.*

FBOP recorded twenty-five consecutive years of profits and grew from a $60 million community bank in 1981 to a large multi-bank holding company with nine subsidiary banks, all Plaintiffs in this matter (the "FBOP Subsidiaries" or "Plaintiff Banks"). FAC ¶¶ 16, 20. Together, FBOP and the FBOP Subsidiaries owned $19.4 billion in assets and operated 150 branches, approximately one-third serving low- to moderate-income communities. *Id.* at ¶ 20. FBOP became the largest privately held bank holding company in the country and employed approximately 2,400 people. *Id.*

The Plaintiff Banks never engaged in subprime lending, predatory lending, or excessive executive compensation; FBOP did not once pay a common stock dividend to its sole common shareholder, Michael Kelly. All profit was reinvested in the banks or the community. *Id.* at ¶ 23.

B. <u>Government's Enticement to Invest Tier 1 Capital in GSEs</u>

Created to provide increased liquidity and stability to the secondary mortgage market by securitizing mortgage loans as mortgage-backed securities, Fannie Mae and Freddie Mac (the "GSEs") were originally chartered by Congress. FAC ¶¶ 24, 25. The GSEs were for-profit, publicly traded companies on the New York Stock Exchange until June 2010. *Id.* at 25.

The Office of Federal Housing Enterprise Oversight ("OFHEO") was the chief regulator of the GSEs tasked with ensuring the GSEs were adequately capitalized and operating safely; in 2006, the OFHEO imposed increased capital requirements on the GSEs totaling approximately $36 billion ("2006 Consent Agreements"). FAC ¶¶ 29-32. To meet these requirements, the GSEs issued a new series of preferred shares of stock. In order to quickly attract interest in GSE preferred shares, it was necessary to create a market that would specifically appeal to banks, like Plaintiffs, with cash reserves available to recapitalize the GSEs. *See id.* at ¶ 32.

The Government created strong regulatory incentives targeted to induce banks to invest

heavily in the GSEs in order to accomplish its recapitalization goals. FAC ¶ 33. These incentives were established and promulgated by the Treasury, the OCC, the OTS, the Federal Reserve, the FDIC, and the IRS and included the following: (1) Banks were permitted to invest, "without limitation up to 100% of Tier 1 Capital," in GSE preferred share. Normally, banks were not allowed to invest in equity investments other than U.S. Treasury bonds; (2) IRS rules were amended to provide the Banks an unheard of 70% tax deduction on GSE preferred share dividends; and (3) the OCC assigned a 20% capital risk-weight for GSE shares—the same weight applicable to Treasury Bonds, AAA rated investments, and cash, based upon the "unique government relationship with Fannie Mae and Freddie Mac [and] to reflect the quasi-governmental nature of the entities." Most other investments were assigned a 50% or 100% risk weighting. *Id.* at ¶ 34.

"Tier 1 Capital" is defined as a bank's core capital—the minimum adequate reserves determined to be needed by a bank to function on a regular basis. FAC ¶ 36. Tier 1 Capital includes cash reserves and approved equity capital as the basis for evaluating a financial institution's strength. *Id.* Tier 1 Capital must be available when banks need it and is highly monitored and scrutinized by banking regulators. *Id.*

As the key regulator, the FDIC permitted, encouraged, and approved banks to invest up to 100% of their Tier 1 Capital in GSE preferred shares. FAC ¶ 36. Other investments, as a class, were generally restricted to a limit of 10% of Tier 1 Capital. *Id.* Furthermore, at the time that the Plaintiffs made their investments in GSE preferred shares, the FDIC publicly stated that these investments did not represent a significant risk to the Deposit Insurance Fund (*see* 12 CFT 362.3(b)(2)(iii)): GSE preferred shares were rated "AA-" by S&P; "A1" by Moody's; and "A+" by Fitch, all considered relatively risk-free. *Id.* at ¶ 35.

Given the existing regulatory requirements for maintaining sufficient levels of approved Tier 1 Capital, and the extreme consequences of a bank's failure to do so—insolvency—the Government incentives and approval to invest up to 100% of a bank's Tier 1 Capital in GSE preferred shares was a unique and significant regulatory and policy decision by the FDIC. FAC ¶ 37.

The FBOP Subsidiaries relied on the FDIC's affirmation that up to 100% of their Tier 1 Capital requirements could be satisfied by an investment in GSE preferred shares. FAC ¶ 37. Plaintiff California National Bank ("CNB") (which held the largest investment in GSE preferred shares of Plaintiffs), was assigned a full-time on-site OCC examiner, who encouraged CNB to invest in GSE shares, highlighting the advantages provided by banking regulations and the implied guarantee of the U.S Government. FAC ¶ 43. That OCC regulator, fully aware of CNB's newfound reliance on GSE stock as Tier 1 Capital, never raised a single concern. *Id.* Regulators reviewed and repeatedly affirmed, certified, and approved the investments in GSE preferred shares as Tier1 Capital. FAC ¶¶ 43,50. Mr. Kelly testified before Congress that he never would have allowed Plaintiff Banks to invest so much of their then-existing Tier 1 Capital cash and U.S. Treasury bond reserves in the GSEs but for the Government's inducement and continued approval. FAC ¶¶ 44-45.

The statements and actions taken through its various agencies, including tax incentives, the exception to existing regulatory requirements, the published rating-weight given to the GSE preferred shares, and the approval by regulators of the banks' purchase of high percentage levels of Tier 1 Capital—and the potential catastrophic insolvency risk associated with the loss of Tier 1 Capital—together represented the offer, consideration, and acceptance that formed an implied contract by which the Government would refrain from regulatory or other activity that would

vitiate the value of the GSE preferred shares purchased by Plaintiffs. FAC ¶¶ 34-46. These Government induced transactions significantly benefitted the GSEs in providing the much-needed liquidity to recapitalize the GSEs. *Id.* at ¶ 38. The Government and public significantly benefitted by avoiding the need to otherwise fund the required GSE liquidity. *Id.*

Accepting the Government's offers and incentives in late 2007 and early 2008, the FBOP Subsidiaries and River Capital purchased GSE preferred shares having a Combined Net Book Value of $898,448,392. FAC ¶ 46.

C. <u>The 2008 Conservatorship</u>

The "taking" alleged by Plaintiffs was carefully planned and meticulously executed. At the height of the worst financial crisis since the Great Depression, as an avalanche of distressed mortgage assets besieged the banking industry and threatened massive bank failures, the U.S. Secretary of the Treasury and the Chairman of the Federal Reserve, with the Director of the Federal Housing Finance Agency (FHFA), devised a plan, explicitly approved by the President of the United States, to alleviate the crisis and safeguard the U.S. banking system and economy at "breakneck speed." *See* FAC ¶ 63.

The plan was both swift and straightforward: by imposing a conservatorship on the GSEs, the FHFA took total and complete control, ownership, title and interest of and all assets of the GSEs. FAC ¶¶ 63-93.

On September 4, 2008, the FHFA wrote to the boards of the GSEs and informed them that they were undercapitalized and required immediate recapitalization. FAC ¶ 69. The very next day, on September 5, 2008, Paulson, Bernanke, and Lockhart, representing government action by the President of the United States, met with GSE representatives and directed them to consent to conservatorship. If they did not agree, the Government "would seize them." *Id.*

According to Secretary Paulson, the GSE Boards did not resist. FAC ¶ 70. On September 6, 2008, the GSE Boards met with Treasury and the FHFA and provided consent to conservatorship. *Id.* Daniel Mudd, the former CEO of Fannie Mae, has stated that "we were given 24 hours to accede to a government takeover—or else the government would effectively go to war against the company." Mr. Mudd made clear that the GSEs were not afforded any opportunity to address the Government's concerns. Rather, as detailed by the FCIC, the Government's plain goal "was really to force conservatorship." *Id.*

At the time conservatorship was imposed, Fannie Mae's excess core capital was $9.4 billion, and Freddie Mac's was $2.7 billion. FAC ¶ 74. FHFA Director Lockhart later admitted to the FCIC that "[Fannie Mae] was adequately capitalized the day we put them into conservatorship." *Id.* Once in control, the Treasury infused massive amounts of liquidity to keep mortgage financing available, stabilize markets and protect American taxpayers, and thereby successfully averted a meltdown of the U.S. economy. FAC ¶ 89.

On September 7, 2008, the conservator transferred his authority and exclusive right to terminate the conservatorship under HERA to the Department of Treasury. FAC ¶ 90. This direct action was, in effect, a nationalization of the GSEs. *See* FAC ¶¶ 6, 67.

D. The Government's Conduct Caused the Failures of FBOP and Subsidiaries

Through this forced "nationalization," the GSEs stopped operating for the benefit of their shareholders, and the Government took for a public use the rights, protections, and duties that adhered to the ownership of the GSE preferred shares. As of September 2008, the FHFA, as conservator, succeeded to all of the power and authority of the Board of Directors, management and the shareholders (FAC ¶ 165); the conservator delegated authority to a newly constituted Board of Directors (FAC ¶¶ 143, 182); the conservator retained overall management authority

(FAC ¶ 165); and shareholders no longer had voting rights (FAC ¶ 165).

The conservator transferred to Treasury the authority to end the conservatorship and then proceeded to restructure the GSEs so that the Government controlled management of the GSEs and redirected the GSEs' focus from maximizing shareholder value to providing liquidity, stability, and affordability in the mortgage market. FAC ¶¶ 78-93. As a result of this taking, any investment in the GSEs that were a part of a bank's Tier 1 Capital evaporated. FAC ¶¶ 101, 107.

As a result of this loss of Tier 1 Capital, seven of the nine Plaintiff Banks were unable to meet their capital requirements and the Government placed them into receivership. FAC ¶¶ 114, 127. While the other two FBOP subsidiary Plaintiff Banks remained solvent, the Government invoked a rarely used authority to place them in receivership as well. FAC ¶ 128. The result was that the Government took all of the assets of all of the Plaintiff Banks. FAC ¶¶ 129-130.

III. <u>PROCEDURAL POSTURE</u>

Prior to the filing of this case, a putative class filed *Washington Federal v. United States* in this Court on June 10, 2013. *See* No. 1:13-cv-00385, ECF No. 1.[2] The proposed classes included pre-conservatorship shareholders of both common and preferred stock of the GSEs. *Id.* at ¶ 192.

The Court stayed proceedings in *Washington Federal* pending the completion of jurisdictional discovery in a related case, *Fairholme Funds, Inc. v. United States. See* No. 1:13-cv-00465, ECF Nos. 1, 43-46. The Court lifted that stay on January 12, 2018, and issued a scheduling order, requiring plaintiffs to file an amended complaint and set a briefing schedule for

[2] The Government is well aware that the Court stayed *Washington Federal* for the better part of a decade pending the outcome of other GSE cases, yet conveniently omits the procedural background relevant to its class action tolling arguments, opting instead to aver obliquely that "Plaintiffs' claims…were brought more than 13 years after they accrued." ECF No. 31 at 2.

the Government's anticipated motion to dismiss. ECF No. 53. After hearing argument on the Government's motion to dismiss, the Court again stayed *Washington Federal* pending the conclusion of *Fairholme.* ECF No. 82.

On July 16, 2020, the Court made its order granting the Government's motion to dismiss public. ECF No. 100. The *Washington Federal* plaintiffs timely filed an appeal. ECF No. 101.

Following dismissal of *Washington Federal*, and prior to disposition on appeal, Plaintiffs filed their original Complaint in this case on October 1, 2021. ECF No. 1. Plaintiffs have consistently alleged that the proposed class action in *Washington Federal* tolled their individual claims between the date *Washington Federal* was filed (June 10, 2013) and the date the court in *Washington Federal* dismissed the action (July 16, 2020). FAC ¶ 12; ECF No. 1, ¶ 102.

On November 24, 2021, the parties filed a joint motion to stay this case pending the disposition of the *Washington Federal* appeal, which was granted on November 29, 2021. ECF Nos. 7, 8. On February 22, 2022, the Federal Circuit affirmed the judgment of dismissal. *See Washington Fed. v. United States*, 26 F.4th 1253 (Fed. Cir. 2022). The *Washington Federal* plaintiffs did not seek further review. After the Federal Circuit's decision, this Court lifted its stay of this case and issued an amended schedule, and extended it once, to address Plaintiffs' continuing need to obtain new legal counsel. ECF Nos. 11-14.

On December 16, 2022, the Government moved to dismiss Plaintiffs' original Complaint. ECF No. 16. New counsel for Plaintiffs filed unopposed motions to substitute in on January 20, 2023 and January 25, 2023, which was granted on January 26, 2023. ECF Nos. 19-22. On March 3, 2023, Plaintiffs filed an Unopposed Motion for a Scheduling Order related to Plaintiffs' anticipated Motion for Leave to Amend—which was granted on March 6, 2023. ECF Nos. 23, 24.

Plaintiffs filed their Motion for Leave to Amend on March 6, 2023, and the Government filed its Response on April 21, 2023. ECF Nos. 25, 26. The Government's Response raised many, if not all, of the same issues contained in its prior Motion to Dismiss. *Compare* ECF No. 16 with No. 26. Accordingly, the parties conferred and agreed to request that the Court consider the Government's Response as a Motion to Dismiss the Proposed Amended Complaint. *See* ECF No. 27. This Court then ordered a telephonic conference during which the Court granted Plaintiffs' Motion for Leave to Amend. ECF No. 29. Plaintiffs filed on May 11, 2023. ECF No. 30. The Government's Motion to Dismiss followed. ECF No. 31.

IV. <u>LEGAL STANDARD</u>

When ruling on a motion to dismiss, the court must "assume all factual allegations to be true and draw all reasonable inferences in favor of the plaintiff." *Henke v. United States,* 60 F.3d 795, 797 (Fed. Cir. 1995)). Likewise, dismissal under Court of Federal Claims Rule 12(b)(6) is appropriate only when the facts as asserted do not entitle the claimant to a legal remedy. *Godwin v. United States,* 338 F.3d 1374, 1377 (Fed. Cir. 2003). In evaluating such a motion, the court must accept all well-pled factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *Id.*

Under RCFC 12(b)(6), a complaint will survive a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

V. ARGUMENT

A. Plaintiffs' Claims Are Timely Under the Tucker Act

Where, as here, a class action was filed and dismissed *before* class certification, tolling of a putative plaintiff's individual claims applies. Plaintiffs' claims are timely because *Washington Federal* tolled every one of its claims. As such, this Court has jurisdiction over all of Plaintiffs' claims, and they are not subject to dismissal.

1. Class Action Tolling Applies

Plaintiffs agree that a six-year statute of limitations governs the timeliness of Plaintiffs' claims under the Tucker Act. 28 U.S.C. § 2501. The Government unilaterally pinpoints September 6, 2008—the date on which the FHFA Director decided to place the Enterprises into conservatorships—as the event triggering accrual. *See* ECF No. 31 at 13. Setting aside the Government's assumption, and using September 6, 2008 to calculate the running of the statute[3], Plaintiffs' claims are not time-barred under any of the Government's theories.

The Government argues against tolling based solely upon artificialities manufactured from inapposite cases. Splicing narrow holdings from those cases, the Government seeks to create a bright-line rule prohibiting class action tolling of Tucker Act claims where class certification was not sought, and even goes so far as to manufacture a rule that disallows tolling on *any* Tucker Act claim. *See* Mot. at 14. Neither this contrived rule, nor any part of it, is grounded in existing law.

Beginning with the Supreme Court's decisions in *American Pipe* and *Crown, Cork & Seal,* federal courts have developed jurisprudence on tolling in class actions, seeking to balance the competing interests of class action litigation (efficiency and economy) *vis-à-vis* those of

[3] Plaintiffs do not concede that September 6, 2008 is the accrual date for all of their claims, but will do so for purposes of this motion.

statutes of limitation (protection against stale claims). The resulting rule "is well settled that '[t]he filing of a class action tolls the statute of limitations 'as to all members of the class.'" *Birdbear v. United States,* 162 Fed. Cl. 225, 242 (2022) (citing *Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345, 350 (1983)); *see also Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 548, 552-53 (1974). This rule applies until a decision is reached whether to certify the class or the case comes to an end other than through voluntary dismissal. *See, e.g.*, *Am. Pipe & Constr. Co.*, 414 U.S. at 552-53; *Smith v. Bayer Corp.,* 564 U.S. 299, 313-14, n. 10 (2011); *Leyse v. Bank of Am., Nat. Ass'n*, 538 Fed. App'x 156, 161–62 (3d Cir. 2013); *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011); *McKowan Lowe & Co., Ltd. v. Jasmine, Ltd.*, 295 F.3d 380, 389 (3d Cir. 2002).

The Government conspicuously ignores this authority[4], and instead points to *Bright v. United States*, 603 F.3d 1273, 1281 (Fed. Cir. 2010), which involved claims under the Tucker Act. The *Bright* court was faced with the novel question of whether putative class members were permitted to opt in under RCFC 23 after expiration of the limitations period, where the class action complaint had been filed within the six-year limitations period of the Tucker Act by one named plaintiff, and class certification was sought prior to the expiration of the limitations period. *Id.* Ultimately, the *Bright* court—acknowledging a split of authority both pre-and post-

[4] *See* ECF No. 25. In *American Pipe,* the Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. The Court expressly found that the rule was "in no way inconsistent" with the proper function of a statute of limitations. *Id.* at 554-55. Subsequently, in *Crown*, the Supreme Court extended the class action tolling rule from *American Pipe* to apply to all members of the asserted class, including those who subsequently filed their own suits, because tolling properly allows class members to "rely on the existence of the suit to protect their rights." *Crown,* 462 U.S. at 350.

American Pipe—agreed with courts holding that class action tolling is available under an opt-in scheme, such as that in the CFC, a "result [which] is most consistent with the objectives which class action procedures are meant to achieve." *Bright*, 603 F.3d at 1285 ("…all other considerations being equal, the laudable goal of avoiding 'multiplicity of actions' should prevail").

But the Government overlooks the *Bright* court's nuanced reasoning. Distinguishing the concept of "equitable tolling" from "class action statutory tolling," as those concepts had developed in the courts, the *Bright* court concluded that class action tolling does not modify a statutory time limit or extend equitable relief—"[r]ather, it is a procedure that suspends or tolls the running of the limitations period for all purported members of a class once a class suit has been commenced, in a manner consistent with the proper function of a statute of limitations." *Id.* at 1288 (citing *Arctic Slope Native Ass'n v. Sebelius,* 583 F.3d 785, 791 (Fed. Cir. 2009) (tolling principles permit "the statute of limitations [to be] suspended during the pendency of the class action proceedings")). Likewise, the court explained,

> RCFC 23, which has the force and effect of law, *see M.A. Mortenson,* 996 F.2d at 1183, does not modify a statutory time limit or "extend equitable relief." Its procedures can only come into play once a class action complaint has been filed within the section 2501 limitations period. Neither does tolling of the limitations period under RCFC 23 turn on "equities," because such tolling is not triggered by equitable considerations.

Id.[5]

Thus, contrary to the Government's assertion, the Supreme Court's decision in *California Public Employees' Retirement System (CalPERS) v. ANZ Securities, Inc.,* 137 S. Ct. 2042 (2017)

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[5] In other words, *American Pipe* tolling should be viewed neither as equitable nor statutory, but rather as a common law device designed to effectuate Rule 23. *See, e.g.*, Stephen B. Burbank, Tobias Barrington Wolff, *Class Action, Statutes of Limitations and Repose and Federal Common Law*, 167 UPALR 1 (2018).

does not "call into question *Bright*'s continued vitality." ECF No. 31 at 16. *ANZ* involved neither a class action filed under the opt-in scheme of RCFC 23 nor a Tucker Act claim. The suit was filed by a plaintiff who was a member of a putative class in a class action, but who later elected to withdraw and proceed in a separate suit under the Securities Act in district court. *ANZ, supra,* 137 S.Ct. at 2047-48. Importantly, the time limit imposed on the Securities Act claim at issue is a statute of repose, not a statute of limitation. *Id.* at 2049-2050. The purpose of a statute of repose is to create "an absolute bar on a defendant's temporal liability." *Id.* at 2050. As such, "[t]he statute of repose transform[ed] the analysis," and the "mandate of the statute of repose takes the case outside the bounds of the *American Pipe* rule." *Id.* at 2055.[6]

At bottom, that the genesis of the class action tolling rule created by *American Pipe* and *Crown* has, at times, been referred to as "equitable" in nature does not mean the rule is somehow tantamount to the traditional equitable tolling principles held inapplicable to Tucker Act claims. *See, e.g.*, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 135 (2008). And, as tacitly conceded by the Government, no court has so held. *See* ECF No. 26 at 8-9. The Government's illogical play on semantics is unavailing. This is a straightforward application of *American Pipe* and its progeny, in conjunction with *Bright*, and class action tolling applies.

2. Class Certification Not a Condition for Class Action Tolling

Ignoring the procedural history that led to this case (see Section III, *infra*), the Government broadly asserts that because the *Washington Federal* plaintiffs never sought class certification, Plaintiffs here lose the ability to benefit from class action tolling. Mot. at 17. Nary

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[6] Noting that while the holding in *American Pipe* was "grounded in the traditional equitable powers of the judiciary," the *ANZ* Court specifically acknowledged that the "*American Pipe* Court did not consider the criteria of the formal doctrine of equitable tolling in any direct manner.*"* *Id.* at 2052.

a mention that *Washington Federal* was stayed for several years, then ended on a motion to dismiss—so the class action plaintiffs had no opportunity to get that far.

The lynchpin of the Government's position is *Big Oak Farms, Inc. v. United States*, 141 Fed. Cl. 482 (2019). *Big Oak,* however, is plainly distinguishable, and its holding narrow.[7] In *Big Oak*, this Court declined to allow new plaintiffs to join the case after the original plaintiffs, having had sufficient time to move for class certification, instead abandoned their class action allegations and amended the complaint. *Id.* at 485. The Court granted the Government's subsequent motion to dismiss on statute of limitations grounds because the new plaintiffs' claims were neither tolled by the complaint nor related back to it under RCFC 15. *Id.* at 493 ("Plaintiffs did not follow the court's class action procedure in this case and thus *Bright* does not apply.")

The Government also tries to distinguish this Court's decisions in *Toscano v. U.S.*, 98 Fed. Cl. 152 (2011) and *Geneva Rock Products, Inc. v. United States,* 100 Fed. Cl. 778 (2011) because classes were eventually certified in those cases. That assessment, however, misrepresents the express findings which, respectively, made clear that a motion for class certification is not necessary to invoke class action tolling. In *Toscano*, the named plaintiffs filed a timely class-action complaint but did not submit a motion for class certification until after the statute of limitations had run. 98 Fed. Cl. at 153. The trial court applied the holding of *Bright*, which tolled the statute of limitations when "class certification is *sought* prior to the expiration of the section 2501 limitations period." *Id.* at 154 (quoting *Bright*, 603 F.3d at 1274 (emphasis added)). It reasoned that, in the case before it, the plaintiffs' complaint "explicitly request[ed] certification of the class." *Id.* at 153-54 (internal quotation marks omitted). The later filing of

[7] The Government presumes an "aha" moment by pointing out Plaintiffs' omission of *Big Oak* in their Motion for Leave to Amend. But the reason for the omission is simple: *Big Oak* does not have the significance in this case that the Government believes it does.

the motion for class certification was inconsequential; the statute of limitations period was tolled from the date of the complaint. *Id.* at 155.

Similarly, the *Geneva Rock* court noted that the plaintiff had filed its complaint seeking class certification before the statute of limitations ran but filed its motion to certify "well afterward." 100 Fed. Cl. at 783. Finding the "logic of *Toscano* persuasive," the court noted that the decision in *Bright* focused on "when the plaintiff actually informed the court (and defendant) that it sought class certification by filing a properly-worded complaint. *Id.* Thus, "*Bright*'s tolling of the statute of limitations was contingent not on a motion for class certification, but rather on the plaintiff's seeking class certification which may be done through class-action allegations in a complaint." *Id.*

Nor do Plaintiffs suggest the *Bright* allows for perpetual tolling, as the Government seems to interpret. Rather, once a class action lawsuit has ended—for whatever reason—the clock starts running, and a plaintiff must file within the remaining time left in the statute of limitations. See, e.g., *Collins v. Village of Palatine, Ill.,* 875 F.3d 839, 840-41 (7th Cir. 2017) ("Tolling continues until the case is 'stripped of its character of a class action'…[and] stops immediately when a class-action suit is dismissed—with or without prejudice—before the class is certified."); *Sawyer, supra,* 642 F.3d at 563 ("Tolling lasts from the day a class claim is asserted until the day the suit is conclusively not a class action—which may be because the judge rules adversely to the plaintiff, or because the plaintiff reads the handwriting on the wall and decides not to throw good money after bad.")

For that reason, the Government misrepresents that this case would invoke the "major jurisdictional loophole" contemplated by the *Big Oak* court. There, the court opined, "if by simply filing a class action complaint a party could unilaterally toll the statute of limitations and

then have new parties join the litigation as though the new parties were opting into a class action without any court ruling on class certification, why would any party seek class certification before this court." *Big Oak, supra*, 141 Fed. Cl. at 493. Confirming that Plaintiffs' claims were tolled in this matter, which involves an altogether different scenario, creates no such "loophole."

3. Plaintiffs' Contract Claims Were Tolled by *Washington Federal*

Precise claim identity is not required for class action tolling. The Government concludes, without support or concrete examples, that the "factual and legal predicates" of Plaintiffs' takings claims are "different" from the contract claim. Mtn. at 20-21. This is simply not a basis upon which to deny tolling for Plaintiffs' claims.

In a concurring opinion in *Crown,* Justice Powell, joined by Justices O'Connor and Rehnquist, wrote, "when a plaintiff invokes *American Pipe* in support of a separate lawsuit, the district court should take care to ensure that the suit raises claims that 'concern the same evidence, memories, and witnesses as the subject matter of the original class suit,' so that 'the defendant will not be prejudiced.' " *Crown,* 462 U.S. at 355 (Powell, J., concurring), *quoting American Pipe,* 414 U.S. at 562 (Blackmun, J., concurring).

The majority of courts have since followed Justice Powell's reasoning: subsequent individual claims need not be identical for tolling to apply, so long as they share a common factual basis and legal nexus so that the defendant would rely on the same evidence and witnesses in its defense. *See e.g., In re Community Bank of Northern Virginia,* 622 F.3d 275, 300 (3d Cir. 2010) (listing cases); *Tosti v. City of L.A.,* 754 F.2d 1485, 1489 (9th Cir. 1985) ("We find no persuasive authority for a rule which would require that the individual suit must be identical in every respect to the class suit for the statute to be tolled."); *Cullen v. Margiotta,* 811 F.2d 698, 720 (2d Cir. 1987) ("Notwithstanding the differences between the legal theories

advanced by plaintiffs in the state court action and those advanced in the present action, we are persuaded that the *American Pipe* doctrine has applicability to the present action."), *overruled on other grounds by Agency Holding Corp. v. Malley–Duff & Assocs., Inc.,* 483 U.S. 143 (1987).

The Government's attempt to distinguish this authority is conclusory and uncompelling. In fact, the *Cullen* court's reasoning speaks to the very concern raised by the Government and makes clear that the "challenged conduct" is what puts a defendant on notice, obviating the need for claim identity, which would only muddy the purposes of the class action process. *Cullen*, 811 F.2d at 721[8]. Simply put, the challenged conduct here is the same—which the Government has previously acknowledged. *Compare Washington Fed.*, 26 F.4th at 1259 ("The claims here primarily were predicated on the imposition of the conservatorships over the Enterprises, rather than on actions the FHFA later took in its capacity as conservator.") *with* Mot. at 2 ("In October 2021, plaintiffs filed their original complaint in this case, challenging the decision to place the Enterprises into conservatorships"). The Government—otherwise eager to tie this case to *Washington Federal*—now distances itself because *Washington Federal* purportedly did not provide enough notice that the Government would "need to address the elements of a breach of contract or implied covenants claim." Mtn at 21. But "it is not a flaw under [*American Pipe*]

[8] "The **challenged conduct** is what is common to both the RICO and the state-law claims, and that is what the defendant must be alerted to in order to preserve its evidence, record its recollections, and keep track of its witnesses. The state court complaint clearly challenged the conduct that is at issue here, and we would be hard pressed to conclude that that complaint was not sufficient to alert the defendants sued there to preserve the evidence regarding that conduct…. Indeed, limiting *American Pipe* tolling to the identical "causes of action" asserted in the initial class action would encourage and require absent class members to file protective motions to intervene and assert their new legal theories prior to class certification, thereby producing the very results the New York courts seek to prevent by such tolling, *i.e.,* "court congestion, wasted paperwork and expense." [citations omitted]…In sum, because the asserted factual basis of the state court claims was the same as that of the claims asserted here and the County was made a defendant to that action, the running of the statute on the claims of the absent plaintiff class members against the County was thereby tolled." *Id.* (emphasis added).

that the first action did not alert the defendant to have its lawyers research the applicability of a particular statute or rule of common law." *Cullen,* 811 F.2d at 721.

Glaringly, the Government's actions belie its own argument. In late 2021, it agreed to stay proceedings in this case pending the disposition of the *Washington Federal* appeal, jointly stating, "The Federal Circuit's rulings in *Washington Federal* may provide binding guidance in this case given the **overlapping issues and claims**." ECF No. 7 (emphasis added). If this case was so clearly untimely, and the contract claims so far afield of *Washington Federal*, why did the Government not move to dismiss at that point rather than agreeing to a stay?

Therefore, assuming Plaintiffs' claims accrued at the time of the imposition of the conservatorship, the time between September 6, 2008 and the filing of *Washington Federal* on June 10, 2013 constituted 1,739 days of the six years (2,190 days) available under the Tucker Act's limitation period. Plaintiffs' individual claims were tolled until the dismissal of *Washington Federal* by the trial court on July 9, 2020, giving Plaintiffs until October 3, 2021 to file. Plaintiffs did so on October 1, 2021. ECF No. 1. Their claims are timely.

B. ***Washington Federal* Does Not Preclude Plaintiffs' Taking Claims**

Like its statute of limitations argument, the Government's assertion that Plaintiffs are unable to state a cognizable taking claim rests upon both legal and factual fallacies. Specifically, the Government's premise that *Washington Federal* controls and acts as a legal bar to this action is fundamentally flawed. Moreover, in making this argument, the Government grossly misrepresents the factual allegations set forth in Plaintiffs' Amended Complaint.

First, the Government argues that Plaintiffs' taking claims, as in *Washington Federal*, are premised upon the alleged illegality of the 2008 conservatorship. *See* Mot. at 23. To the contrary, Plaintiffs make no claims asserting the illegality of the conservatorship. *See* Pl. Mtn.

for Leave to Amend, ECF No. 25 at 11 [advising this Court of the "[d]eletion of illegal exaction claim and allegations related to illegality of conservatorship"]; *compare* Compl. at ¶¶ 1, 75, 81, 111, 124 *with* FAC at ¶¶ 5, 65, 147-150, 158. Accordingly, the Amended Complaint is agnostic as to whether the imposition of a conservatorship was unlawful. In short, the Government's position blatantly mischaracterizes Plaintiffs' operative allegations, i.e., assuming the conservatorship was lawful, the Government took the Plaintiffs' private property for a public use, which requires compensation.

Next, the Government tries to sidestep Plaintiffs' allegations by conflating the concepts of coercion and illegality. Mot. at 24 ("…the takings claims continue to rest on the premise that the appointment of the FHFA as conservator was coerced and unlawful."). Indeed, Plaintiffs' amended—and detailed—allegations do depict coercion which is, of course, distinct from illegality. Plaintiffs' allegation of coercion simply addresses the fact that the taking alleged was "government action." When the action that constitutes the taking is compelled by the government, then the government can be held liable for the taking. *See A&D Auto Sales, Inc. v. U.S.,* 748 F.3d 1142, 1154 (Fed. Cir. 2014) ("The line between coercion (which may create takings liability) and persuasion (which does not create takings liability) is highly fact-specific and hardly simple to determine."); *see also Turney v. United States*, 126 Ct. Cl. 202, 214 (Ct. Cl. 1953) (finding coercion where an embargo placed "irresistible pressure" on the plaintiffs to turn the property over to the United States, [and] it created a taking).

Finally, the Government posits, under *Washington Federal*, that Plaintiffs cannot assert any taking claims based on the imposition of the conservatorship as a matter of law—even if the conservatorship is assumed lawful. Mot. at 24. This is incorrect. Even if the *Washington*

Federal class action was correctly decided in this regard[9], it is distinguishable from Plaintiffs' case alleged here. *Washington Federal* was a shareholder action seeking to recover losses resulting from the declination of share value attributable to the conservatorship, which the putative class plaintiffs claimed was imposed illegally. *See Washington Fed.*, 26 F.4th at 1262-63. That class action was filed on behalf of a variety of individuals and entities.[10] Plaintiffs in this case, however, have pled an alternative cause of action: a taking of private property by government action for a public purpose without just compensation in violation of the Fifth Amendment. This government action, which occurred after enticing Plaintiffs into purchasing GSE preferred shares as Tier 1 Capital, imposed a conservatorship on the solvent and profitable GSEs, destroyed the value of the Tier 1 Capital GSE shares, which rendered the Plaintiff Banks insolvent, and confiscated Plaintiffs' compensable property interest in the banks and all of their assets through that insolvency. This compensable property interest was not alleged by the *Washington Federal* plaintiffs. But here, that compensable property interest is the very gravamen of Plaintiffs' taking claims. Compare No 1:13-cv-00385, ECF No. 70 at ¶¶ 17-19 with FAC ¶¶ 139-156.

Reflecting that fundamental difference, *Washington Federal*'s decision is limited to cases that involve claims of diminished stock value. *See, e.g., Washington Fed.,* 26 F.4th at 1268. There was neither an examination of the legal viability of a constitutional taking claim where the compensable property interest constitutes all of the banks' assets, nor any analysis of how the nature of an investment-backed expectation fundamentally changes under those circumstances.

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[9] Given that all of the claims in *Washington Federal* were based on the alleged illegality of the conservatorship, findings regarding claims *not* challenging the lawfulness of the conservatorship are dicta. *National American Ins. Co. v. U.S.*, 498 F.3d 1301, 1306 (Fed. Cir. 2007).

[10] The named plaintiffs estimated that there could be "thousands of individual shareholders" in the class. No 1:13-cv-00385, ECF No. 70 at ¶ 211.

Yet the Government improperly seeks to have the Court treat this threshold motion to dismiss as a summary judgment proceeding and doubles down by arguing that *Washington Federal* stands for the broad proposition and factual conclusion that Plaintiffs here had no reasonable investment-backed expectation. Mot. at 24; *see A&D Auto,* 748 F.3d at 1159 ("…to support a claim for a regulatory taking, an investment-backed expectation must be reasonable." (citing *Cienega Gardens v. U.S.,* 331 F.3d 1319, 1346 (Fed. Cir. 2003)). The Government is wrong. Assessing the reasonableness of a plaintiff's expectations "is an objective, but fact-specific inquiry into what, under all the circumstances, the [plaintiff] should have anticipated." *Id.,* 331 F.3d at 1346; *see id.* at 1348–53 (engaging in extensive analysis of whether "a reasonable developer in the [plaintiff's] circumstances" would have held the same expectations). In other words, this is a factual dispute that will be the subject of litigation and cannot be so cavalierly dismissed. The Government's bootstrapped reliance upon *Washington Federal*'s references to *Collins v. Yellen*, 141 S. Ct. 1761 (2021) and *Golden Pac. Bancorp v. United States*, 15 F.3d 1066 (Fed. Cir. 1994), is similarly misplaced. Neither of those cases address the investment-backed expectations of banks that were induced to invest their critical Tier 1 Capital Reserves in the GSEs and then lost those reserves, and all of their other valuable assets, due to the Governmental taking. Rather, the cases all addressed the expectations of the ordinary shareholders that had simply invested in banks. *Washington Federal* neither governs nor forecloses Plaintiffs' takings claims.

C. <u>Plaintiffs Have Stated a Cognizable Direct Taking Claim</u>

The Government glosses over both the precepts of takings law and the clear factual allegations of the Amended Complaint, and rushes to the conclusion that, "...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.'" Mot. at 25, citing *Washington Fed.*, 26 F.4th at 1266.

Short of bootstrapping itself onto *Washington Federal*'s inapposite findings, and in the absence of any meaningful discussion of Plaintiffs' amended factual allegations, it can only be surmised that the Government concedes Plaintiffs have indeed stated a viable taking claim. Put simply, Government takeover of the GSEs disenfranchised Plaintiff Banks[11] of their Tier 1 Capital and all of their other assets as well, which requires just compensation.

Under the Takings Clause of the Fifth Amendment, "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause applies the fundamental notion that the government cannot "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Thus, "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002).

In a takings case, the plaintiff must establish two elements to have a viable claim. First, plaintiff must establish that he or she holds "a property interest for purposes of the Fifth Amendment." *Caquelin v. United States*, 140 Fed. Cl. 564, 572 (2018) (citing *Members of the Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005)) (additional citations omitted). A court must then determine whether the "asserted right is one of the rights in the bundle of sticks of property rights that inheres in a *res* by looking to 'existing rules or

[11] Plaintiff Banks are wholly-owned subsidiaries of parent company FBOP, of which Plaintiff Kelly is the sole common shareholder. FAC ¶ 14.

understandings' and 'background principles' derived from an independent source such as state, federal, or common law." *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1376 (Fed. Cir. 2004) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992)); *Tyler v. Hennepin Cnty., MN*, __ U.S. __, 143 S. Ct. 1369, 1375 (2023) (courts "also look to 'traditional property law principles,' plus historical practice and this Court's precedents"'). After identifying a valid property interest, "the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest." *Am. Pelagic, supra*, 379 F.3d at 1372.

"[N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012). "[D]ue to the fact-intensive nature of takings cases," trial courts tend to be slow to dismiss them. *Moden v. United States*, 404 F.3d 1335, 1342 (2005) (noting that "summary judgment should not be granted precipitously" in takings cases due to their fact-intensive natures, even when, as there, the parties engaged in discovery).[12]

With this framework in mind, the Amended Complaint necessarily pleads facts sufficient to state a cognizable *per se* taking of Plaintiffs' private property that must be compensated under the Fifth Amendment, and the motion to dismiss should be denied.

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[12] This is the case no matter the analytical "test" that applies to an alleged claim. A government taking can occur in many forms, ranging from the classic example of a permanent physical occupation of property, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), to regulation which permanently deprives a property owner of all economically viable uses of his or her land, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992), or one that bars most such uses, *see Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). More specifically, takings can be broken down by their means, duration, and impact. That is, takings can be either (1) physically or by regulation; (2) permanent or temporary; and (3) categorical or non-categorical. *See Caquelin*, 140 Fed. Cl. at 573.

1. Plaintiffs' Tier 1 Capital and Bank Assets Constitute Compensable Property Interests

Plaintiffs' Amended Complaint pleads that the Government took Plaintiff Banks' Tier 1 Capital and all of their other assets—a direct and complete appropriation.

Since at least 1960, the Supreme Court has recognized this direct appropriation of intangible personal property as a *per se* compensable taking under the Fifth Amendment. *Armstrong, supra*, 364 U.S. at 44. In *Armstrong,* the government contracted with a shipbuilder to have boats built for the Navy. *Id.* at 41. Based upon that contract and the Government's promise to pay, Armstrong supplied materials to the shipbuilder secured by liens on the material, as a continued ownership interest until the materials were paid for by the Government and shipbuilder. *Id.* When the shipbuilder defaulted, the Government exercised its contractual right to take title and all ownership interests in the materials supplied by Armstrong. *Id.* The liens became valueless, and Armstrong's ownership interest was extinguished. *Id.* at 42.

Holding that the liens represented a "compensable property interest" within the meaning of the Fifth Amendment, the Supreme Court likened the liens to mortgages. *See id.* at 48 (citing *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601–02 (1935) (bankruptcy provisions affecting the rights of secured creditors violate the Fifth Amendment where such provisions result in the taking without just compensation of a creditor's rights in specific property which are of substantial value)).

The Supreme Court has continued to extend *per se* Fifth Amendment protection to such intangible interests. *See Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) ("a per se approach" should be used to analyze a taking of IOLTA account interest and stating that "the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in *Loretto* [than any regulatory taking]"); *Horne v. Dep't of Agric.*, 576

U.S. 350, 361-62 (2015) (confirming that *Loretto* is not limited to real property); *see also Tyler, supra,* 143 S. Ct at 1374 (taxpayer sufficiently pleaded "classic taking" where local government retained excess home equity proceeds to satisfy tax bill); *Dames & Moore v. Regan*, 453 U.S. 654, 689–90 (1981) (attachment liens considered property within the meaning of the Fifth Amendment taking clause); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65 (1980) (taking of interest earned interpleader fund must be compensated under Takings Clause); *A & D Auto Sales*, 748 F.3d at 1154 (franchise agreements are compensable property interests under the Takings Clause); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (trade secrets are compensable property).

So, too, has the Federal Circuit and this Court. *See Cienega Gardens*, 331 F.3d at 1340 (taking of contractual rights to prepay mortgages must be compensated); *Murray v. U.S.*, 817 F.2d 1580, 1583-84 (Fed. Cir. 1987) ("We see no difference, for Fifth Amendment purposes, between the Murrays' mortgage lien and the materialmen's liens at issue in *Armstrong*."); *King v. U.S.*, 159 Fed. Cl. 450, 469-71 (2022) (retired participants have cognizable property interest in unreduced pension benefits, analogizing to *Cienega Gardens, supra, Piszel v. U.S.,* 833 F.3d 1366, 1375 (Fed. Cir. 2016), and *A&D Auto, supra*); *Jonathan Dinh v. U.S.,* __ Fed. Cl. ___, 2023 WL 3815051 at *13-14 (June 5, 2023) (bondholders sufficiently pleaded compensable property interest in right to repayment on the bonds as well as lien on revenues).

The Plaintiff Banks' stock holdings in the GSEs can be treated no differently. They represent the same "compensable property interest," i.e., a direct, ongoing ownership interest in the underlying property, as liens and mortgages. And, as Plaintiffs' allegations make clear, those property interests pre-dated the government takeover of the GSEs. In fact, the compensable property interest represented by the stock holdings in the GSEs is even more compelling since

they embodied the Government's inducement, recommendation, and continued approval, time and again, of the banks exchanging their "Tier 1 Capital Cash" reserves for "GSE Stock Tier 1 Capital" reserves and the continued treatment of them as equivalent. *See* FAC ¶¶ 43, 50. By taking the GSEs, the Government was, *ipso facto*, rendering the banks insolvent and took them in their entirety.

Furthermore, to the extent the Government relies upon the lack of Plaintiffs' investment-backed expectations, under the guise of the *Washington Federal* decision, for the proposition that there was no compensable property interest (Mot. at 23-24), that reading is illogical and flawed. *Presault v. U.S.*, 100 F.3d 1525, 1540 (Fed. Cir. 1996) ("[In *Loretto*], Justice Marshall clearly said [sic] that a physical occupation of one's property by the Government, that is, a taking of a recognized property interest, invokes a general expectation of compensation….It is the law-created right to own private property, recognized and enforced by the Constitution, legislation, and common law, that gives the owner a historically rooted expectation of compensation. The expectations of the individual, however well- or ill-founded, do not define for the law what are that individual's compensable property rights.")

Finally, that it may arise in a "highly regulated" environment does not peremptorily foreclose the existence of a compensable property right, contrary to the Government's flawed premise. *See* Mot. at 24, citing *Washington Federal*. At most, it would be relevant to the Court's fact-intensive analysis of whether a regulatory taking had occurred under the *Penn Central* factors, assuming that test even applies. *King*, *supra*, 159 Fed. Cl. at 477 (interpreting line of Federal Circuit cases and finding "existence of a robust regulatory framework in ERISA and the Tax Code does not defeat the plaintiffs' property interest in their unreduced pension benefits").

2. The Government Conduct Alleged Is Sufficient to State a Cognizable Taking Claim

Plaintiffs, having identified a compensable property interest—the "bedrock requirement" of any successful takings challenge—have likewise alleged sufficient Government conduct constituting a taking of that property interest. *See, e.g.*, *Leider v. U.S.*, 301 F.3d 1290, 1295 (Fed. Cir. 2002); *Am. Pelagic, supra*, 379 F.3d at 1372. *Armstrong* is instructive. After transfer of all of the construction materials to the United States, the liens at issue were still valid, and, therefore, the "taking" resulted in a destruction ***of the value*** of all Armstrong's property rights under their liens:

> The total destruction by the Government ***of all value of these liens***, which constitute compensable property, has every possible element of a Fifth Amendment "taking," ***and is not a mere*** "consequential incidence" of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government, for its own advantage, destroyed the value of the liens . . . . Since this acquisition was for a public use, ***however accomplished, whether with an intent and purpose of extinguishing the liens or not,*** the Government's action ***did destroy them***, and, in the circumstances of this case, ***did thereby take the property value*** of those liens within the meaning of the Fifth Amendment…..a ***fair interpretation*** of this constitutional ***protection entitles these lienholders to just compensation*** here. *Cf. Thibodo v. United States,* 187 F.2d 249.

Armstrong, supra, 364 U.S. at 48-49 (emphasis added).

The Supreme Court's decision parallels the Government action alleged here. The Government, in taking the GSEs for its own advantage, destroyed the value of the banks' Tier 1 Capital represented by the GSE stock holdings. *See* FAC ¶ 113. Before the Tier 1 Capital holdings were destroyed, the banks had compensable property; immediately afterwards, they had none—the banks were taken, including all of their assets. *See Armstrong, supra,* 364 U.S at 42; Plaintiffs have alleged, in detail, a complete

appropriation of Plaintiffs' intangible personal property—a *per se* taking as a matter of law[13]—more than sufficient to require that the Government's motion to dismiss be denied.

D. Plaintiffs' Direct Takings Claims Are Not Derivative, and Plaintiffs Have Standing to Bring Them

The Government argues that the Direct Takings Claims should be dismissed because those claims are derivative claims for which Plaintiffs lack standing. This argument is meritless.

The Government again relies on *Washington Federal*, which as described above was a different case with different claims. It is unremarkable that the court in *Washington Federal* held shareholders' claims of stock diminution to be derivative, but the claims here are very different. The *Washington Federal* plaintiffs pled that the "destr[uction] the value of the stock held by Plaintiffs and members of the Classes." *See* No. 1:13-cv-00385, ECF No. 70 at ¶ 222. But Plaintiffs here are banks alleging that the Government enticed them to purchase GSE stock, to be

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[13] While the ad hoc analysis of *Penn Central* generally does not apply where, as here, there was a complete taking, Plaintiffs have also sufficiently pleaded a regulatory taking under *Penn Central* or, alternatively, under *Lucas*. The Government alludes that this is the framework that applies to Plaintiffs' taking claim by pointing the Court to *Washington Federal*'s inapposite evaluation of shareholders' investment-backed expectations. Mtn. at 24. In order to establish a regulatory taking, a plaintiff must show that his property suffered a diminution in value or a deprivation of economically beneficial use. This is equally true under the categorical test of *Lucas* and the *Penn Central* test. *Lucas,* 505 U.S. at 1015, (plaintiff must show loss of "all economically beneficial or productive use"); *Penn Cent.,* 438 U.S. at 124 (court weighs "economic impact of the regulation on the claimant"). Assessing the reasonableness of a plaintiff's expectations "is an objective, but fact-specific inquiry into what, under all the circumstances, the [plaintiff] should have anticipated." *Cienega Gardens,* 331 F.3d at 1346; *see id.* at 1348–53 (engaging in extensive analysis of whether "a reasonable developer in the [plaintiff's] circumstances" would have held the same expectations). Notably, the Government does not challenge the legal sufficiency of the claim as pleaded under *any* of these potential analyses. Nor can it: they are inherently factual questions that courts are loath to evaluate on summary judgment motions, let alone a motion to dismiss. *See, e.g., King, supra*, 159 Fed. Cl. at 477-486 (analysis "constrained by the present stage of litigation" even on summary judgment motion). Nevertheless, Plaintiffs have sufficiently plead facts that show the value their compensable property interests would have had but for the taking, as required to state a regulatory taking claim. *A&D Auto Sales, supra,* 748 F.3d at 1157.

held by the banks as Tier 1 Capital, and then took that Tier 1 Capital and all other bank assets. This was a direct taking of Plaintiffs' personal property, not that of the GSEs, which resulted in harm to the Plaintiffs which they seek to recover. The Amended Complaint also pleads that the Plaintiffs suffered another taking—their rights and protections as shareholders, which is universally held to be a direct claim. *Infra* at 38. The Government admits this. Mot. at 28 ("even if certain ancillary allegations of harm, such as the loss of voting rights, could be construed as direct, ...").

As described in more detail below, applying the proper law, the Direct Takings Claims are direct and not derivative, and Plaintiffs have standing to bring them.

1. *Tooley* Does Not Apply

The Defendant urges this Court to apply the test set forth in *Tooley v. Donaldson, Lufkin & Jenrette*, 845 A.2d 1031 (Del. 2004) (en banc) to determine if the takings claims are direct or derivative. But the Delaware Supreme Court has made clear that *Tooley* does not apply to causes of action like the Direct Takings Claims. Instead, the "case law under *Tooley* . . . and its progeny deal with the distinct question of when a cause of action for breach of fiduciary duty or to enforce rights belonging to the corporation itself must be asserted derivatively." *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1138 (Del. 2016). "Before evaluating a claim under *Tooley*, "a more important initial question has to be answered: does the plaintiff seek to bring a claim belonging to her personally or one belonging to the corporation itself?'" *Id.* at 1126–27. Again, it is unremarkable that *Washington Federal* applied *Tooley* to analyze claims brought by a class of

shareholders alleging diminution in share value. This case is not *Washington Federal*, and *Tooley* does not apply.[14]

Moreover, the Supreme Court has repeatedly (and recently) confirmed that it would also be improper for any state law (like the test enumerated by the Delaware state court in *Tooley*) or any federal law (like HERA) to interfere with constitutional rights like the Fifth Amendment rights the Plaintiffs seek to enforce here. *Tyler v. Hennepin Cnty., MN*, __ U.S. __, 143 S. Ct. 1369, 1375 (2023) ("'[T]he Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take.'" (*quoting Hall v. Meisner*, 51 F.4th 185, 190 (6th Cir. 2022)); *Jacobs v U.S.*, 290 U.S. 13, 17 (1933) ("[T]he right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate."); *Seaboard Air Line Ry Co v U.S.*, 261 U.S. 299, 304 (1923) (citing *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312, 327 (1893)) ("Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a

[14] The cases cited by the Government in support of its assertion that there can be no taking based on the imposition of a conservatorship or receivership are (Motion at 28), like *Washington Federal*, easily distinguishable. In *Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1995), the Federal Circuit found no taking where a statute spread a bank's liability to related banks, finding "fair and just for Congress to impose the burdens of one bank's failure on its sister institutions within the same bank holding company system, rather than imposing that liability on the public as a whole." *Id.* at 1583. Finding no problem with the liability sharing scheme, the Federal Circuit unremarkably stated that, if the result of that liability sharing made a bank insolvent, placing the insolvent bank into a receivership was also not a taking. *Id.* at 1575. In *California Hous. Sec., Inc. v. United States*, 959 F.2d 955, 956 (Fed. Cir. 1992), the Federal Circuit found no taking based on the U.S. placing a bank into a conservatorship pursuant to existing law to regulate banks. The Federal Circuit noted that there had not been substantial change to the banking regulations over time, and that the plaintiff had no expectation that its bank would not, at some point, be placed into a conservatorship. *Id.* at 959. Here, Plaintiffs made the Tier 1 Capital investments in the GSEs before the law allowing the imposition of the conservatorship was passed.

judicial function."); *Phelps v U.S.*, 274 U.S. 341, 344 (1927) ("Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution."); *Marbury v. Madison*, 5 U.S. 137, 176–77 (1803). *See also Trinco Investment Co v. U.S.*, 140 Fed. Cl. 530, 545 (2018) (interpreting *Monongahela*) ("Congress cannot by legislation limit the compensation justly due the owner.").

2. Plaintiffs Have Article III Standing To Bring Direct Takings Claims

The proper test for Plaintiffs' standing to bring the Direct Takings Claims is whether Plaintiffs have "suffered an 'injury in fact' that is 'fairly traceable" to the defendant's conduct and would likely be 'redressed by a favorable decision.'" *Collins, supra*, 141 S. Ct. at 1779 (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)). Plaintiffs here clearly have plead an "injury in fact" (the loss of their Tier 1 Capital and all bank assets) that is "fairly traceable" to the Government's conduct that resulted in the loss of Tier 1 Capital and confiscation of all other bank assets, *ipso facto,* through insolvency. This harm would clearly be "redressed by a favorable decision" in Plaintiffs' favor where damages are sought. Plaintiffs here seek damages alone.

3. Even Under Tooley, The Direct Takings Claims Are Direct, and not Derivative

Even though *Tooley* does not apply here, the Direct Takings Claims in this case are, nevertheless, direct claims under *Tooley*. There, the court stated that "whether a stockholder's claim is derivative or direct . . . must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy"845 A.2d at 1033. Turning to the first *Tooley* question, the taking of Plaintiffs' Tier 1 Capital and all other bank assets was not harm

suffered by the GSEs. The GSEs had no ownership rights or interest in Plaintiffs' Tier 1 Capital and assets—those were Plaintiffs' sole property.[15] As to the second *Tooley* prong, the GSEs would receive no benefit if *Plaintiffs* were to recover their lost Tier 1 Capital and bank assets. Plaintiffs' claim that the Government took their shareholder rights and protections is also a direct claim under *Tooley*.[16] Courts applying *Tooley* have consistently held that shareholder rights and protections are direct, and not derivative. *See, e.g.*, *In re MultiPlan Corp. Stockholders Litigation*, 268 A.3d 784, 802 (Del. Ch. 2022) ("Delaware courts regard 'a wrongful impairment by fiduciaries of the stockholders' voting power or freedom' as causing 'a personal injury to the stockholders, not the corporate entity."); *In re Tyson Foods, Inc.*, 919 A.2d 563, 601 (Del. Ch. 2007) ("Where a shareholder has been denied one of the most critical rights he or she possesses—the right to a fully informed vote-the harm suffered is almost always an individual, not corporate, harm.")

E. Preclusion Does Not Bar Plaintiffs' Claims

The Government also argues that *Washington Federal* bars Plaintiffs' takings claims by preclusion but concedes that the claim must 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. Mot. at 31. The Government has not satisfied the required elements.

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[15] Even if the loss of Tier 1 Capital is found to be harm suffered by the GSEs due to its relationship to the GSE stock (which, as described above, it is not), the loss of the remaining bank assets cannot constitute harm to the GSEs for the same reason.

[16] The Government presses the Court to hold that HERA's "succession clause" took Plaintiffs' right to bring derivative claims. If that is true, Plaintiffs have argued themselves into a valid takings claim. The Government cannot say in one breath that Plaintiffs have to bring their takings claim derivatively and in the next breath argue that the Government has taken away Plaintiffs' standing to do so. If Plaintiffs claims are derivative, the right to press such a claim is a valuable right that Government claims it took away from Plaintiff under the succession clause.

Plaintiff Banks are a consortium of community banks that purchased GSE preferred shares in 2007 and 2008 with Tier 1 Capital, well-before conservatorship was imposed. *See* FAC ¶¶ 46-50. As a result of those purchases, as detailed in the Amended Complaint, Plaintiff Banks had investment backed expectations related to both the treatment of its Tier 1 Capital and other rights that adhered to the shares that they purchased, including that (1) the GSEs would be managed and operated to increase shareholder value; (2) their investment would be held in trust by the GSEs and that the directors of the GSEs would manage the enterprises as their fiduciaries; (3) that their voting rights and the voting rights of the common stock would operate to protect their investments; (4) that they or other shareholders would have claims against the directors of the GSEs in the event the directors mismanaged the enterprises or caused harm to the enterprises; and (5) that the Government would not step in to seize their Tier 1 Capital investments, take away their value, force their banks into insolvency and take all of the banks' assets.[17] FAC ¶ 163.

Based on pled facts, Plaintiffs allege two direct takings claim: (1) the Government took Tier 1 Capital and all other bank assets and (2) the Government took Plaintiffs rights and protections as pre-conservatorship GSE shareholders.[18]

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[17] As detailed in the Amended Complaint: Unlike non-bank purchasers of GSE preferred shares, the FBOP Subsidiaries also had reasonable investment-backed expectations that their investment in the GSE preferred shares was low-risk and that the value of those shares was stable (not volatile) and not subject to a high risk of immediate and substantial, value loss because the United States allowed the FBOP Subsidiaries to invest 100% of their Tier 1 Capital in the shares, examined the investments of the FBOP Subsidiaries, never registered any concern and rated the risk of the investment the same as cash. FAC ¶ 164.

[18] On the second taking, when "the conservatorship was imposed, a succession clause was triggered that took for a public purpose all voting rights, liquidation preferences, and dividend rights the FBOP Subsidiaries and River Capital obtained by virtue of their ownership of the preferred shares because under HERA the conservator succeeded to "all rights, title, powers, and privileges of the [GSEs] and any stockholder, officer, or director of such [GSE with respect to the [GSE and the assets of the [GSE]. FAC ¶ 165. In addition, when the conservatorship was

Based on the above, preclusion cannot bar Plaintiffs' takings claim because the *Washington Federal* plaintiffs did not litigate claims as community banks that placed their Tier 1 Capital in the GSEs pre-conservatorship with investment backed expectations that were taken when the conservatorship was imposed.[19] Moreover, the *Washington Federal* claims were not litigated on the same transactional facts underlying Plaintiffs' individual claims. First, the transactional facts related to the Government's taking of Plaintiffs' Tier 1 Capital was not part of the *Washington Federal* litigation. Second, as to the taking of shareholder rights, the decision did not consider how HERA and the conservatorship destroyed the investment-backed expectations of pre-HERA purchasers who had invested Tier 1 Capital into the GSEs, like Plaintiff Banks. As *Washington Federal* itself recognized, "the FHFA's authority under HERA is both unusual and extremely broad" and HERA allowed the conservator to act against the best interests of the enterprises because 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."

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imposed, "the Government also took for a public purpose the fiduciary relationship that existed between the preferred shareholders and the GSEs because HERA authorized the FHFA as conservator to 'take any action . . . which the [FHFA] determines is in the best interests of the GSE or the FHFA." FAC ¶ 166. Finally, in passing HERA, the Government took for a public purpose "the right of preferred shareholders to challenge the GSEs' decisions to consent to the conservatorship because under HERA the directors of the GSEs are not liable for acquisition in the appointment of a conservator" and the "rights to seek meaningful judicial review of the GSEs actions." FAC ¶¶ 166-67.

[19] *See Washington Federal*, Case No. 1:13-cv-00385-MMS, Doc. 64 (Government's Amended Motion to Dismiss) ("Plaintiffs' 'economic interests' in Fannie Mae and Freddie Mac stock comprise the alleged property at issue here. Plaintiffs allege that these interests were taken, exacted, or breached on August 17, 2012, when FHFA as conservator and Treasury entered into the Third Amendment. Several plaintiffs, however, purchased shares after the Third Amendment was adopted. Several *Fairholme* plaintiffs previously admitted in response to a Government interrogatory that they did not own *any* shares in the Enterprises until May 2013—more than eight months after the Third Amendment was signed. The Government could not, through the Third Amendment, have taken, illegally exacted, or breached contracts concerning stock that plaintiffs did not own before the amendment was adopted on August 17, 2012." (internal citations omitted)).

Washington Federal, 26 F.4th at 1266. *Washington Federal* did not litigate the transactional facts of how those "unusual" and broad powers frustrated the investment backed expectations of pre-HERA purchasers of GSE preferred shares.[20]

Finally, Plaintiffs bring their claims alternatively as derivative claims. The *Washington Federal* plaintiffs did not bring derivative claims and its decision cannot have preclusive effect on claims brought on behalf of GSEs. *See Washington Federal*, 26 F.4th at 1266 n.5 ("In their opening brief on appeal, the Washington Federal Plaintiffs also asked, in the alternative, that we remand this matter to the Claims Court so that they might amend claims to assert the claims derivatively on behalf of the Enterprises. They have since withdrawn that request as well." (internal citations omitted)).

F. Standing to Bring Derivative Claims

In the alternative, Plaintiffs bring their constitutional Fifth Amendment takings claims derivatively on behalf of the GSEs in the unlikely event the Court finds that those claims belong to the GSEs. The Government argues, however, that the right to bring a derivative claim is a shareholder right that HERA's succession clause extinguished. Mot. at 31-32. Two times, however, this Court has recognized a conflict-of-interest exception to HERA's succession clause that preserved a shareholder's right to bring constitutional takings claims on behalf of the GSEs.

[20] Though *Washington Federal* noted that investment backed expectations are limited in highly regulated areas, a post-*Washington Federal* court of claims decision has made clear that takings can take place in highly regulated environments: "The plaintiffs in all three cases operated in highly regulated environments. Those facts did not eliminate, as a matter of law, the plaintiffs' otherwise cognizable property interests under the fifth amendment, even when the governing legal framework did change. Accordingly, the plan documents' dependence on ERISA and the Tax Code does not eviscerate the plaintiffs'' property rights under the fifth amendment and thereby eliminate the premise of their claims for the taking of those rights." *King*, 159 Fed. Cl. at 450.

In *Fairholme Funds, Inc. v. United States*, Judge Sweeney found that shareholders had standing to bring derivative constitutional takings claims because the Federal Circuit established a conflict-of-interest exception to an identical succession clause in an earlier-passed statute. 147 Fed. Cl. 1 (2019) (citing *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1282 (Fed. Cir. 1999), *rev'd in part and aff'd in part on other grounds*, 26 F.4th 1274 (Fed. Cir. 2022).

In *First Hartford*, the Federal Circuit, [w]ithout addressing the statutory language, focused on the purpose of derivative suits: "permit[ting] shareholders to file suit on behalf of a corporation when the managers or directors of the corporation, perhaps due to conflict of interest, are unable or unwilling to do so, despite it being in the best interest of the corporation." *Id.* (citing *First Hartford*, 194 F.3d at 1295). The Federal Circuit reasoned that the plaintiff had standing because, "most significantly," of "the conflict of interest faced by the FDIC in determining whether to bring suit." *Id.* Indeed, the "FDIC was asked to decide on behalf of [Dollar] whether [the FDIC] should sue the federal government based upon a breach of contract, which if proven was caused by the FDIC itself." *Id.* Simply stated, the Federal Circuit held that a shareholder of a company could bring a derivative claim, **notwithstanding a succession clause, if the company was controlled by an entity with a conflict of interest.**" *See id.* (emphasis added).

First Hartford is instructive because the Federal Circuit was addressing the same issue that is present in this case: whether shareholders can assert a derivative claim when there is a succession clause transferring shareholders' rights to another entity. *First Hartford* is also informative because Congress, after that case was decided, included in HERA the same succession clause that was at issue in the Federal Circuit's decision, and when judicial

interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matters, Congress' intent to incorporate such interpretations as well. *Id.* (internal citations, punction, and footnotes omitted). Indeed, seven months later, Judge Sweeney reaffirmed this Court's conclusion with respect to *First Hartford* in *Washington Federal.* In that case, plaintiffs did not bring derivative claims, and Judge Sweeney noted that, "[i]f plaintiffs had asserted derivative claims in their amended complaint, the 'conflict of interest' holding in *First Hartford* would have aided plaintiffs in their quest to establish standing. But they did not do so." 149 Fed. Cl. 281, 286 (2020), *aff'd*, 26 F.4th 1253 (Fed. Cir. 2022). Moreover, on direct appeal, the Government challenged Judge Sweeney's conclusions about *First Hartford*'s effect on the succession clause. Presumably recognizing that a panel of the Federal Circuit cannot overturn another Federal Circuit panel, the Federal Circuit avoided the issue entirely. 26 F.4th at 1302 ("we reverse the Claims Court on those issues, without the need to address *First Hartford*."). Accordingly, *Fairholme* and *First Hartford* compel this Court to find that Plaintiffs have standing to bring constitutional derivative claims on behalf of the GSEs.

The Government advances arguments against finding a conflict-of-interest exception found in *Perry Capital LLC v. Lew*, 70 F.Supp.3d 208, 230-31 (D.C. Cir. 2014). In that case, however, the plaintiffs expressly asked the D.C. Circuit to adopt *First Hartford*, which it declined to do. *Id.* Because *First Hartford* remains the law of this circuit, the D.C. Circuit's analysis on why not to adopt the holding in that case does not help the Government in this case.

The Government then engages in a statutory analysis and concludes that if "Congress believed that these dealings created a conflict of interest that should permit suit by shareholders, it would have said so." Mot. at 42. But as Judge Sweeney pointed out, the Federal Circuit found

the conflict-of-interest exception to an identical succession clause "without addressing the statutory" and instead rooted the exception in the policies and principles underlying recognition of derivative standing in the first instance. And the rules of statutory interpretation cut in favor of Plaintiffs here because, again as Judge Sweeney found, if Congress intended that exception not to apply it would have legislated around *First Hartford* but it chose not to do so. The Government invites this Court to find that *Perry Capital* has preclusive effect on Plaintiffs' ability to bring its constitutional derivative claims. The Government, however, concedes that *Perry Capital* did not involve the type of constitutional derivative claims asserted here and merely makes the argument to preserve the issue for appeal.

Based on the foregoing, *First Hartford* compels this Court to find that Plaintiffs have standing to pursue constitutional derivative claims on behalf of the GSEs.

G. Plaintiffs Have Stated Claims Based Upon Implied Contract

Plaintiffs have alleged claims that the Government breached implied covenants and implied contracts. In its Motion, the Government argues only that Plaintiffs have failed to show that it was a counterparty to any implied-in-fact contract and that Plaintiffs failed to establish that the Government was in privity with the GSEs. The Amended Complaint, however, details facts that make the Government a counterparty to an implied-in-fact contract and, additionally, put the Government in privity with Plaintiff Banks under the GSEs' charters and bylaws.

1. The Government's Implied-in-Fact Contractual Obligations with Plaintiff Banks

The Government does not engage the facts alleged by the Plaintiff Banks that establish an implied-in-fact regulatory contract[21] and instead generally argues that precedent disfavors

[21] The Government's Motion treats Plaintiff Banks as just an ordinary shareholder in the GSEs and makes sweeping statements like "Nothing in the complaint provides any "clear indication" that the United States intended to contract with Enterprise shareholders." But the Amended

interpreting laws and regulations to create vested rights and obligations for which the Government can be found liable. Mot. at 36-37. But the Amended Complaint pleads in detail how the Government targeted Plaintiff Banks with an offer to use their Tier 1 Capital to capitalize the GSEs, provided incentives to the Plaintiff Banks to accept the Government's offer, and accepted near $900 million of the banks' Tier 1 Capital cash reserves for GSE stock with the promise and guarantee that the GSE stock would be treated the same as cash for satisfying regulatory solvency requirements and would be backed by the federal government, all prior to the passage of HERA. FAC ¶¶ 33-38. Plaintiffs allege that an OCC examiner encouraged Plaintiff CNB, which held the largest investment in GSE preferred shares, to make the investments. FAC ¶ 43.

Additionally, the Amended Complaint sets forth facts that show that the Government's promises were unmistakable. At the time Plaintiff Banks made their investments in the GSEs, the FDIC publicly stated that these investments did not represent a significant risk to the Deposit Insurance Fund. FAC ¶ 35. Indeed, former FHFA Director James Lockhart acknowledged that until August 2008, the three major rating agencies classified the GSEs abilities to meet their financial obligations as strong largely in part due to the explicit and implied guarantee of the U.S. Government, and even President Bush acknowledged that many were led to believe that the federal government guaranteed these investments. FAC ¶ 39. Plaintiff Kelly, in sworn testimony before Congress, explained how he relied on the Government's guarantee that the investments

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Complaint is clear that Plaintiff Banks are not just an "Enterprise shareholder" purchasing GSE shares in the secondary market. The Government conspicuously avoids engaging in Plaintiff Banks' allegations that make them different than an ordinary "Enterprise shareholder," namely as FDIC insured institutions, Plaintiff Banks could *only* use their Tier 1 Capital to invest in the GSEs and maintain those investments because the Government treated those investments as cash or U.S. Treasury bonds for regulatory purposes, which the Government (of course) guarantees.

would be safe, and that he would never have allowed Plaintiff Banks to park their Tier 1 Capital in the GSEs without a guarantee. FAC ¶ 44. Persons questioning Mr. Kelly at that hearing summarized the situation perfectly: the investments were made "mainly at the behest of the Federal Government, that they encouraged you, and highly encouraged you to make that type of investment." FAC ¶ 45. Once the investments were made, individual regulators repeatedly certified them as sound. FAC ¶ 50.

Moreover, post-conservatorship, the Government took actions consistent with its obligations and the promise that the Plaintiff Banks' investments in the GSEs were guaranteed and safe. For example, Secretary Paulson made a press statement that 'The [federal government agencies encourage depository institutions to contact their primary Federal regulator if they believe that losses on their holdings of Fannie Mae and Freddie Mac common or preferred shares, whether realized or unrealized, are likely to reduce the regulatory capital below well-capitalized. The banking agencies are prepared to work with the affected institutions to develop capital restoration plans consistent with capital regulations.'" FAC ¶¶ 116. These capital restoration plans were meant to address the benefit of the bargain that the Government had agreed to with the Plaintiffs Banks. The Government then created the TARP program to help distressed banks, and the Comptroller of the Currency, John C. Dugan contacted Mr. Kelly personally to say that the TARP program was "the solution" and that it "was designed for you." FAC ¶¶ 118, 121. Mr. Kelly was led to believe that a solution had been found, but for reasons beyond his control, the timing did not work out for TARP to satisfy the government guarantee the Plaintiff Banks were entitled to.

Based on these well-plead facts, Plaintiffs outline a clear and plausible offer and acceptance that was supported by consideration and provide evidence of mutuality of intent

between the Government and Plaintiff Banks. The Government complains that there is not even a "cloud of evidence" that supports the proposition that the Government intended "regulatory incentives" to be an open offer to contract with the Government. Mot. at 37. But Plaintiff Banks implied-in-fact contract claim rests on much more than regulatory incentives being an open offer. In short, the Government needed to raise capital for the GSEs and told Plaintiff Banks that if it supplied that capital then their investment in the GSEs would be treated as Tier 1 Capital (the same as when such capital was in cash or U.S. Treasury bonds) to satisfy the Plaintiff Banks' Tier 1 Capital solvency requirements. By so doing, the Government guaranteed that those GSE investments were safe investments backed by the Government, similar to other approved categories of Tier 1 Capital that Plaintiff Banks could have maintained instead, like cash or U.S. Treasury bonds.

The Government further complains that Plaintiffs have not put forward even a "cloud of evidence" identifying any person with authority that made any promises to Plaintiffs. As an initial matter, the Amended Complaint outlines how agencies made these promises, which is enough to survive a motion to dismiss. *Compare e.g.,* FAC ¶ 46 ("Convinced by Government regulators, in late 2007 and early 2008, the FBOP Subsidiaries and River Capital, in late 2007 and early 2008, purchased GSE preferred shares.") *with Sommers Oil v. United States*, 241 F.3d 1375, 1379 (Fed. Cir. 2001) ("In particular, the complaint alleges that all of the acts complained of were committed by 'duly authorized agents of the United States Department of Treasury, Internal Revenue Service."). But, as a secondary matter, the Government's allegations are not true: an OCC examiner encouraged Plaintiff CNB to make the investments and regulators reviewed and repeatedly affirmed, certified, and approved Plaintiffs Banks' investments in GSE preferred shares in numerous audits of the banks' reserves. FAC ¶¶ 43, 50. Mr. Kelly has

testified to Congress that he would never have allowed Plaintiff Banks to invest their Tier 1 Capital in GSE preferred shares but for the Government's inducement and continued approval of the holdings. FAC ¶¶ 44-45.[22]

On these facts, Plaintiffs have established an implied-in-fact contract, in privity between the Government and Plaintiffs. Plaintiffs are aware of no case foreclosing an implied-in-fact contract on these facts because Plaintiffs are in a unique position. As explained in the Amended Complaint, the Government targeted and induced Plaintiffs to invest in the GSEs, provided Plaintiffs with special treatment and continued affirmation that their investments were sound and appropriate, and then took action in seizing the GSEs with full knowledge of the catastrophic destruction it would cause to Plaintiff Banks if, as here, the Government breached its promise to guarantee the value of the Tier 1 Capital in the GSE investments. *See* FAC ¶¶ 33, 50, 102.

2. Government Action Also Put The Government in Privity with Plaintiffs under GSE <u>Bylaws and Stock Certifications</u>.

Second, under the GSEs' bylaws and charters, both GSEs had promised operations that would maximize shareholder value and that the GSEs' officers and directors would accomplish maximum shareholder value by managing the GSEs as fiduciaries consistent with the duties of good faith and fair dealing, loyalty, and care. FAC ¶¶ 194-195; *see Fairholme Funds, Inc. v. Federal Housing Financing Agency*, 2018 WL 4680197, at *1 (D.D.C. Sept. 28, 2018) ("Fannie Mae and Freddie Mac are government-sponsored enterprises, born from statutory charters issued

[22] The Government points to HERA sections for the proposition that GSE securities were not backed by the full faith and credit of the United States. This argument misses the mark because the Government guaranteed the safety and security of Plaintiff's investment as Tier 1 Capital. Additionally, even if HERA disclaimed the GSE securities as being backed by full faith and credit, it does not follow that this provision immunizes the Government from taking Plaintiff Banks' Tier 1 Capital and acting through the FHFA to destroy Plaintiffs' investments.

by Congress." (*citing* 12 U.S.C. §§ 1716-1723; §§ 1451-1459)). The GSEs' pre-conservatorship charters, bylaws, and public disclosures codify these promises. After the passage of HERA, the Government forced the GSEs to acquiesce to a conservatorship. FAC ¶¶ 69-71. On September 7, 2008, within 24 hours of the imposition of the conservatorship, the conservator transferred his authority and the exclusive right to terminate the conservatorship under HERA to the Department of Treasury. FAC ¶ 90. That transfer of authority and the exclusive right to terminate the conservatorship from the FHFA to the Department of Treasury was a purely governmental function under HERA; it cannot be characterized as a private commercial activity. *Fairholme*, 26 F.4th at 1295. As explained in the Amended Complaint, by February 2009: (1) the FHFA succeeded to all of the power and authority of the Board of Directors, management, and shareholders, (2) delegated authority to a newly constituted Board of Directors; (3) eliminated all fiduciary duties owed to the shareholders; (4) eliminated shareholder voting rights; and (4) implemented a management strategy that expressly disclaimed any pursuit to maximize shareholder value. In short, by imposing the conservatorship, the FHFA rewrote the GSEs bylaws and charters.

The conservator, exercising a government function, also caused the GSEs to issue preferred shares to Treasury and warrants to purchase a majority of the common stock on a fully diluted basis. Under certain stock purchase agreements, Treasury obtained a superior liquidation preference and dividend rights as well as the right and authority to prevent the conservator from terminating the conservatorship.

Based on these facts, the Amended Complaint alleges that the Government breached the duties of good faith and fair dealing implied in the GSE bylaws and preferred shares by destroying Plaintiffs' investment backed expectations that: (1) a fiduciary relationship with the

directors and officers of the GSEs protected their investments; (2) the directors of the GSEs would operate and manage the enterprises to increase shareholder value; (3) that the investments were low risk; and (4) that Plaintiff Banks could invest 100% of their Tier 1 Capital without risking undercapitalization and failure. FAC ¶ 209.

Therefore, the Government's actions put it in privity with the GSEs vis-à-vis the obligations under the GSE charters, bylaws, and the stock certificates issued to Plaintiff Banks. As the Supreme Court has recognized:

> [E]ven when [the FHFA] acts as conservator or receiver, its authority stems from a special statute, not the laws that generally govern conservators and receivers. In deciding what it must do, what it cannot do, and the standards that govern its work, the FHFA must interpret [HERA], and "interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution of the laws.'"

Collins, 141 S.Ct. 1785-86 (internal citations omitted). The "FHFA clearly exercises executive power" when acting as a conservator. *Id.* at 1786. The Amended Complaint goes into great detail showing how the conservator exercising a government function transferred to Treasury the authority to end the conservatorship and then proceeded to restructure the GSEs so that the Government controlled management of the GSEs and redirected the GSEs' focus from maximizing shareholder value to providing liquidity, stability, and affordability in the mortgage market and to providing additional assistance in the market and the struggling housing market. Indeed, to accomplish the task, the FHFA expressly terminated any duty owed to any person or entity except to the conservator and extinguished shareholder voting rights as well as other shareholder rights. The complained of actions are not actions that Government took in a private commercial transaction and required the conservator to interpret and exercise its HERA powers.

The Government ignores each of the above allegations asserting only that the Federal Circuit rejected a similar argument in its *Fairholme* decision. In *Fairholme*, plaintiffs argued that the succession clause put the Government in the shoes of the GSEs such that the Government was liable for breaching promises in the plaintiffs' share certificates when it implemented the "net worth sweep." But Plaintiffs' claims and factual allegations are more robust than those cited in *Fairholme*. Here, Plaintiffs do not allege that the succession clause itself put the Government in privity with the GSEs, but that the succession clause *and* the conservator's decision to use its HERA powers to transfer the right to terminate the conservatorship to Treasury, coupled with its decision to rewrite the rules of the GSEs' corporate governance, put the Government in privity with GSEs and make it liable for causing the GSEs to abandon operation and management of the GSEs for the benefit of the shareholders. These actions could not simply have been private commercial activity in the role of conservator, they were fundamentally carried out through the interpretation of federal law (HERA), thereby establishing FHFA's governmental character and the Government's privity with the Plaintiff Banks. *Fairholme,* 26 F.4th at 1295. Indeed, Judge Lamberth from the District of Columbia allowed claims for breach of implied covenants to go forward on similar facts. *See Fairholme Funds, Inc. v. Federal Housing Finance*, Nos. 13-1053 (RCL) & 13-1439, 2018 WL 4680197, at *7-16 (D.D.C. Sept. 28, 2018).

VI. CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully request that the Court deny the Government's Motion to Dismiss and allow this case to proceed.

Dated: June 16, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to counsel of record.

By: /s/ Robert F. Ruyak
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