IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL E. KELLY, *et al.*, *Plaintiffs*, v. THE UNITED STATES, *Defendant*.	No. 21-1949 L Judge Molly R. Silfen

PLAINTIFFS' MOTION TO FILE SURREPLY TO GOVERNMENT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS AMENDED COMPLAINT

Pursuant to Rule 7(b) of the United States Court of Federal Claims, Plaintiffs respectfully move for leave to file the Proposed Surreply to the Government's Reply in Support of Its Motion to Dismiss Amended Complaint, filed on August 11, 2023 (Reply) (ECF No. 40), submitted herewith. Counsel for the United States indicated on August 10, 2023, that it opposes this motion.

BACKGROUND & ARGUMENT

The Government's Reply raises a number of new arguments and counter-factual scenarios. However, a party "may not raise new arguments in a reply brief." *CliniComp Int'l, Inc. v. United States*, 135 Fed. Cl. 477, 482 (2017). Plaintiffs should be afforded an opportunity to respond succinctly to the United States' new arguments, which they would otherwise not be able to address in any further briefing on the Motion to Dismiss.

As previously articulated by this Court, "[t]he decision to grant or deny leave to file a surreply is committed to the sound discretion of the court, and the court considers whether the surreply is helpful to the adjudication of the motion and whether defendant will be unduly prejudiced if the court grants leave." *Campo v. United States*, 157 Fed. Cl. 584, 593 (2021)

(citations omitted). "The standard for granting a leave to file a surreply is whether the party making the motion would be unable to contest matters present to the court for the first time in the opposing party's reply." *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C); *see Ute Indian Tribe of Uintah & Ouray Indian Rsrv. v. United States*, 145 Fed. Cl. 609, 617 n.6 (2019) (granting the Tribe's motion to file a surreply because the surreply provided helpful clarifications).

Plaintiff's Proposed Surreply, is succinct and addresses matters presented to the court for the first time in the Government's Reply. Plaintiffs' Proposed Surreply will be helpful to the adjudication of the motion and it will not unduly prejudice the Government.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the Court grant this motion for leave to file the enclosed Proposed Surreply.

Dated: August 21, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 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
Robert F. Ruyak, Partner

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL E. KELLY, *et al.*, *Plaintiffs*, v. THE UNITED STATES, *Defendant*.	No. 21-1949 L Judge Molly R. Silfen

[PROPOSED] ORDER ON PLAINTIFFS' MOTION TO FILE SURREPLY TO GOVERNMENT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS AMENDED COMPLAINT

Having considered Plaintiffs' motion for leave to file a surreply to the Government's Reply in Support of Its Motion to Dismiss Amended Complaint, filed on August 11, 2023 (ECF No. 40) (Reply), the record, and the arguments of counsel, the Court finds and concludes that Plaintiffs' motion is with merit.

Accordingly, the Court GRANTS Plaintiffs' Motion, and Plaintiffs may file its Proposed Surreply to the Government's Reply.

Dated: _____

By:_____
Hon. Molly R. Silfen
United States Court of Federal Claims

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL E. KELLY, *et al.*, *Plaintiffs*, v. THE UNITED STATES, *Defendant*.	No. 21-1949 L Judge Molly R. Silfen **HEARING REQUESTED**

[PROPOSED] PLAINTIFFS' SURREPLY TO GOVERNMENT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS AMENDED COMPLAINT

The Government's Reply in Support of its Motion to Dismiss Amended Complaint (ECF No. 40) ("Reply") advances new arguments and counter-factual scenarios that fail to address Plaintiffs' actual claims and their underlying facts. This is principally carried out, yet again, by a strained conflation of this case with that of *Washington Federal v. U.S.*, 26 F.4th 1253 (Fed. Cir. 2022), which neither governs nor forecloses Plaintiffs' claims. In doing so, the Government has further exposed its inability to formulate a coherent basis for its underlying Motion.

As the Government is well aware, when evaluating a Motion to Dismiss, the Court must accept as true all the factual allegations in the complaint, and must indulge all reasonable inferences in favor of the non-movant. *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (citations omitted). Yet the Government's Reply repeatedly invites the Court to disregard this fundamental tenet, and instead apply an illusory "one size fits all" analysis. This conflicts with the *ad hoc* nature of factual enquiries in takings cases, which necessarily cannot be considered through the prism of a rote formula. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Indeed, the Government's repeated contention that Plaintiffs' claims and

factual allegations are "superficially" different from the legal analysis upon which it relies (ECF No. 40 at 2-3, 5, 8, 12, 25), only reinforces the paucity of its position.

Accordingly, notwithstanding the broad and unavailing positions set out in the Government's Reply, by this Surreply Plaintiffs seek only to succinctly address the Government's new arguments and counter-factual allegations to provide helpful clarifications for the benefit of the Court. *See Campo v. U.S.*, 157 Fed.Cl. 584 (2021).[1]

I. THE GOVERNMENT'S STATUTE OF LIMITATIONS ARGUMENT IS MISPLACED

As a threshold matter, the Government continues to conflate the "formal doctrine of equitable tolling" (*see California Public Employees' Retirement System (CalPERS) v. ANZ Securities, Inc.,* 137 S.Ct. 2042, 2052 (2017)) with the concept of class action tolling originating under *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974) and *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983), and evolving—for purposes of litigating a subsequent individual action in the Court of Federal Claims—from *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010).

The Government for the first time relies upon *China Agritech, Inc. v. Resh,* 138 S. Ct. 1800, 1808 (2018) to reinforce its broad stance on "equitable tolling principles." ECF No. 40 at 6. *China Agritech*, however, denied class action tolling to a putative class member which, after denial of class certification in an initial class action, sought to file a second class action anew beyond the time allowed by the applicable statute of limitations. In reaching this conclusion, the Supreme Court, as it did in *CalPERS,* recognized that the class action tolling rule originating in

[1] Plaintiffs do not purport to rebut each and every overgeneralization, exaggeration, or mischaracterization in the Government's Reply. Rather, Plaintiffs aim to clarify only the most salient issues arising from the Government's disingenuous and misplaced contentions.

American Pipe emerged even in the absence of an analysis of the "criteria of the formal doctrine of equitable tolling in any direct manner." *China Agritech*, 138 S.Ct. at 1808. Simply put, the concept of class action tolling is not the same as "formal" or "traditional" equitable tolling. Though each may be grounded in the "traditional powers of the judiciary," the concepts are distinct. If they were not, the Supreme Court would not find occasion to repeatedly differentiate class action tolling from the "formal doctrine of equitable tolling."

Nor does the Government's newfound reliance upon the decisions of "other appellate courts" which have "generally concluded" that *American Pipe* tolling is equitable "in nature" have any bearing on Plaintiffs' position. ECF No. 40 at 6-7, citing *Dusek v. JP Morgan Chase & Co.*, 832 F.3d 1243, 1249 (11th Cir. 2016). *Dusek* denied class action tolling on a statute of repose (much like in *CalPERS*), which again, is not at issue here. But more importantly, the *Dusek* court came to its conclusion only after discussing the circuit split as to whether class action tolling should be characterized with an "equitable," "judicial" or "legal" label, given that courts did not (and do not) consistently refer to it in the same fashion. *Id.* at 1248-49.

And, contrary to the Government's blasé refrain that Plaintiffs rely only upon "superficial differences" between the instant case and the authorities offered by the Government (ECF No. 40 at 8, 9, 11, 13), it is those very "differences" that "transform the analysis." *CalPERS*, 582 U.S. at 515 ("The statute of repose transforms the analysis."). Simply put, neither the Supreme Court nor the Federal Circuit has opined on the effect of *CalPERS*—to the extent there is one—in the context of class action tolling of a Tucker Act claim. So, despite the Government's urging, *Bright,* which concluded that class action tolling is available to Tucker Act claims in the Court of Federal Claims (603 F.3d at 1287-89), remains good law. None of the new authorities raised by the Government in its Reply alters this fundamental matter.

The Government's Reply is also rife with factually inaccurate anecdotes that ostensibly justify their far-reaching conclusions. For instance, the Government newly asserts—without any support—that "[P]laintiffs should have brought their claims before the expiration of the statute of limitations, as several other plaintiffs in related cases have done, despite the pendency of purported class actions in which they might have joined, advancing similar claims." ECF No. 40 at 10. There is a reason the Government omits any reference to any other such "related" case: there is not one. Plaintiffs are the first pre-conservatorship shareholders to bring individual claims challenging the imposition of conservatorship on the GSEs as a taking or contractual breach.

And in any event, the Government's position is internally inconsistent: to the extent Plaintiffs can distill the Government's updated interpretation of *Big Oak Farms, Inc. v. United States*, 141 Fed. Cl. 482 (2019), it appears the Government now endorses the widely-held principle that "the class action tolling rule was instituted in the first place with an eye toward efficient administration in avoiding needless multiplication of actions," yet it chastises Plaintiffs for not filing a duplicative action.[2] ECF No. 40 at 9-10.

From the most basic procedural standpoint, the *Washington Federal* plaintiffs never even had an opportunity to move for class certification. The case was stayed for several years and was then adjudicated on a motion to dismiss. To suggest otherwise defies logic.

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[2] This is particularly the case where the there is no consensus on the Forfeiture Rule which, in some circuits, punishes individuals for filing their own protective suit prior to a determination on class certification. Neither the Federal Circuit nor the Supreme Court have decided the rule's applicability in these circumstances.

Finally, the Government continues to assert that even if tolling is permitted on their takings[3] claims—which it should be—then Plaintiffs' contract claims should not be tolled. The Government now seemingly asserts that not only does there need to be claim identity as between an original class action and a subsequent individual one, but that each and every "factual and legal predicate" must be identical. *See* ECF No. 40 at 10-11. The Government again plays on semantics, attempting to parse the differences between a "nexus" versus a "predicate," and hyperfocuses on Plaintiffs' operative allegations, but that focus, again, misses the point. It is a question of notice.

Therefore, the Government's newfound reliance upon what "other appellate courts" require—while outright ignoring Plaintiffs' authorities—is unavailing. *See* ECF No. 40 at 11. And the opinions of those "other" courts are no more binding upon this Court than Justice Powell's concurring opinion. To be clear, there is no uniformity amongst the circuit courts as to whether claim identity is required for class action tolling. The Government's concession that "it may be that plaintiffs' contract claims effectively allege that the conduct that plaintiffs assert constitutes a taking" (ECF No. 40 at 10-11) is telling: courts that do allow for tolling do so because it is the "challenged conduct" that puts a defendant on notice. *See* ECF No. 33 at 27 (citing *Cullen v. Margiotta*, 811 F.2d 698, 720 (2d Cir. 1987)). This, of course, is consistent with Justice Powell's concurring opinion in *Crown, Cork & Seal*.

II. THE GOVERNMENT'S COUNTER-FACTUALS CANNOT OVERCOME PLAINTIFFS' DISTINCT AND COGNIZABLE CLAIMS

Central to the Government's Reply is the continuing fallacy that Plaintiffs' takings claims are somehow premised on an allegedly unlawful application of HERA to place the GSEs into

[3] The Government continues to refer to Plaintiffs' "illegal exaction" claim, though it is no longer part of the operative complaint.

conservatorship. ECF No. 40 at 20. This, of course, being the central question in *Washington Federal*. However, Plaintiffs' Opposition plainly established that their takings claims arise under the Takings Clause of the Fifth Amendment. ECF No. 33 at 26. Whether the conservatorships under HERA were lawful or unlawful is immaterial.

Tacitly recognizing this error, the Government pivots and acknowledges that a question for this Court is whether Plaintiffs can advance a takings claim in circumstances where the GSE conservatorships were lawful. ECF No. 40 at 20. This admission, in itself, precludes an application of *Washington Federal* because all of those claims were based on the alleged illegality of the conservatorship, the Court's findings regarding claims not challenging the lawfulness of the conservatorship were *dicta*. ECF No. 33 at 24, fn. 9.

Further attempting to shoehorn the facts of the Plaintiffs' takings claim into new counter-factual arguments, the Government stretches to argue that the Plaintiffs are seeking to distinguish their claim from *Washington Federal* by "arguing that they can maintain a takings claim because the plaintiffs entered bankruptcy as a result of the diminution in value of their preferred shares" (ECF No. 40 at 20) and that "to the extent plaintiffs suggest that their bankruptcy constituted a taking, they are wrong." ECF No. 40 at 23. The Government's reliance on bankruptcy is misconceived.

It is not an insolvency of the FBOP Subsidiary banks that is at issue, it is the Government's taking of the Tier 1 Capital for its own public purpose which destroyed the banks compensable property; and immediately afterwards, having none—the Government took the banks themselves, including all of their assets. ECF No. 33 at 32.

This was the result of the Government's multiple takings actions. More specifically, the Government's imposition of conservatorship on the GSEs effected a taking of the Plaintiffs'

Tier-1 Capital requiring compensation; the Government's forced divestment of the assets of the seven FBOP Subsidiaries which fell out of regulatory compliance solely due to the imposition of conservatorship on the GSEs effected a taking requiring compensation; and the Government's forced divestment of the assets of the two solvent and profitable FBOP Subsidiaries effected a taking requiring compensation. ECF No. 30 at ¶ 150. Accordingly, the Government's new contention that the Plaintiffs' takings claim seeks consequential damages does not form part of the Plaintiffs' claim, and it is entirely misplaced as a matter of the facts alleged. ECF No. 40 at 20, 22.

Additionally, the Government's contention that the Plaintiffs lack a direct takings claim is simply wrong on the facts as pled. ECF No. 40 at 25-26. This position plainly ignores the specific allegations of direct taking from the FBOP Subsidiaries and the individual harms to them unrelated to any possible harm to the GSEs—injuries that that the GSEs had no property interest in and could never claim. These claims of harm are unique to the FBOP Subsidiary banks.

Unlike the GSEs, the FBOP Subsidiary banks were targeted and the banks' Tier 1 Capital in the form of the GSE investment was confiscated; the banks were then declared insolvent for failing to meet regulatory capital requirements; and the banks and all of their substantial assets were seized and confiscated by the Government. The Government also effectuated a taking of FBOP's 100% ownership interest in the banks. ECF No. 30 at ¶ 150. These actions are incapable of supporting a derivative claim, and are distinct from *Washington Federal*. ECF No. 30 at ¶¶ 150, 154-155.

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III. CONCLUSION

For the aforementioned reasons, and for those set out in the Plaintiffs' Amended Complaint (ECF No. 30) and Plaintiffs' Opposition to the Government's Motion to Dismiss Amended Complaint (ECF No. 33), the Plaintiffs' respectfully request that the Court deny the Government's Motion to Dismiss and allow this case to proceed.

Dated: August 21, 2023

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