IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

TIMOTHY J. PAGLIARA, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, Defendant.	C.A. No. 16-193-GMS

DECLARATION OF ZI-XIANG SHEN IN SUPPORT OF DEFENDANT FEDERAL NATIONAL MORTGAGE ASSOCIATION'S RESPONSE BRIEF OPPOSING PLAINTIFF'S MOTION TO REMAND

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

S. Mark Hurd (#3297)
Zi-Xiang Shen (#6072)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
Telephone: (302) 658-9200
shurd@mnat.com
zshen@mnat.com

O'MELVENY & MYERS LLP

Jeffrey W. Kilduff
Michael J. Walsh, Jr.
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, D.C. 20006-4001
Telephone: (202) 383-5300
jkilduff@omm.com
mwalsh@omm.com

Attorneys for Defendant Federal National Mortgage Association

1. I am an attorney at law, licensed to practice in the State of Delaware. I am an associate at Morris Nichols Arsht & Tunnell and represent the defendant Federal National Mortgage Association ("Fannie Mae") in the above-captioned action. I submit this declaration in support of Fannie Mae's Response Brief Opposing Plaintiff's Motion to Remand. I am over the age of 18, am capable of making this declaration, know all the following facts of my own personal knowledge and, if called and sworn as a witness, could and would testify competently thereto.

2. Attached hereto as Exhibit A is a true and correct copy of a letter from Jeffrey W. Kilduff, counsel for Fannie Mae, to C. Barr Flinn, counsel for Timothy J. Pagliara, dated August 4, 2016.

3. Attached hereto as Exhibit B is a true and correct copy of an excerpt of Fannie Mae's Annual Report for fiscal year 2002, filed with the United States Securities & Exchange Commission as Form 10-K on March 31, 2003, *available at* https://www.sec.gov/Archives/edgar/data/310522/000095013303001151/w84239e10vk.htm.

4. Attached hereto as Exhibit C is a true and correct copy of an excerpt of Fannie Mae's Bylaws (as amended through July 21, 2016), *available at* http://www.fanniemae.com/resources/file/aboutus/pdf/bylaws.pdf .

5. Attached hereto as Exhibit D is a true and correct copy of an unpublished opinion issued on August 18, 2016 by a panel of the United States Court of Appeals for the Federal Circuit in *Piszel v. United States*, Case No. 2015-5100.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration is executed this 18th day of August, 2016 in Wilmington, DE.

/s/ Zi-Xiang Shen
Zi-Xiang Shen (#6072)

EXHIBIT A

O'MELVENY & MYERS LLP

BEIJING
BRUSSELS
CENTURY CITY
HONG KONG
LONDON
LOS ANGELES
NEWPORT BEACH

1625 Eye Street, NW
Washington, D.C. 20006-4001
TELEPHONE (202) 383-5300
FACSIMILE (202) 383-5414
www.omm.com

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SILICON VALLEY
SINGAPORE
TOKYO

August 4, 2016

OUR FILE NUMBER
258,938-1160

VIA EMAIL

WRITER'S DIRECT DIAL
(202) 383-5383

WRITER'S E-MAIL ADDRESS
jkilduff@omm.com

C. Barr Flinn
Young Conaway Stargatt & Taylor, LLP
Rodney Square
1000 N. King Street
Wilmington, DE 19801

Re: *Pagliara v. Fannie Mae*, Case No. 1:16-cv-193 (GMS)

Dear Mr. Flinn:

On behalf of Fannie Mae, we are writing to ask you to correct certain incorrect statements in Pagliara's Verified Complaint and Pagliara's Remand Motion dated August 1, 2016. Pagliara's Remand Motion states that "Fannie Mae was initially federally chartered, but subsequently incorporated in Delaware…." Remand Motion at 3. There is no citation to support this proposition. The Remand Motion later states that "on August 21, 2002, Fannie Mae filed a certificate of incorporation in Delaware." Remand Motion at 7. For support, Pagliara cites to Exhibit C of his Verified Complaint, which appears to be a certificate of incorporation filed on August 21, 2002 with the Delaware Secretary of State for an entity purportedly called "Federal National Mortgage Association, Inc."

As even the slightest diligence by you or your client would have revealed, the Delaware Secretary of State voided the 2002 certificate of incorporation for "Federal National Mortgage Association, Inc.," attached as Exhibit C to your Verified Complaint, more than twelve years ago. In so doing, the Secretary of State explained that "the aforesaid corporation is no longer in existence and good standing under the laws of the State of Delaware having become inoperative and void the first day of March, A.D. 2004 for non-payment of taxes." A copy of this certificate is attached to this letter. The fact that the Secretary of State voided the certificate of incorporation for the "Federal National Mortgage Association, Inc." is readily ascertainable on the Secretary of State's website for a fee of $10. The underlying 2004 certificate is available for an additional $50 fee. We would expect that you would be familiar with the process of obtaining these documents. The 2004 certificate is judicially noticeable because it is a decision letter of a government body and it is integral to Pagliara's complaint. *See Pension Benefit Guar. Corp. v.*

White Consol. Indus., Inc., 998 F.2d 1192, 1197 (3d Cir. 1993); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997).

In addition, as you know, Pagliara did not sue "Federal National Mortgage Association, Inc.," as listed in the certificate. The company Pagliara sued – the Federal National Mortgage Association – has never been known as "Federal National Mortgage Association, Inc.," nor has it ever been incorporated in the State of Delaware. In fact, the very first section of Fannie Mae's Bylaws, which you also attach to your Remand Motion at Exhibit A, makes clear that Fannie Mae shall be known as the "Federal National Mortgage Association" or "Fannie Mae." Bylaws § 1.01. Similarly, Fannie Mae's Charter, which is also publicly available, states that Fannie Mae shall be known as "Federal National Mortgage Association." Charter § 302(a)(1), 302(a)(2)(B). Fannie Mae's Charter further provides that Fannie Mae can "conduct its business without regard to any qualification or similar statute in any State of the United Sates," Charter §309(a), so there would be no reason for Fannie Mae to file such a certificate. And on its face, the certificate attached as Exhibit C to your Verified Complaint should have placed you on notice that it did not relate to Fannie Mae. It states that the "Federal National Mortgage Association, Inc." was authorized to issue up to 1,500 shares of common stock. As any review of Fannie Mae's public SEC filings – including the Form 10-K that Pagliara attached an excerpt of as Exhibit C to the Remand Motion – makes clear, Fannie Mae has over one billion shares of common stock outstanding. *See* Fannie Mae Form 10-K (Feb. 19, 2016), at F-3.

If you have any basis for alleging that the entity Pagliara sued – the Federal National Mortgage Association, or Fannie Mae – is incorporated in the State of Delaware other than Exhibit C to Pagliara's Verified Complaint, please provide it as soon as possible,[1] but no later than one week from today, so that we are able to address it in our opposition to Pagliara's remand motion. Consistent with your obligations under applicable rules of civil procedure and rules of professional responsibility, please also confirm that you will be filing a corrected Verified Complaint and a corrected Remand Motion to account for the fact that Fannie Mae is not incorporated in Delaware and that the certificate Pagliara cited to support its allegation that Fannie Mae is incorporated in Delaware was voided in 2004. Thank you for your prompt attention to this matter.

Sincerely,

Jeffrey W. Kilduff
of O'MELVENY & MYERS LLP

cc: Counsel of Record

[1] Note that the Federal Housing Finance Agency's Final Rule on corporate governance, entitled "Responsibilities of Boards of Directors, Corporate Practices and Corporate Governance Matters," makes clear that Fannie Mae's election to follow a state's corporate governance and indemnification practices and procedures does not "create any rights in any third party, … nor shall it cause or be deemed to cause any regulated entity to become subject to the jurisdiction of any state court with respect to entity's corporate governance." 12 C.F.R. § 1239.3(d).

Delaware

The First State

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THAT THE CERTIFICATE OF INCORPORATION OF "FEDERAL NATIONAL MORTGAGE ASSOCIATION, INC.", WAS RECEIVED AND FILED IN THIS OFFICE THE TWENTY-FIRST DAY OF AUGUST, A.D. 2002.

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CORPORATION IS NO LONGER IN EXISTENCE AND GOOD STANDING UNDER THE LAWS OF THE STATE OF DELAWARE HAVING BECOME INOPERATIVE AND VOID THE FIRST DAY OF MARCH, A.D. 2004 FOR NON-PAYMENT OF TAXES.

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CORPORATION WAS SO PROCLAIMED IN ACCORDANCE WITH THE PROVISIONS OF GENERAL CORPORATION LAW OF THE STATE OF DELAWARE ON THE TWENTY-FIFTH DAY OF JUNE, A.D. 2004 THE SAME HAVING BEEN REPORTED TO THE GOVERNOR AS HAVING NEGLECTED OR REFUSED TO PAY THEIR ANNUAL TAXES.

3560366 8400
SR# 20161641989

Authentication: 201979750
Date: 03-14-16

You may verify this certificate online at corp.delaware.gov/authver.shtml

EXHIBIT B

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UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

Form 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d)

OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2002

Commission File No.: 0-50231

Federal National Mortgage Association

(Exact name of registrant as specified in its charter)

Fannie Mae

Federally chartered corporation *(State or other jurisdiction of incorporation or organization)*	**52-0883107** *(I.R.S. Employer Identification No.)*
3900 Wisconsin Avenue, NW **Washington, DC** *(Address of principal executive offices)*	**20016** *(Zip Code)*

Registrant's telephone number, including area code:

(202) 752-7000

Securities registered pursuant to Section 12(b) of the Act:

None

Securities registered pursuant to Section 12(g) of the Act:

Common Stock, without par value
(Title of class)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☐ No ☑

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☑

Indicate by check mark whether the registrant is an accelerated filer (as defined in Exchange Act Rule 12b-2). Yes ☐ No ☑

As of the close of business on February 28, 2003, there were 986,925,508 shares of common stock outstanding. As of June 28, 2002 (the last business day of Registrant's most recent second fiscal quarter), the aggregate market value of the common stock held by non-affiliates of the registrant was approximately $73,217 million. As of February 28, 2003, the aggregate market value of the common stock held by non-affiliates of the registrant was approximately $63,262 million.

DOCUMENTS INCORPORATED BY REFERENCE

Material contained in the registration statement of Fannie Mae on Form 10 filed with the Securities and Exchange Commission on March 31, 2003 is incorporated by reference in Part II, Item 5, and Part III of this Form 10-K.

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FANNIE MAE

BALANCE SHEETS

	December 31,	
	2002	2001
	(Dollars in millions, except share stated values)	
Assets		
Mortgage portfolio:		
Mortgage-related securities:		
Held-to-maturity	$437,932	$509,155
Available-for-sale	173,706	32,900
Total	611,638	542,055
Loans held-for-investment	185,652	165,917
Allowance for loan losses	(79)	(48)
Unamortized premiums (discounts) and deferred price adjustments, net	337	(2,640)
Loans held-for-sale	145	40
Mortgage portfolio, net	797,693	705,324
Nonmortgage investments:		
Held-to-maturity	23,050	38,671
Available-for-sale	36,794	35,883
Cash and cash equivalents	1,710	1,518
Accrued interest receivable	4,915	4,705
Acquired property and foreclosure claims, net	1,033	684
Derivatives in gain positions	3,666	954
Other	18,654	12,209
Total assets	$887,515	$799,948
Liabilities and Stockholders' Equity		
Liabilities:		
Debentures, notes and bonds, net:		
Senior debt:		
Due within one year	$382,412	$343,492
Due after one year	458,600	413,582
Subordinated debt:		
Due after one year	9,970	6,393
Total	850,982	763,467
Accrued interest payable	8,379	8,529
Derivatives in loss positions	5,697	5,069
Guaranty liability for MBS	729	755
Other	5,440	4,010
Total liabilities	871,227	781,830
Stockholders' Equity:		
Preferred stock, $50 stated value, 100 million shares authorized — 53.6 million shares issued and outstanding in 2002 and 46 million shares issued and outstanding in 2001	2,678	2,303
Common stock, $.525 stated value, $1.32 of dividends per share paid in 2002 and $1.20 of dividends per share paid in 2001, no maximum authorization — 1,129 million shares issued	593	593
Additional paid-in capital	1,839	1,651
Retained earnings	29,385	26,175
Accumulated other comprehensive loss	(11,792)	(7,065)
	22,703	23,657
Less: Treasury stock, at cost, 140 million shares in 2002 and 132 million shares in 2001	6,415	5,539
Total stockholders' equity	16,288	18,118
Total liabilities and stockholders' equity	$887,515	$799,948

See Notes to Financial Statements.

EXHIBIT C

FANNIE MAE BYLAWS
As amended through July 21, 2016

The Director of the Federal Housing Finance Agency, or FHFA, Fannie Mae's safety, soundness and mission regulator, appointed FHFA as conservator of Fannie Mae on September 6, 2008. As conservator, FHFA succeeded to all rights, titles, powers and privileges of the corporation, and of any stockholder, officer or director of the corporation with respect to the corporation and its assets, and may, by regulation or order, provide for the exercise of any function by any stockholder, director, or officer of Fannie Mae. On November 24, 2008, FHFA, as conservator, reconstituted the Fannie Mae Board of Directors (Board) and directed the functions and authorities of the Board. The Board serves on behalf of the conservator and shall exercise their authority as directed by the conservator. The Bylaws should be read in conjunction with an understanding of the Company's conservatorship status.

Article 1: General Provisions

Section 1.01. *Name.* The name of the corporation is Federal National Mortgage Association. The corporation may also do business under the name Fannie Mae.

Section 1.02. *Principal Office and Other Offices.* The principal office of the corporation shall be in the District of Columbia. Other offices of the corporation shall be in such places as may be deemed by the Board of Directors or the Chief Executive Officer to be necessary or appropriate.

Section 1.03. *Seal.* The seal of the corporation shall be of such design as shall be approved and adopted from time to time by the Board of Directors, and the seal or a facsimile thereof may be affixed by any person authorized by the Board of Directors or these Bylaws by impression, by printing, by rubber stamp, or otherwise.

Section 1.04. *Fiscal Year.* The fiscal year of the corporation shall end on the 31st day of December of each year.

Section 1.05. *Corporate Governance Practices and Procedures.* Pursuant to Sections 12 C.F.R. 1236 and 1239 of the Federal Housing Finance Agency Regulations (the "FHFA Regulation"), to the extent not inconsistent with the Charter Act and other Federal law, rules, and regulations, the corporation has elected to follow the applicable corporate governance practices and procedures of the Delaware General Corporation Law, as the same may be amended from time to time. The inclusion of Sections 1.01, 1.02, 1.05, 2.01, 2.02, 2.03, 2.10, 3.08(b), 3.08(c), 4.01, 4.02, 4.03 and 4.19, Articles 6, 7 and 8, and any new bylaw which may be adopted from time to time and designated as a "Certificate Provision" in accordance with Section 7.01 (collectively, the "Certificate Provisions") in these Bylaws shall constitute inclusion in the corporation's "certificate of incorporation" for all purposes of the Delaware General Corporation Law. The inclusion in these Bylaws of bylaws that are not Certificate Provisions (collectively, the "Bylaw Provisions") shall constitute inclusion in the corporation's "bylaws" for all purposes of the Delaware General Corporation Law.

Article 2: Capital Stock

Section 2.01. *Common Stock.* The common stock, all of which is voting and has no par value, shall have a stated value per share as determined from time to time by the Board of Directors. Shares of the corporation may be acquired and held in the treasury of the corporation, and may be disposed of by the corporation for such consideration and for such purposes as may be determined from time to time by the Board of Directors.

Section 2.02. *Preferred Stock.* The corporation shall have authority to issue up to 700,000,000 shares of preferred stock having no par value. The preferred stock may be issued from time to time in one or more series upon approval by the Board of Directors, or a committee thereof appointed for such purpose, and the Board of Directors or such committee may, by resolution providing for the issuance of such preferred stock, designate with respect to such shares: (a) their voting powers; (b) their rights of redemption; (c) their right to receive dividends (which may be cumulative or non-cumulative) including the dividend rate or rates, conditions to payment, and the relative preferences in relation to the dividends payable on any other class or classes or series of stock; (d) their rights upon the dissolution of, or upon any distribution of the assets of, the corporation; (e) their rights to convert into, or exchange for, shares of any other class or classes of stock of the corporation, including the price or prices or the rate of exchange; and (f) other relative, participating, optional or special rights, qualifications, limitations or restrictions. Notwithstanding Sections 4.12(a)(6) and 4.17 of these Bylaws, the Board of Directors may authorize a committee of the Board to declare dividends on preferred stock.

Section 2.03. *Payment for Shares.* The consideration to be received by the corporation for the issuance of common shares shall be fixed from time to time by the Board of Directors. A subscriber shall be entitled to issuance of shares upon receipt by the corporation of the consideration for which the shares are to be issued. No certificates shall be issued for any share until the share is fully paid, and, when issued, such shares shall be nonassessable.

Section 2.04. *Uncertificated Shares.* Any shares of stock of any class or series of the corporation shall be issued in uncertificated form pursuant to customary arrangements for issuing shares in such form, unless a stock certificate is requested by a stockholder.

Section 2.05. *Certificates Representing Shares.* Each registered holder of the capital stock of the corporation shall be entitled to a certificate or certificates signed by the Chairman of the Board of Directors or the President and by the Secretary or an Assistant Secretary of the corporation, and sealed with the seal of the corporation certifying the number of shares owned by him in the corporation. The certificates shall be in such form as the Board, from time to time, may approve. Any or all of the signatures on the certificate may be a facsimile. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon a certificate shall have ceased to be such officer, transfer agent or registrar before such certificate is issued, it may be issued by the corporation with the same effect as if he or she were such officer, transfer agent or registrar at the date of issue.

Section 2.06. *Transfers of Stock.* Transfers of stock shall be made upon the books of the corporation at the request of either the registered holder of the stock or the attorney, lawfully constituted in writing, of such registered holder and, in the case of a holder with a certificate, on surrender for cancellation of the certificate for such share or, in the case of a holder with an uncertificated share, on presentment of proper evidence of succession, assignation or authority to transfer in accordance with customary procedures for transferring shares in uncertificated form.

Section 2.07. *Registered Holder.* The corporation shall be entitled to treat the registered holder of any share or shares of stock as the holder in fact thereof and accordingly shall not be bound to recognize any equitable or other claim to or interest in such share on the part of any other person whether or not it shall have express or other notice thereof, save as expressly provided by the laws of the State of Delaware insofar as they are applicable to the stock of stock corporations organized under the Delaware General Corporation Law.

Section 2.08. *Loss or Destruction of Certificate of Stock.* In case of loss or destruction of any certificate of stock, another may be issued in its place, pursuant to such requirements and procedures as may be established by the Secretary of the corporation with the concurrence of the General Counsel (including, without limitation, requiring provision of a surety bond).

Section 2.09. *Stockholder Records.*

(a) The corporation shall keep at its principal place of business, or at the office of its transfer agent or registrar, a record of its stockholders, giving the names and addresses of all stockholders and the number of shares held by each.

(b) The officer who has charge of the stock ledger of the corporation shall prepare and make, at least 10 days before every meeting of stockholders, a complete list of the stockholders entitled to vote at said meeting, arranged in alphabetical order, showing the address of and the number of shares registered in the name of each stockholder. Such list shall be open to the examination of any stockholder, for any purpose germane to the meeting, for a period of at least 10 days prior to the meeting, during ordinary business hours, at the principal place of business of the corporation or as may otherwise be permitted by the Delaware General Corporation Law. The list shall be produced and kept at the time and place of the meeting during the whole time thereof and may be inspected by any stockholder who is present.

Section 2.10. *Registration of common and preferred stock.* The corporation shall register its common and preferred stock with the Securities and Exchange Commission as required pursuant to Sections 12(b) or (g) of the Securities Exchange Act of 1934, as amended, and shall take appropriate steps to maintain such registration. Notwithstanding anything to the contrary contained in Section 7.02 of these Bylaws, this Section 2.10 may be altered, amended, or repealed only by the unanimous vote or consent of all the then incumbent Members of the Board then in office.

Article 3: The Stockholders

Section 3.01. *Place of Meetings.* Meetings of the stockholders of the corporation shall be held at such place or places, within or without the District of Columbia, as shall be determined by the Board of Directors; and the Chairman of the Board (or in his absence another person designated by the Board of Directors) shall preside at all such meetings.

Section 3.02. *Annual Meeting.* The annual meeting of stockholders shall be held on such date and at such time as the Board of Directors may designate.

Section 3.03. *Special Meetings.* Special meetings of the stockholders may be called by the Board of Directors or the Chairman of the Board, or at the request of the holders of not less than one-third of all the shares entitled to vote, to be determined as of the close of the first day of the

month preceding the month in which the request is presented to the Secretary. Business transacted at all special meetings shall be confined to the subjects stated in the notice of special meeting.

Section 3.04. *Notice of Meetings — Waiver and Adjourned Meetings.* Written notice stating the place, date and hour of the meeting, and the purpose or purposes for which the meeting is called, shall be delivered not less than 10, nor more than 60, days before the date of the meeting, by the Secretary of the corporation, to each registered holder entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the registered holder at his address as it appears on the stock transfer books of the corporation, with first class postage prepaid. Waiver by a stockholder in writing of notice of a stockholders' meeting, signed by him either before or after the time of the meeting, shall be equivalent to the giving of such notice. Attendance by a stockholder at a stockholders' meeting, whether in person or by proxy, without objection to the notice or lack thereof, shall constitute a waiver of notice of the meeting. Any meeting of stockholders may be adjourned by the chair of the meeting to reconvene at another time or place. When a meeting is adjourned to another time or place, notice need not be given of the adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken. At the adjourned meeting the corporation may transact any business which might have been transacted at the original meeting. If the adjournment is for more than 30 days, or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting.

Section 3.05. *Fixing Record Date*

(a) For the purpose of determining stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, the Board of Directors may fix a date as the record date. Such date, in any case, shall not precede the date upon which the resolution fixing the record date is adopted by the Board of Directors and shall be not more than 60 days and not less than 10 days prior to the date of such meeting. If no such record date is fixed, the close of business on the day next preceding the day on which notice is given, or, if notice is waived, the close of business on the day next preceding the date on which the meeting is held shall be the record date for the determination of stockholders entitled to notice of or to vote at a meeting of stockholders. When a determination of stockholders entitled to vote at any meeting of stockholders has been made, as provided in this section, the determination shall apply to any adjournment thereof, provided, however, that the Board of Directors may fix a new record date for the adjourned meeting.

(b) For the purpose of determining stockholders entitled to receive payment of any dividend, or in order to make a determination of stockholders for any other purpose (except as provided in Section 3.05(a), the Board of Directors or a duly authorized Committee thereof may fix a date as the record date. Such date, in any case, shall not precede the date upon which the resolution fixing the record date is adopted and shall be not more than 60 days prior to the date on which the particular action is to be taken. If no such record date is fixed, the close of business on the day on which the resolution relating thereto is adopted shall be the record date for the determination of stockholders.

Section 3.06. *Quorum.* A majority of the shares entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of stockholders. The stockholders present at a duly organized meeting may continue to do business until adjournment, notwithstanding the withdrawal of the holders of enough shares to leave less than a quorum. If a meeting cannot be

organized because a quorum has not attended, either the chair of the meeting, or those stockholders present, in person or by proxy, by a majority of the votes cast by such stockholders so present, may adjourn the meeting from time to time until a quorum is present when any business may be transacted that may have been transacted at the meeting as originally called.

Section 3.07. *Proxies.* A stockholder may vote either in person or by proxy executed in writing by the stockholder or his duly authorized representative. No proxy shall be valid after 11 months from the date of its execution, unless otherwise expressly provided in the proxy.

Section 3.08. *Voting*

(a) At every meeting of the stockholders, every holder of the common stock shall be entitled to one vote for each share of common stock registered in the name of such holder on the stock transfer books of the corporation at the close of the record date. A proxy purporting to be executed by a corporation shall be presumed to be valid and the burden of proving invalidity shall rest on any challenger. A proxy purporting to be executed by a partnership shall be presumed to be valid and the burden of proving invalidity shall rest on any challenger. Unless a higher percentage of affirmative votes is required by the Charter Act, these Bylaws, applicable stock exchange rules or regulations, or other applicable Federal law, rules, or regulations, the stockholders will have approved any matter if, at a meeting at which a quorum is present, the votes cast by the stockholders present, either in person or by proxy and entitled to vote thereon, in favor of such matter exceed the votes cast by such stockholders against such matter.

(b) Except as provided in Section 308 (b) of the Charter Act, members of the Board of Directors shall be elected by a majority of the votes cast in person or by proxy at any meeting that includes the election of directors at which a quorum is present, provided that if (i) the number of nominees exceeds the number of directors to be elected or (ii) the Secretary of the Corporation received notice that a stockholder nominated a person for election to the Board of Directors in accordance with Section 4.21 of these Bylaws, and that nomination has not been withdrawn by the stockholder on or before the tenth day preceding the date the corporation first mails its meeting notice to stockholders, the directors are to be elected by a plurality of the votes cast in person or by proxy. For purposes of this Section, a majority of the votes cast means that the number of shares voted “for” a director must exceed the number of votes cast “against” that director. For purposes of this Section, if plurality voting is applicable to the election of directors at any meeting, the director nominees who receive the highest number of votes cast “for”, without regard to votes cast “against,” shall be elected as directors up to the total number of directors to be elected at that meeting. Abstentions and broker non-votes will not count as a vote cast with respect to a director’s election.

(c) If an incumbent director fails to receive the required vote for re-election, the Nominating and Corporate Governance Committee will review the director’s previously submitted irrevocable resignation (which is contingent upon (i) his or her failure to receive the required vote and (ii) Board acceptance of such resignation), will act on an expedited basis to determine whether to accept such director’s resignation, and will submit such recommendation for prompt consideration by the Board. The Board expects the director whose resignation is under consideration to abstain from participating in any decision regarding that resignation. The Nominating and Corporate Governance Committee and the Board may consider any factors they deem relevant in deciding whether to accept a director’s resignation. The Board will publicly disclose (in accordance with Section 3.12 of these Bylaws) its decision regarding the tendered resignation and the rationale for the decision within 90 days after the date of certification of the election results. If such incumbent director’s resignation is not accepted by

the Board, such director will continue to serve until the next meeting that includes the election of directors and until his or her successor is chosen and qualified, or his or her death, resignation, or retirement or removal in accordance with applicable law or regulation, whichever event shall first occur. If a director's resignation is accepted by the Board, or if a nominee for director is not elected and the nominee is not an incumbent director, then the Board, in its sole discretion, may fill any resulting vacancy pursuant to the provisions of Section 308(b) of the Charter Act.

Section 3.09. *Inspectors of Votes.* The Board of Directors, in advance of any meeting of stockholders, shall appoint one or more Inspectors of Votes to act at the meeting or any adjournment thereof and make a written report thereof. One or more persons may be designated as alternates to replace any Inspector of Votes who fails to act. In case any person so appointed Inspector of Votes or alternate resigns or fails to act, the vacancy shall be filled by appointment made by the chairman of the meeting. The Inspectors of Votes shall (a) ascertain the number of shares outstanding and the voting power of each and determine all questions concerning the qualification of voters; (b) determine the shares represented at the meeting and the validity of proxies and ballots; (c) determine all questions concerning the acceptance or rejection of votes and, with respect to each vote by ballot, shall collect and count all votes and ballots; (d) determine and retain for a reasonable period a record of the disposition of any challenges made to any determination by the Inspectors of Votes; and (e) report in writing to the secretary of the meeting their determination of the number of shares represented at the meeting, and their count of all votes and ballots. The Inspectors of Votes need not be stockholders of the corporation. No person who is an officer or Member of the Board of Directors of the corporation, or who is a candidate for election as a Member of the Board of Directors, shall be eligible to be an Inspector of Votes. Any report or certificate by the Inspectors of Votes shall be prima facie evidence of the facts stated and of the votes as certified by them.

Section 3.10. *Stockholder Notices to the Corporation.* Whenever notice is to be given to the corporation by a stockholder under any provision of law or of these Bylaws, such notice shall be delivered to the Secretary at the principal executive offices of the corporation. If delivered by electronic mail or facsimile, the stockholder's notice shall be directed to the Secretary at the electronic mail address or facsimile number, as the case may be, specified in the corporation's most recent proxy statement.

Section 3.11. *Conduct of Meetings.* The date and time of the opening and the closing of the polls for each matter upon which the stockholders will vote at a meeting shall be announced at such meeting by the person presiding over the meeting. The Board of Directors may adopt by resolution such rules or regulations for the conduct of meetings of stockholders as it shall deem appropriate. Except to the extent inconsistent with such rules and regulations as adopted by the Board of Directors, the chair of any meeting of stockholders shall have the right and authority to prescribe such rules, regulations and procedures and to do all such acts as, in the judgment of such chair, are appropriate for the proper conduct of the meeting. Such rules, regulations or procedures, whether adopted by the Board of Directors or prescribed by the chair of the meeting, may include, without limitation, the following: (a) the establishment of an agenda or order of business for the meeting; (b) rules and procedures for maintaining order at the meeting and the safety of those present; (c) limitations on attendance at or participation in the meeting to stockholders of record of the corporation, their duly authorized and constituted proxies, or such other persons as the chair shall permit; (d) restrictions on entry to the meeting after the time fixed for the commencement thereof; and (e) limitations on the time allotted to questions or comments by participants. Meetings of stockholders shall not be required to be held in accordance with rules of parliamentary procedure.

Section 3.12. *Notice of Business to be Brought Before an Annual Meeting.* At an annual meeting of the stockholders, only such business shall be conducted as shall have been properly brought before the meeting. To be properly brought before an annual meeting, business must be (a) specified in the notice of meeting (or any supplement thereto) given by or at the direction of the Board of Directors; (b) otherwise properly brought before the meeting by or at the direction of the Board of Directors; or (c) otherwise properly brought before the meeting by a stockholder. For business to be properly brought before an annual meeting by a stockholder (other than the nomination of a person for election as a director, which is governed by Section 4.21 of these Bylaws), the stockholder must have given timely notice thereof in writing to the Secretary of the corporation. To be timely, a stockholder's notice must be delivered to or mailed and received at the principal executive offices of the corporation not earlier than the close of business on the 120th day and not later than the close of business on the 60th day prior to the first anniversary of the preceding year's annual meeting; provided, however, that in the event that the date of the annual meeting is more than 30 days before or more than 60 days after such anniversary date, notice by the stockholder to be timely must be so delivered not earlier than the close of business on the 120th day prior to such annual meeting and not later than the close of business on the later of the 60th day prior to such annual meeting and the 10th day following the day on which public disclosure of the date of such meeting is first made by the corporation. In no event shall the public disclosure of an adjournment of an annual meeting commence a new time period for the giving of a stockholder's notice as described above. (For purposes of these Bylaws, public disclosure shall be deemed to include a disclosure made in a press release reported by the Dow Jones News Services, Associated Press or a comparable national news service or in a document filed by the corporation with the Securities and Exchange Commission pursuant to Section 13 of the Securities Exchange Act of 1934, as amended.) A stockholder's notice to the Secretary shall set forth as to each matter the stockholder proposes to bring before the annual meeting (A) a brief description of the business desired to be brought before the annual meeting and the reasons for conducting such business at the annual meeting; (B) the name and address, as they appear on the corporation's books, of the stockholder proposing such business; (C) the class and number of shares of the corporation that are beneficially owned by the stockholder; and (D) any material interest of the stockholder in such business. Notwithstanding anything in these Bylaws to the contrary, no business shall be conducted at any annual meeting except in accordance with the procedures set forth in this Section 3.12. The chair of the annual meeting shall, if the facts warrant, determine and declare to the meeting that business was not properly brought before the meeting in accordance with the provisions of this Section 3.12, and if he or she should so determine, he or she shall so declare to the meeting and any such business not properly brought before the meeting shall not be transacted.

Article 4: The Board of Directors

Section 4.01. *General Policies.* General policies governing the operations of the corporation shall be determined by the Board of Directors.

Section 4.02. *Membership.* The Board of Directors shall consist of those Members appointed and elected as provided by law.

Section 4.03. *Term of Members.* Each Member shall hold office for the term for which he is elected or appointed and until his successor is chosen and qualified, or his death, resignation, or retirement or removal in accordance with applicable law or regulation, whichever event shall first occur.

Section 4.04. *Regular Meetings.* The Board of Directors shall meet in regular meetings at such times as shall be determined by the Board from time to time, except as provided in section 4.05 and except when the Chairman of the Board shall notify the Secretary of a different date prior to a scheduled regular meeting. Each regular meeting shall be held at the principal office of the corporation in the District of Columbia, unless special provision is made by the Board, in advance of any such regular meeting, to hold that meeting at another place, either within or without the District of Columbia.

Section 4.05. *Annual Meeting.* Immediately following the annual meeting of the stockholders, the Board of Directors shall meet each year for the purpose of considering any business that may properly be brought before the meeting, and such annual meeting of the Board shall be a regular meeting.

Section 4.06. *Special Meetings.* Other meetings of the Board of Directors may be held upon the call of the Chairman of the Board of Directors, or of a majority of the then incumbent Members of the Board. Each special meeting shall be held at the principal office in the District of Columbia unless the Chairman of the Board prescribes and the notice specifies another place.

Section 4.07. *Notice of Meetings — Waiver.* No notice of any kind to Members of the Board of Directors shall be necessary for any regular meeting that is held on a date determined by the Board, or for the annual meeting. In the case of a regular meeting on a different date, notice shall be given to each Member by the Secretary; in the case of a special meeting, notice shall be given to each Member by the Secretary at the direction of the calling authority. Such notice shall be in writing and sent to the address on file with the Secretary of the corporation not later than during the third day immediately preceding the day for the meeting; or by word of mouth, telephone, facsimile or electronic mail, directed to the telephone number, facsimile number or electronic mail address, as the case may be, on file with the Secretary of the corporation, not later than during the second day immediately preceding the day for the meeting. The attendance of any Member at a meeting shall constitute a waiver of notice by such Member, except where such Member attends for the express purpose of protesting at the beginning of the meeting the lack of notice of the meeting. Neither the business to be transacted at, nor the purpose of, any meeting of the Board of Directors need be specified in the notice of the meeting.

Section 4.08. *The Chairman of the Board of Directors*. The Chairman of the Board of Directors may be chosen by the Board at any meeting of the Board from among the Members, and his tenure shall commence immediately and continue until the next succeeding annual meeting of the Board, or until his successor is chosen, whichever occurs first. The Chairman of the Board (or in his absence another person designated by the Board of Directors) shall preside at all meetings of the Board of Directors and at meetings of stockholders. In addition, the Chairman of the Board shall have such powers and perform such duties as the Board may prescribe. Except as otherwise provided by law, the Charter Act, these Bylaws, or the Board, the Chairman shall have plenary authority to perform all duties as may be assigned to him from time to time by the Board.

Section 4.08a. *The Vice Chairman of the Board of Directors.* The Board of Directors may from time to time elect from among the Members of the Board one or more Vice Chairmen of the Board. Any such Vice Chairman shall have such powers and shall perform such duties as the Board of Directors may prescribe or as the Chairman of the Board shall delegate to him.

Section 4.09. *Quorum.* The presence, in person or otherwise in accordance with section 4.18 hereof, of a majority of the then incumbent Members of the Board of Directors or of a Board Committee, as applicable, at the time of any meeting of the Board or such Committee, shall constitute a quorum for the transaction of business. The act of the majority of such Members present at a meeting at which a quorum is present shall be the act of the Board of Directors unless the act of a greater number is required by these Bylaws. Members may not be represented by proxy at any meeting of the Board of Directors or a Board Committee.

Section 4.10. *Action Without a Meeting.* Any policy or action that may be approved or taken at a meeting of the Board or of any Board Committee may be approved or taken without a meeting if all incumbent Members of the Board or the Committee, as the case may be, consent thereto in writing and the writings are filed with the minutes of the proceedings of the Board or the Committee.

Section 4.11. *Facsimile Signatures.* The Board of Directors, the Chairman of the Board, the Chief Executive Officer or any designee of the Chief Executive Officer may authorize the use of facsimile signatures in lieu of manual signatures.

Section 4.12. *Executive Committee.*

(a) The Executive Committee of the Board shall consist of at least five Members who shall be designated by the Board and serve at the pleasure of the Board. One of the members of the Executive Committee shall be the Chief Executive Officer of the corporation who may also, but is not required to, be chair of the Committee. The designation of such Committee and the delegation thereto of authority shall not alone relieve any director of any duty he owes the corporation. The Executive Committee, during the interim between Board meetings, shall have the authority of the Board, except that it shall not have the authority to take any of the following actions:

1. The submission to stockholders of any action requiring stockholders' authorization.

2. The filling of vacancies on the Board of Directors or on the Executive Committee.

3. The fixing of compensation of the directors for serving on the Board or on the Executive Committee.

4. The appointment or removal of the Chairman of the Board, Chief Executive Officer, President, any Vice Chairman, and any Executive Vice President, except that vacancies in established positions may be filled subject to ratification by the Board of Directors.

5. The amendment or repeal of these Bylaws or the adoption of new bylaws.

6. The declaration of dividends or the authorizing of the issuance of the corporation's stock.

7. The amendment or repeal of any resolution of the Board which by its terms is not so amendable or repealable.

8. The adoption of an agreement of merger or consolidation or the adoption of a certificate of ownership and merger.

9. The recommendation to stockholders of the sale, lease or exchange of all or substantially all of the corporation's property and assets.

10. The recommendation to stockholders of a dissolution of the corporation or a revocation of a dissolution.

(b) The Executive Committee shall meet at the call of its chairman or of a majority of its members, and a majority shall constitute a quorum. The action of the majority of the members of the Committee shall be the action of the Committee.

(c) Unless otherwise expressly provided by resolution of the Board of Directors, members of the Executive Committee shall be compensated and shall be reimbursed for travel and expenses on the same basis and at the same rate as is provided for Members of the Board of Directors for attendance at meetings of the Board.

(d) At the first regular meeting of the Board of Directors following a meeting of the Executive Committee, the Executive Committee shall present to the Board a report and such recommendations as are in its judgment necessary for the proper operation of the corporation.

Section 4.13. *Audit Committee.* The Board of Directors shall have an Audit Committee and, as required by Section 1239.5(b) of the FHFA Regulation, as the same may be amended from time to time, the Audit Committee shall comply with the charter, independence, composition, expertise and other requirements under section 301 of the Sarbanes-Oxley Act of 2002 and under rules issued by the New York Stock Exchange, as the same may be amended from time to time.

Section 4.14. *Compensation Committee.* The Board of Directors shall have a Compensation Committee and, as required by Section 1239.5(b) of the FHFA Regulation, as the same may be amended from time to time, the Compensation Committee shall comply with the charter, independence, composition, expertise, duties, responsibilities, and other requirements set forth under the rules issued by the New York Stock Exchange, as the same may be amended from time to time. The duties of the Compensation Committee shall include overseeing the corporation's compensation policies and plans for executive officers and employees and approving the compensation of principal officers of the corporation.

Section 4.15. *Nominating and Corporate Governance Committee.* The Board of Directors shall have a Nominating and Corporate Governance Committee, as required by Section 1239.5(b) of the FHFA Regulation, as the same may be amended from time to time. The Nominating & Corporate Governance Committee shall comply with the charter, independence, composition, expertise and other requirements set forth under the rules issued by the New York Stock Exchange, as the same may be amended from time to time.

Section 4.16. *Risk Committee.* The Board of Directors shall have a Risk Committee, as required by Section 1239.11(b) of the FHFA Regulation, as the same may be amended from time to time. The Risk Committee shall comply with the charter, independence, composition, expertise and other requirements set forth under the rules issued by the New York Stock Exchange, as the same may be amended from time to time.

Section 4.17. *Other Committees.* In addition to the Executive, Audit, Compensation, Nominating and Corporate Governance and Risk committees, the Board of Directors may by resolution designate from among its Members such other committees as it deems appropriate, each of which, to the extent provided by resolution of the Board, may exercise all authority of the Board except those actions outside the authority of the Executive Committee. The designation of any such committee and the delegation thereto of authority shall not alone relieve any director of any duty he owes the corporation.

Section 4.18. *Remote Meetings.* Any meeting of the Board of Directors or any meeting of a Board Committee may be held with the Members of the Board or members of such Committee participating in such meeting by telephone or by any other means of communication by which all such persons participating in the meeting are able to speak to and hear one another.

Section 4.19. *Limitation on Liability.* To the fullest extent permitted by Delaware statutory and decisional law, as amended or interpreted, no director of this corporation shall be personally liable to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. This Section 4.19 does not affect the availability of equitable remedies for breach of fiduciary duties.

Section 4.20. *Eligibility to Make Nominations.* Nominations of candidates for election as directors at an annual meeting of stockholders called for election of directors may be made (i) by any stockholder entitled to vote at such meeting only in accordance with the procedures established by Section 4.21 of these Bylaws, or (ii) by the Board of Directors or by a duly authorized Committee thereof. In order to be eligible for election as a director, any director nominee must first be nominated in accordance with the provisions of these Bylaws.

Section 4.21. *Procedure for Nominations by Stockholders.* Any stockholder entitled to vote for the election of a director at an annual meeting may nominate one or more persons for such election only if written notice of such stockholder's intent to make such nomination is delivered to or mailed and received by the Secretary of the corporation. Such notice must be received by the Secretary not later than the following dates: with respect to an annual meeting of stockholders, not earlier than the close of business on the 120th day and not later than the close of business on the 60th day prior to the first anniversary of the preceding year's annual meeting; provided, however, that in the event that the date of the annual meeting is more than 30 days before or more than 60 days after such anniversary date, notice by the stockholder to be timely must be so delivered not earlier than the close of business on the 120th day prior to such annual meeting and not later than the close of business on the later of the 60th day prior to such annual meeting and the 10th day following the day on which public disclosure of the date of such meeting is first made by the corporation. The written notice shall set forth: (1) the name, age, business address and residence address of each nominee proposed in such notice; (2) the principal occupation or employment of each such nominee; (3) the class of securities and the number of shares of capital stock of the corporation which are beneficially owned by each such nominee; and (4) such other information concerning each such nominee as would be required, under the rules of the Securities and Exchange Commission in a proxy statement soliciting proxies for the election of such nominee as a director. Such notice shall include a signed consent of each such nominee to serve as a director of the corporation, if elected and a statement whether such nominee, if elected, intends to tender, promptly following such nominee's election or re-election, an irrevocable resignation effective upon such nominee's failure to receive the required vote for re-election at the next meeting of stockholders at which such nominee faces re-election and upon acceptance of such resignation by the board of directors. The corporation may also require any proposed nominee to furnish such other

information as may be reasonably required by the corporation to determine whether such proposed nominee is eligible to serve as an independent director of the corporation or that could be material to a reasonable stockholder's understanding of independence, or lack thereof, of such nominee.

Section 4.22. *Compliance with Procedures.* If the chair of the stockholders' annual meeting determines that a nomination of any candidate for election as a director was not made in accordance with the applicable provisions of these Bylaws, such nomination shall be void.

Article 5: The Officers

Section 5.01. *Number.* The principal officers of the corporation shall consist of the Chief Executive Officer, a President, one or more Vice Chairmen of the Board if the Board has elected to fill such position or positions, one or more Executive Vice Presidents and Senior Vice Presidents, a General Counsel, a Controller, a Treasurer, and a Secretary. There shall be such other officers, assistant officers, agents, and employees as may be deemed necessary. Any two or more offices may be held by the same person.

Section 5.02. *General Authority and Duties.* All officers, agents, and employees of the corporation shall have such authority and perform such duties in the management and conduct of the business of the corporation as may be provided for in these Bylaws, as may be established by resolution of the Board of Directors not inconsistent with these Bylaws, as generally pertain to their respective offices, and as may be delegated to them in a manner not inconsistent with these Bylaws.

Section 5.03. *Election, Tenure, and Qualifications.* The principal officers shall be selected by the Board of Directors. Each officer shall hold office until his successor is chosen and qualified, or his death, resignation, retirement, or removal from office, whichever event shall first occur. Selection or appointment without express tenure, of an officer, agent, or employee shall not of itself create contract rights.

Section 5.04. *Removal.* Any officer, agent, or employee may be removed by the Board of Directors. Any removal shall be in accordance with such procedures and safeguards as the corporation may establish and shall be without prejudice to the contract rights, if any, of the person so removed.

Section 5.05. *Vacancies.* Any vacancy in any office shall be filled in the manner prescribed in these Bylaws for selection or appointment to the office.

Section 5.06. *Chief Executive Officer.* The Chief Executive Officer shall have the general powers and duties of supervision, management and direction over the business and policies of the corporation. The Chief Executive Officer shall see that all orders and resolutions of the Board of Directors and any committee thereof are carried into effect, and shall submit reports of the current operations of the corporation to the Board of Directors at regular meetings of the Board of Directors and in annual reports to the stockholders.

Section 5.07. *The President.* The President shall have such powers and perform such duties as the Board of Directors may prescribe, or, if the President is not also the Chief Executive Officer, the Chief Executive Officer may delegate to him.

Section 5.08. *The Vice Presidents.* Each Vice President shall have such powers and perform such duties as the Board of Directors may prescribe or as the Chief Executive Officer may delegate to him.

Section 5.09. *The Treasurer.* The Treasurer shall, in general, perform all the duties ordinarily incident to the office of Treasurer and such other duties as may be assigned to him by the Board of Directors or by the Chief Executive Officer or his designee. The Treasurer shall render to the Board of Directors or the Chief Executive Officer or his designee, whenever the same shall be required, an account of all his transactions as Treasurer. The Treasurer shall, if required to do so by the Board, give the corporation a bond in such amount and with such surety or sureties as may be ordered by the Board for the faithful performance of the duties of his office and for the restoration to the corporation, in case of his death, resignation, retirement, or removal from office, of all books, papers, vouchers, money, and other property of whatever kind in his possession or under his control belonging to the corporation. The premium for any such bond shall be paid by the corporation.

Section 5.10. *The General Counsel.* The General Counsel shall be the principal consulting officer of the corporation in all matters of legal significance or import; shall be responsible for and direct all counsel, attorneys, employees, and agents in the performance of all legal duties and services for and on behalf of the corporation; shall perform such other duties and have such other powers as are ordinarily incident to the office of the General Counsel; and shall perform such other duties as, from time to time, may be assigned to him by the Board of Directors or by the Chief Executive Officer.

Section 5.11. *The Secretary.* The Secretary shall keep or cause to be kept in books provided for the purpose the minutes of the meetings of the Board of Directors and the minutes or transcripts of the meetings of the stockholders; shall see that all notices are duly given as required by law and in accordance with the provisions of these Bylaws; shall be responsible for the custody and maintenance of all related records and the blank stock certificates of the corporation; shall be custodian of the records and of the seal of the corporation; and, in general, shall perform all the duties ordinarily incident to the office of Secretary and such other duties as may be assigned to him by the Board or by the Chief Executive Officer. The Secretary and any Assistant Secretary are expressly empowered to attest signatures of officers of the corporation and to affix the seal of the corporation to documents.

Section 5.12. *The Controller.* The Controller shall keep full and accurate accounts of all assets, liabilities, commitments, receipts, disbursements, and other financial transactions of the corporation; and in general, shall perform all the duties ordinarily incident to the office of Controller and such other duties as may be assigned to him by the Board of Directors or by the Chief Executive Officer or his designee.

Section 5.13. *Assistant Officers.* Each assistant to an officer, including but not limited to any Assistant Vice President, any Assistant Treasurer, any Assistant General Counsel, and any Assistant Secretary, and any other such assistant to any officer, shall perform such duties as are, from time to time, delegated to him by the officer to whom he is an assistant, by the Board of Directors or by the Executive Officer or his designee. At the request of the officer to whom he is an assistant, an assistant officer may temporarily perform the duties of that officer, and when so acting shall have the powers of and be subject to the restrictions imposed upon that officer.

Section 5.14. *Compensation.* Subject to the approval of the Conservator, if so required, the compensation of the principal officers shall be fixed, from time to time, by the Board of Directors.

Article 6: Indemnification

Section 6.01. *General Indemnification.* The Board of Directors may, in such cases or categories of cases as it deems appropriate, indemnify and hold harmless, or make provision for indemnifying and holding harmless, Members of the Board of Directors, officers, employees, and agents of the corporation, and persons who formerly held such positions, and the estates of any of them against any or all claims and liabilities (including reasonable legal fees and other expenses incurred in connection with such claims or liabilities) to which any such person shall have become subject by reason of his having held such a position or having allegedly taken or omitted to take any action in connection with such position.

Section 6.02. *Indemnification of Board Members and Officers.*

(a) To the fullest extent permitted by the Delaware General Corporation Law for a corporation subject to such law, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits a Delaware corporation to provide broader indemnification rights than said law permitted such corporation to provide prior to such amendment), the corporation will indemnify and hold harmless each Member of the Board and officer of the corporation or any subsidiary against any and all claims, liabilities, and expenses (including attorneys' fees, judgments, fines, and amounts paid in settlement) actually and reasonably incurred and arising from any threatened, pending, or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative, to which any such person shall have become subject by reason of having held such a position or having allegedly taken or omitted to take any action in connection with any such position. However, the foregoing shall not apply to:

i. any breach of such person's duty of loyalty to the corporation or its stockholders;

ii. any act or omission by such person not in good faith or which involves intentional misconduct or where such person had reasonable cause to believe his conduct was unlawful, or

iii. any transaction from which such person derived any improper personal benefit.

(b) The decision concerning whether a particular indemnitee has satisfied the foregoing shall be made by (i) the Board of Directors by a majority vote of a quorum consisting of Members who are not parties to the action, suit, or proceeding giving rise to the claim for indemnity ("Disinterested Directors"), whether or not such majority constitutes a quorum; (ii) a committee of Disinterested Directors designated by a majority vote of Disinterested Directors, whether or not such majority constitutes a quorum; (iii) if there are no Disinterested Directors, or if the Disinterested Directors so direct, by independent legal counsel in a written opinion; or (iv) a vote of the stockholders.

(c) The Board of Directors may authorize the advancement of expenses to any Member of the Board or officer, subject to a written undertaking to repay such advance if it is later determined that the indemnitee does not satisfy the standard of conduct required for indemnification. The Chairman of the Board is authorized to enter into contracts of indemnification with each Member and officer of the corporation with respect to the

indemnification provided in the Bylaws and to renegotiate such contracts as necessary to reflect changing laws and business circumstances.

Article 7: Amendments

Section 7.01. *Actions by the Board of Directors*. The Board of Directors has the power to alter, amend, or repeal any Certificate Provision or Bylaw Provision of these Bylaws, or to adopt new bylaws, either (i) by the affirmative vote of two-thirds of the then incumbent Members of the Board of Directors, with the exception of Section 2.10, or (ii) in the manner provided in Section 4.10 of these Bylaws. Except by unanimous consent of all the then incumbent Members of the Board, no such action shall be undertaken until at least one week shall have elapsed from either (i) the introduction of the proposal at a meeting of the Board of Directors at which a quorum shall have attended, or (ii) the circulation of such proposed action to all the then incumbent Members of the Board. Any (i) new bylaw adopted by the Board of Directors and (ii) Certificate Provision, as altered or amended by the Board of Directors pursuant to this Section 7.01, shall be designated a "Certificate Provision" for all purposes under these Bylaws unless, by the affirmative vote of two-thirds of the then incumbent Members of the Board of Directors, the Board of Directors shall approve the designation of such bylaw as a "Bylaw Provision" for all purposes under these Bylaws.

Section 7.02. *Actions by the Stockholders*.

(a) Bylaw Provisions. The stockholders have the power to alter, amend, or repeal any Bylaw Provision, or to adopt any new bylaw, the subject matter of which is the subject matter of a Bylaw Provision, by the affirmative vote of a majority of the stock issued and outstanding and entitled to vote at any regular meeting of the stockholders or at any special meeting of the stockholders if notice of such proposed action be contained in the notice of such special meeting; provided, however, that notwithstanding the foregoing, the stockholders shall not have the power to alter, amend or repeal any Bylaw Provision, or adopt any new bylaw, if (i) such Bylaw Provision, as proposed to be altered or amended, or the repeal of such Bylaw Provision, or the new bylaw proposed for adoption, is or would be inconsistent with the Charter Act or other Federal law, rules, and regulations or the safe and sound operations of the corporation, in each case as determined by the applicable regulator, (ii) the subject matter of such Bylaw Provision, as proposed to be altered or amended, or the subject matter of the new bylaw proposed for adoption is the subject matter of any Certificate Provision, or (iii) such Bylaw Provision, as proposed to be altered or amended, or the repeal of such Bylaw Provision, or the new bylaw proposed for adoption is or would be inconsistent with any Certificate Provision. Notwithstanding anything to the contrary herein, any action by the stockholders pursuant to Section 7.02 shall be null and void, without legal effect, if such action shall violate any law, rule or regulation by any government authority applicable to this corporation, including, without limitation, the Charter Act, or any rule, regulation or other requirement of any stock exchange on which the stock of this corporation is then listed. For the avoidance of doubt, any proposed action by the stockholders pursuant to this Section 7.02 will be subject to Article 8 of these Bylaws.

(b) Certificate Provisions. The stockholders may not alter, amend, repeal or adopt any Certificate Provision unless such action is explicitly authorized and referred to the stockholders by the Board of Directors. No such authorization and referral shall be made by the Board of Directors unless such authorization and referral is approved pursuant to the procedures set forth

in Section 7.01. For the avoidance of doubt, this Section 7.02(b) in no way obligates the Board of Directors to seek stockholder approval for any action pursuant to Section 7.01.

Article 8: Regulatory Powers

Nothing in these Bylaws shall be deemed to affect the regulatory or conservatorship powers of the Federal Housing Finance Agency under the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Title XIII, P.L. 102-550, as amended by the Federal Housing Finance Regulatory Reform Act of 2008, P.L. 110-289.

EXHIBIT D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 08/18/2016

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the appellant in favor of the appellee under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed Fed. R. App. P. 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

cc: William E. Donnelly
James K. Goldfarb
David A. Harrington
Gregory P.N. Joseph
Rebecca LeGrand
Mara Leventhal
Sandra Myndelle Lipsman
Michael V. Rella
Christopher James Stanley

15-5100 - Piszel v. US
United States Court of Federal Claims, Case No. 1:14-cv-00691-LKG

United States Court of Appeals for the Federal Circuit

ANTHONY PISZEL,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2015-5100

Appeal from the United States Court of Federal Claims in No. 1:14-cv-00691-LKG, Judge Lydia Kay Griggsby.

Decided: August 18, 2016

MICHAEL V. RELLA, Murphy & McGonigle, P.C., New York, NY, argued for plaintiff-appellant. Also represented by JAMES K. GOLDFARB; WILLIAM E. DONNELLY, Washington, DC.

DAVID A. HARRINGTON, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by BENJAMIN C. MIZER, ROBERT E. KIRSCHMAN, JR., FRANKLIN E. WHITE, JR.

GREGORY P.N. JOSEPH, Joseph Hage Aaronson LLC, New York, NY, for amici curiae Louise Rafter, Josephine Rattien, Stephen Rattien, Pershing Square Capital Management, L.P. Also represented by MARA LEVENTHAL, SANDRA MYNDELLE LIPSMAN, CHRISTOPHER JAMES STANLEY.

REBECCA LEGRAND, LeGrand Law PLLC, Washington, DC, for amicus curiae The National Black Chamber of Commerce.

Before DYK, SCHALL, and HUGHES*, *Circuit Judges*.

DYK, *Circuit Judge*.

Mr. Anthony Piszel appeals from a judgment of the United States Court of Federal Claims ("the Claims Court") dismissing his complaint against the United States for failure to state a claim. That complaint alleged a taking and illegal exaction resulting from a statute and regulations barring the payment of so-called "golden parachute" compensation upon his termination as an employee of the Federal Home Loan Mortgage Corporation ("Freddie Mac"). Because we agree that Mr. Piszel's complaint fails to state a claim on which relief can be granted, we affirm.

BACKGROUND

I

The question here is whether a government prohibition on making golden parachute payments to terminated

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* Judge Hughes concurs in the judgment and joins all but Part I.A. of the Discussion section.

employees of Freddie Mac constitutes a taking or an illegal exaction.

Mr. Piszel is a former employee of Freddie Mac. According to his complaint, Mr. Piszel began working as the chief financial officer ("CFO") of Freddie Mac in November of 2006. As part of his compensation package, Mr. Piszel was to receive a signing bonus of $5 million in Freddie Mac restricted stock units that would vest over four years, an annual salary of $650,000, and performance-based incentive compensation of roughly $3 million a year in restricted stock. In addition, Mr. Piszel's employment agreement provided that in the event of his termination without cause, Mr. Piszel would receive a lump-sum cash payment of double his annual salary and that certain restricted stock units would continue to vest. These types of termination payments are often referred to as "golden parachute payments." The payments at issue here are alleged to have a value in excess of $7 million.

Freddie Mac is a government sponsored enterprise, meaning that it is a privately owned but publicly chartered financial services corporation created by the United States. *See* 12 U.S.C. § 1452. Pursuant to its charter, Freddie Mac was created to "provide stability in the secondary market for residential mortgages" and "to promote access to mortgage credit throughout the Nation" by "increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing." *See* 12 U.S.C. § 1716. As such, Freddie Mac was authorized to purchase and sell residential mortgages from various banks, including "any . . . financial institution the deposits or accounts of which are insured by an agency of the United States." *Id.* § 305(b), 84 Stat. at 454 (codified as amended at 12 U.S.C. § 1454(b)).

At the time that Mr. Piszel accepted his position, Freddie Mac was regulated by the Office of Federal Housing Enterprise Oversight ("OFHEO") pursuant to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992. *See* Pub. L. No. 102-550, § 1311, 106 Stat. 3672, 3944 (1992). Mr. Piszel alleged in his complaint that his employment contract was reviewed and approved by OFHEO. Mr. Piszel alleged that he performed his job as CFO as a "strong leader" with "excellent performance." J.A. 30–31.

On July 30, 2008, facing great turmoil in the national housing market and the potential collapse of Freddie Mac, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"). Pub. L. No. 110-289, 122 Stat. 2654 (2010) (codified at 12 U.S.C. § 4511 *et seq*.). At the time, Freddie Mac, along with its sister bank the Federal National Mortgage Association ("Fannie Mae"), owned or guaranteed about half of the nation's $12 trillion mortgage market. The act significantly restructured the regulatory framework for Freddie Mac, establishing the Federal Housing Finance Agency ("FHFA") to replace OFHEO as the primary regulator of Freddie Mac. *See* 12 U.S.C. § 4511. In addition, the act significantly clarified and expanded the powers of the FHFA to act as a conservator or receiver for Freddie Mac should the mortgage giant get into serious financial trouble. *See id.* § 4617. As a conservator, the FHFA would "immediately succeed to all rights, titles, powers, and privileges of the regulated entity" and could "take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity." *Id.* § 4617(b)(2). The FHFA as conservator was given the explicit power to "disaffirm or repudiate any contract," after which damages for the breach would be limited to "actual direct compensatory damages." *Id.* § 4617(d)(1).

Additionally, and apart from the powers vested in the conservator to disaffirm contracts, the act contained a limit on "golden parachutes": it authorized the Director of the FHFA to "prohibit or limit, by regulation or order, any golden parachute payment." *Id.* § 4518(e)(1). The statute defined a "golden parachute payment" as "any payment . . . that is contingent on the termination of [a] party's affiliation with [Freddie Mac]" and that is received on or after Freddie Mac is declared insolvent, placed in conservatorship or receivership, or is in financial trouble. *Id.* § 4518(e)(4)(A). The section also provided that "any payment made pursuant to a bona fide deferred compensation plan or arrangement which the Director determines, by regulation or order, to be permissible" is not a "golden parachute payment." *Id.* § 4518(e)(4)(C)(ii).

Congress did not outright prohibit all golden parachute payments,[1] but rather left it to the Director of the FHFA to develop regulations determining which payments should, and should not, be made. Congress provided a number of "factors to be considered by the Director in taking any action" pursuant to his new authority. *Id.* § 4518(e)(2). Specifically, Congress stated that the Director should consider:

> **(A)** whether there is a reasonable basis to believe that the affiliated party has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the regulated entity that has had a material effect on the financial condition of the regulated entity;

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[1] Congress did prohibit some severance payments, specifically the prepayment of salary if made "in contemplation of the insolvency of such regulated entity" or "with a view to, or having the result of preventing" the proper distribution of assets to creditors. 12 U.S.C. § 4518(e)(3).

> **(B)** whether there is a reasonable basis to believe that the affiliated party is substantially responsible for the insolvency of the regulated entity, the appointment of a conservator or receiver for the regulated entity, or the troubled condition of the regulated entity (as defined in regulations prescribed by the Director);
>
> **(C)** whether there is a reasonable basis to believe that the affiliated party has materially violated any applicable provision of Federal or State law or regulation that has had a material effect on the financial condition of the regulated entity;
>
> **(D)** whether the affiliated party was in a position of managerial or fiduciary responsibility; and
>
> **(E)** the length of time that the party was affiliated with the regulated entity, and the degree to which—
>
> > **(i)** the payment reasonably reflects compensation earned over the period of employment; and
> >
> > **(ii)** the compensation involved represents a reasonable payment for services rendered.

Id.

The Director issued regulations implementing the statute on September 16, 2008. *See* 73 Fed. Reg. 53356-01 (2008) (codified at 12 C.F.R. § 1231). These regulations generally prohibited all payments within the statutory definition of "golden parachute payments," but listed several scenarios in which such a payment could be made, for example, when a regulated entity requests to make a payment and can demonstrate that the person involved did not commit any wrongdoing. *See* 12 C.F.R. § 1231.3(b) (2014).

The government placed Freddie Mac into conservatorship on September 7, 2008, because, according to FHFA's website, there was "substantial deterioration in the housing markets that severely damaged Fannie Mae and Freddie Mac's financial condition and left them unable to fulfill their mission without government intervention." J.A. 34. Mr. Piszel alleges the following in his complaint: about two weeks later, on September 22, 2008, the Director of the FHFA, acting in his capacity and under his authority as Freddie Mac's regulator, sent a letter to Freddie Mac's CEO stating that he had "determined that [Mr. Piszel] should be terminated effective close of business today 'without cause.'" *Id.* 35. The letter further provided that Freddie Mac should not pay Mr. Piszel a severance payment nor "any salary beyond the date of the cessation of Mr. Piszel's employment, any annual bonus for 2008 [or] any further vesting of stock grants." *Id.* As alleged, the letter stated that the basis for this decision was the newly-enacted golden parachute section of HERA and the implementing regulations. As a result of the letter, Freddie Mac terminated Mr. Piszel and, according to Mr. Piszel, "refused to provide him with any of the benefits to which he was contractually entitled under his employment agreement, including his $1.3 million termination payment and the remainder of the restricted stock units that were granted to him as a signing bonus and were required to continue vesting after his termination." *Id.* 36.[2]

II

Mr. Piszel filed suit against the United States on August 1, 2014, nearly six years after he was fired from his

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[2] Mr. Piszel alleges that at the time of his termination, he had only received 19,735 of the 78,940 restricted stock units granted under his employment agreement.

job as CFO of Freddie Mac. At the time of the filing of his suit, Mr. Piszel had not filed suit against Freddie Mac for breach of contract nor, apparently, could he have, as the statute of limitations on such an action had already run.[3]

In his complaint, Mr. Piszel alleged a taking and an illegal exaction by the United States. Mr. Piszel asserted that:

> The FHFA's actions . . . in directing Freddie Mac to terminate Mr. Piszel without cause without paying him his contractually-required benefits (or any other just compensation), constitute[d] a taking in violation of the Fifth Amendment that completely deprived Mr. Piszel of his rights in his private property interests and rendered those interests worthless. Indeed, the Government's actions permanently excluded Mr. Piszel from any interest in his contractual benefits and destroyed Mr. Piszel's right to those interests . . . .
>
> Alternatively, the Government's actions constitute an unlawful exaction in violation of HERA and the Due Process Clause of the Fifth Amendment, specifically because the government exceeded its authority under HERA in prohibiting payments that were not "golden parachute payments."

J.A. 39.

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[3] Both parties agree that Freddie Mac, as a private institution, would be the appropriate counterparty in a breach of contract suit. *See O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 85 (1994). According to both parties, the suit would have been brought in Virginia state court under Virginia law, which has a five-year statute of limitations for contract claims. *See* Va. Code Ann. § 8.01-246(2) (1977).

The government moved to dismiss under Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC").[4] This rule is identical to its counterpart rule in the Federal Rules of Civil Procedure. The government argued that Mr. Piszel had failed to plead facts sufficient to support the various takings and illegal exaction claims. Mr. Piszel did not move to amend his complaint under RCFC 15 in response to the motion to dismiss, but rather defended the complaint as originally filed.

The Claims Court granted the government's motion to dismiss the categorical and physical takings claims because it concluded that Mr. Piszel "fail[ed] to allege a plausible categorical or physical takings in his complaint." *Piszel v. United States*, 121 Fed. Cl. 793, 805 (2015). The Claims Court also dismissed Mr. Piszel's regulatory takings claim because it concluded that Mr. Piszel did not have a cognizable Fifth Amendment property interest in his employment agreement and that Mr. Piszel did not have an investment-backed expectation in his employment agreement. *Id.* at 803, 805–06. Additionally, the Claims Court dismissed Mr. Piszel's exaction claim because Mr. Piszel "concedes that he has not paid any money to the government" and therefore "there is no way to read the allegations in the complaint to state a plausible illegal exaction claim." *Id.* at 807.

Mr. Piszel appealed. Following oral argument, we ordered supplemental briefing regarding the regulatory takings claim. Specifically, we asked the parties to address three questions:

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[4] The government also moved to dismiss under Rule 12(b)(1) of the RCFC for identical reasons because the Claims Court would not have jurisdiction if Mr. Piszel could not plausibly state a claim against the United States. *See* 28 U.S.C. § 1491.

> (1) Does the fact that the golden parachute provision, 12 U.S.C. § 4518(e), did not eliminate breach of contract claims preclude a takings action against the government?
>
> (2) Would recovery for such a breach of contract claim be limited by the doctrine of impossibility or the sovereign acts doctrine and would the limitations on damages for breach of contract claims in HERA, 12 U.S.C. § 4617(d)(3)(A), preclude or limit recovery of breach of contract damages? *Compare Office & Prof'l Employees Int'l Union, Local 2 v. FDIC*, 27 F.3d 598 (D.C. Cir. 1994), *with Howell v. FDIC*, 986 F.2d 569 (1st Cir. 1993).
>
> (3) If these doctrines or statutory provisions would limit recovery, what impact would that have on the existence of a takings claim?

Order for Supplemental Briefing, *Piszel v. United States*, No. 15-5100 (Fed. Cir. Apr. 7, 2016). Supplemental briefs were received from both parties. We have jurisdiction under 28 U.S.C. § 1295(a)(3) from a final decision of the Claims Court. We review the Claims Court's grant of a motion to dismiss *de novo*, assuming the factual allegations of the complaint to be true. *See Kam-Almaz v. United States*, 682 F.3d 1364, 1367–68 (Fed. Cir. 2012).

DISCUSSION

I

We first consider Mr. Piszel's regulatory takings claim. The Supreme Court has explained "that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). A regulatory takings analysis eschews any set formula, but

rather involves an "ad hoc, factual inquir[y]" which involves "several factors that have particular significance." *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978). "Primary among [the] factors" for analyzing a regulatory taking is "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Lingle*, 544 U.S. at 538–39 (internal quotation marks and citations omitted).

Here, Mr. Piszel alleges that the government effected a taking of his contractual right to payment of severance benefits when, pursuant to the statute and regulations prohibiting payment of golden parachutes, 12 U.S.C. § 4518(e) and 12 C.F.R. § 1231.3, the Director of the FHFA instructed the CEO of Freddie Mac to terminate Mr. Piszel's employment and not to pay him any severance. The government argues that the government's actions did not amount to a taking for several distinct reasons.

A

The government argues, and the Claims Court found, that Mr. Piszel lacked a cognizable Fifth Amendment property interest. We disagree.

In evaluating whether governmental action constitutes a taking for Fifth Amendment purposes, the court must determine "whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking." *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009). When a claimant lacks such a property interest, nothing has been taken, and thus the claimant cannot maintain a takings claim. *See Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

In general, "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States." *Lynch v. United States,* 292 U.S. 571, 579 (1934); *see U.S. Tr. Co. of N.Y. v. New Jersey,* 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."); *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152 (Fed. Cir. 2014); *see also United States v. Petty Motor Co.*, 327 U.S. 372, 380–81 (1946) (holding that plaintiff was entitled to compensation for government's taking of option to renew a lease). Mr. Piszel's employment contract with Freddie Mac is no exception.

Nonetheless, the government asserts that Mr. Piszel did not have a vested property interest in his contractual rights to severance because Freddie Mac operated in an environment of pervasive federal regulation. The government's theory is that because Mr. Piszel voluntarily contracted with an entity that was subject to pervasive regulation, he assumed the risk of future regulation and thus cannot claim a vested interest in property that was likely to be subject to additional regulation. Because Mr. Piszel voluntarily entered into a highly regulated area, he lacked a right to exclude the government from his property.

To be sure, if a regulation existed at the time of contract formation, the regulation would have inhered in the title. *See A & D*, 748 F.3d at 1152; *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1331 (Fed. Cir. 2012) (holding that the government's precluding plaintiff from building a mitigation bank on his property was not a taking because the government's authority predated plaintiff's property right); *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 618 (D.C. Cir. 1992) (rejecting a takings claim because pre-existing regulations allowed for agency discretion relating

to the act alleged to be a taking). But here there was no specific regulation prohibiting golden parachute payments at the time of contract formation. The regulation, at the time, provided only for government review of Mr. Piszel's compensation to determine whether it was "reasonable and comparable with compensation for employment in other similar businesses . . . involving similar duties and responsibilities." 12 U.S.C. § 4518(a). There is no contention here that Mr. Piszel's golden parachute was unreasonable under that standard. "If a challenged restriction was enacted after the plaintiff's property interest was acquired, it cannot be said to 'inhere' in the plaintiff's title." *A & D*, 748 F.3d at 1152. This is the situation here.

The government is nonetheless correct that the background regulatory environment is relevant to a takings analysis. When the government acts in a highly regulated environment to bolster restrictions or eliminate loopholes in an existing regulatory regime, the existence of government regulation does not defeat a property interest, but is relevant to whether there were investment-backed expectations under the *Penn Central* test. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 645 (1993); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226–27 (1986). Indeed, in *Concrete Pipe* and *Connolly,* relied upon by the government for the proposition that Mr. Piszel lacked a cognizable property interest, the Supreme Court did not conclude that no property interest existed. Rather, the Court concluded that because the property involved in those cases "had long been subject to federal regulation," there was no interference with the plaintiff's reasonable investment-backed expectations because there was no "reasonable basis to expect" that Congress would not alter the regulatory scheme. *Concrete Pipe*, 508 U.S. at 645; *accord Connolly*, 475 U.S. at 226–

27. The same approach is also reflected in our decision in *California Housing Securities, Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992), on which the government additionally relies. *See also Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1073–74 (Fed. Cir. 1994).

In short, "there is [] ample precedent for acknowledging a property interest in contract rights under the Fifth Amendment." *Cienega Gardens v. United States*, 331 F.3d 1319, 1329 (Fed. Cir. 2003). In *Cienega Gardens*, we rejected the government's position that "enforceable rights sufficient to support a taking claim against the United States cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control." *Id.* at 1330 (quoting government brief) (internal quotation marks omitted); *see also A & D*, 748 F.3d at 1152–53 (finding that a property interest in contract rights existed despite being subject to bankruptcy law). We therefore conclude that Mr. Piszel had a cognizable Fifth Amendment property interest in his contract rights.

B

The government argues that Mr. Piszel should be barred from pursuing a takings claim because he failed to pursue a breach of contract claim against Freddie Mac. Mr. Piszel argues that there is no requirement to pursue a breach of contract claim against a private party before bringing a takings claim. We disagree with the government that Mr. Piszel's failure to pursue a contract remedy is an absolute bar to his bringing a takings claim against the government.

The Supreme Court has held that a claimant must exhaust administrative or judicial remedies against the relevant government entity in order for his regulatory takings claim to be ripe. *See, e.g.*, *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473

U.S. 172, 186–87 (1985); *see also, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 618–19 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 735 (1997); *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 348 (1986). The Court has explained that to demonstrate a regulatory taking, a party "must establish that the regulation has in substance 'taken' his property—that is, that the regulation 'goes too far.'" *MacDonald*, 477 U.S. at 348 (citations omitted). But "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Id.* This is because "resolution of [this] question depends, in significant part, upon an analysis of the effect [of the regulation] on the value of [the] property and investment-backed profit expectation. That effect cannot be measured until a final decision is made as to how the regulations will be applied." *Id.* at 349 (quoting *Williamson*, 473 U.S. at 200). As to the second prong of a takings claim, a failure to provide "just compensation," "a court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation the responsible administrative body intends to provide." *MacDonald*, 477 U.S. at 350.

We have applied a similar concept in cases where a party alleges a taking of a contract with the government. We have held that when the government itself breaches a contract, a party must seek compensation from the government in contract rather than under a takings claim. As we have explained, "[t]aking claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than its sovereign capacity" and therefore the "remedies arise from the contracts themselves, rather than from the constitutional protection of private property rights." *Hughes Commc'ns Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001); *see also Sun Oil Co.*

v. United States, 215 Ct. Cl. 716, 770 (Ct. Cl. 1978) (dismissing takings claim where the government was a party—the plaintiff's remedies for the government's violation of its contractual rights "must be directed [at the government] in its proprietary capacity and not in its sovereign capacity").

However, we are aware of no case that mandates that a claimant pursue a remedy against a *private* party before seeking compensation from the government. Indeed, our recent decision in *A & D* is to the contrary. In *A & D*, car dealerships brought takings claims against the government because the government instructed auto manufacturers to breach certain agreements with those dealerships. *A & D*, 748 F.3d at 1147. We addressed the takings claim against the government even though we noted that the claimants may have remaining claims against the auto manufacturers. *Id.* at 1149 ("To the extent the franchises were terminated by action of the bankruptcy estate, the affected dealers received unsecured claims against the estates."). And the Supreme Court has consistently addressed takings claims even though claimants could have pursued breach of contract claims against the private parties. *See, e.g.*, *Armstrong v. United States*, 364 U.S. 40, 41–42 (1960); *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240, 292–94 (1935); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510–11 (1923). We therefore find no basis for the government's argument that Mr. Piszel had to pursue a breach of contract claim against Freddie Mac before bringing a takings claim, even though, as described below, the existence of a remedy for breach of contract is highly relevant to the takings analysis in this case.

II

A

We next consider whether the complaint sufficiently alleges a taking. As noted, the complaint simply alleges that the government's instruction to Freddie Mac amounted to a total taking of Mr. Piszel's contractual right:

> The FHFA's actions . . . in directing Freddie Mac to terminate Mr. Piszel without cause without paying him his contractually-required benefits (or any other just compensation), constitute a taking in violation of the Fifth Amendment that completely deprived Mr. Piszel of his rights in his private property interests and rendered those interests worthless. Indeed, the Government's actions permanently excluded Mr. Piszel from any interest in his contractual benefits and destroyed Mr. Piszel's right to those interests.

J.A. 39.

The government's instruction to Freddie Mac did not take anything from Mr. Piszel because, even after the government's action, Mr. Piszel was left with the right to enforce his contract against Freddie Mac in a breach of contract action. As the government correctly points out, "the only duty a contract imposes is to perform or pay damages." *F.T.C. v. Think Achievement Corp.*, 312 F.3d 259, 261 (7th Cir. 2002) (citing Oliver Wendell Holmes, Jr., *The Common Law* 300–02 (1881)). Thus, to effect a taking of a contractual right when performance has been prevented, the government must substantially take away the right to damages in the event of a breach. *See Castle v. United States*, 301 F.3d 1328, 1342 (Fed. Cir. 2002) (finding that because "the plaintiffs retained the full range of remedies associated with any contractual proper-

ty right they possessed[,]" the government action "did not constitute a taking of the contract").

There can be no doubt that the golden parachute provision of HERA did not take away Mr. Piszel's ability to seek compensation for breach of his employment contract in a traditional breach of contract suit under state contract law. Indeed, at oral argument, Mr. Piszel agreed "that the golden parachute provision didn't eliminate [Mr. Piszel's] breach of contract claim," and the government agreed. Oral Argument at 2:40; *see also id.* at 17:29; Gov't Supp. Br. at 3–4; Piszel Supp. Br. at 1.

Nothing in the statute or regulations removes Mr. Piszel's ability to pursue a breach of contract remedy against his employer. Neither the golden parachute provision nor the regulations make any mention of a breach of contract claim. *See* 12 U.S.C. § 4518; 12 C.F.R. § 1231.3.

Other similar provisions of HERA indicate that when a conservator prohibits performance of a contract, an action for breach of contract remains. Section 1367(b)(2)(H) of HERA states a general policy that the conservator "shall, to the extent of proceeds realized from the performance of contracts or sale of the assets of a regulated entity, pay all valid obligations of the regulated entity that are due and payable at the time of the appointment" of the conservator. 122 Stat. at 2738 (codified at 12 U.S.C. § 4617(b)(2)(H)). Section 1367(b)(19)(d), like the golden parachute provision, allows the conservator to "disaffirm or repudiate" contracts including "any contract for services between any person and any regulated entity" like employment contracts. 122 Stat. at 2747–48, 2750 (codified at 12 U.S.C. § 4617(b)(19)(d)). That section plainly preserves a breach of contract claim, providing that the conservator will be liable for the disaffirmance or repudiation of the contract but limits the liability to

"actual direct compensatory damages." *Id.*; *see also Howell v. F.D.I.C.*, 986 F.2d 569, 571 (1st Cir. 1993) ("By repudiating the contract the receiver is freed from having to comply with the contract . . . but the repudiation is treated as a breach of contract that gives rise to an ordinary contract claim for damages."). The statute cannot reasonably be read to preserve a breach claim when the conservator disclaims a contract providing for a payment but to eliminate a breach claim when the identical action is taken pursuant to a regulatory directive. Thus, the surrounding provisions indicate that Congress intended to preserve breach of contract claims, as the parties agree.

B

On appeal, Mr. Piszel argues that even if his breach claim is preserved, it is of little value because such a breach claim would be subject to an impossibility defense. The complaint makes no such allegation, and there is no basis for such an assumption.

"The Supreme Court . . . has made clear that in the regulatory takings context the loss in value of the adversely affected property interest cannot be considered in isolation." *Cienega Gardens*, 503 F.3d at 1280. Rather, the "test for regulatory taking requires [a court] to compare the value that has been taken from the property with the value that remains in the property." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987); *see also Concrete Pipe*, 508 U.S. at 644; *Cienega Gardens*, 503 F.3d at 1281. The Supreme Court recognized this in the very case that created the regulatory takings framework, explaining that "[i]n deciding whether a particular governmental action has effected a taking, this Court focuses . . . on the character of the action and *on the nature and extent of the interference with rights in the parcel as a whole*." *Penn Cent.*, 438 U.S. at 130–31 (emphasis added). This is, of course, because "a regulato-

ry taking does not occur unless there are serious financial consequences" that stem from the government action. *Cienega Gardens*, 503 F.3d at 1282.

Mr. Piszel asserts in his briefs, but not in his complaint, that pursuing his breach of contract claim against Freddie Mac would have been futile because "[t]he doctrine of impossibility would preclude Mr. Piszel's recovery for a breach of contract claim against Freddie Mac." Piszel Supp. Br. at 11.[5] In other words, Mr. Piszel argues that because the government's actions created an impossibility defense for the private party he may have sued, the government effected a taking of his property or, at least, caused severe adverse financial consequences. It is unclear whether a government action that creates a state-law impossibility defense amounts to an act that would support a takings claim. *See, e.g.*, *Omnia*, 261 U.S. at 511 (finding no takings claim even though the Supreme Court recognized that "[a]s a result of [the] governmental action the performance of the contract was rendered impossible"). But even assuming without deciding that the indirect creation of an impossibility defense could support a takings claim, Mr. Piszel's breach of contract claim may well have survived an impossibility defense, and his complaint does not allege otherwise.

First, an impossibility defense would have been unlikely to succeed if the statute and regulations did not bar the payments.[6] Mr. Piszel could have sought to prove,

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[5] Impossibility, or impracticability, is an affirmative defense against a breach of contract claim which excuses non-performance in certain situations. *See, e.g.*, Restatement (Second) of Contracts § 261 (1981).

[6] While we do not reach the issue here, we have also held that "[a] compensable taking arises only if the government action in question is authorized." *Del-Rio*

and does in fact allege in his complaint, that the termination of his payments was not authorized by the statute. J.A. 39–40 ("[T]he government exceeded and contravened its statutory and regulatory authority under HERA" in withholding payments which were "explicitly excluded from the definition of 'golden parachute payment.'"). Under the statute, the only payments that are prohibited are "golden parachute payments," meaning payments that are "contingent on the termination of [a] party's affiliation with the regulated entity." 12 U.S.C. § 4518(e)(4)(A)(i). Congress explicitly stated that payments "made pursuant to a bona fide deferred compensation plan" are not "golden parachute payments," 12 U.S.C. § 4518(e)(4)(C)(ii), and the regulations include in that definition agreements where a party "voluntarily elects to defer all or a portion of the reasonable compensation, wages, or fees paid for services rendered," 12 C.F.R. § 1231.2.

Mr. Piszel alleges that the payments he was to receive "fit[] squarely into [the] exclusion," Piszel Opening Br. at 54, because "they were payments 'made pursuant to a bona fide deferred compensation plan or arrangement[,]' which are excluded from the definition of 'golden parachute payment.'" J.A. 37. Plaintiffs have brought, and courts have considered, breach claims that particular payments do not qualify as "golden parachute payments" in similar situations. *See, e.g.*, *Solsby v. Plaza Bank*, No. G049272, 2015 WL 668711, at *6 (Cal. Ct. App. Feb. 17, 2015) (addressing the question of "whether . . . severance compensation qualified as a[] . . . 'golden parachute'"); *Cross-McKinley v. F.D.I.C.*, No. CV 211-172, 2013 WL 870309, at *4 (S.D. Ga. Mar. 7, 2013) (same); *Faigin v. Signature Grp. Holdings, Inc.*, 150 Cal. Rptr. 3d 123, 139

Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1362 (Fed. Cir. 1998).

(Cal. Ct. App. 2012) (same); *Hill v. Commerce Bancorp, Inc.*, No. 09-3685 RBK/JS, 2012 WL 694639, at *7 (D.N.J. Mar. 1, 2012) (same). Mr. Piszel offers no reason why the courts could not have addressed his breach claim, had he sought to prove it.

Second, an impossibility defense is not available if the breaching party could have secured permission to perform under the agreement. Under the regulations, a regulated entity may make a golden parachute payment if it requests to do so and "demonstrate[s] that it does not possess and is not aware of any information . . . that would indicate that there is a reasonable basis to believe" that the party to whom the payment is made has committed any wrongdoing that would be likely to have a "material adverse effect" on the regulated entity, is "substantially responsible for the . . . troubled condition of the regulated entity," "has materially violated any applicable Federal or State law or regulation that has had or is likely to have a material effect on the regulated entity," or has violated various sections of federal law relating to fraud and corruption. 12 C.F.R. § 1231.3(b)(1)(iv); *see also, e.g.*, *WMI Liquidating Tr. v. F.D.I.C.*, 110 F. Supp. 3d 44, 54 (D.D.C. 2015) (reviewing and remanding a determination by the Federal Deposit Insurance Corporation ("FDIC") as to a request to pay a golden parachute payment under identical regulations).

In his complaint, Mr. Piszel alleged that "no court, regulator, or government agency has found that Mr. Piszel committed any wrongdoing or violated any law while at Freddie Mac, or that Mr. Piszel was otherwise responsible for Freddie Mac's financial condition or the conservatorship." J.A. 37. The complaint also notes that "the FHFA publicly acknowledged that it investigated but uncovered no evidence sufficient to demonstrate that any of Freddie Mac's current or former officers or directors engaged in" wrongdoing. *Id.* 38 (internal quotation marks

omitted). Thus, Mr. Piszel's complaint itself suggests that Freddie Mac could have received the required permission to make the payments. The complaint, however, makes no allegation that Freddie Mac sought, or that the FHFA denied, permission to make the necessary payments.

In *Hill*, under nearly identical FDIC regulations, the district court denied a bank defendant summary judgment based on an impossibility defense when a former executive sued for breach of his employment contract after his former employer failed to pay his severance. *See* 2012 WL 694639, at *10. The employer asserted an impossibility defense based on an analogous FDIC prohibition on golden-parachute payments. *See id.* However, the district court held that the employee could pursue a theory that the employer's failure to request permission, as allowed under the regulations, constituted a breach of the agreement calling for severance payments. *See id.*, at *9 ("[T]he question of whether Defendants are able to make the requisite certification for the [] exception is central to the question of whether or not Defendants can be said to have breached the Agreement by withholding Mr. Hill's severance payment."). Thus, because "there remain[ed] a genuine question of material fact as to whether or not Defendants are able to make the . . . certification[s] [necessary to apply for an exception], Defendants cannot be afforded summary judgment on their contractual impossibility defense." *Id.* If the employer could but did not, it would be liable for breach notwithstanding the regulations prohibiting golden parachutes. Here also there remained the possibility that Freddie Mac could have secured permission to make the payments.[7]

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[7] There is also the possibility that Mr. Piszel himself could have requested permission to receive the pay-

Third, it is not clear as to whether the impossibility defense would apply at all even if the payments were prohibited. An impossibility defense could be defeated by showing that the contracting party assumed the risk of government regulation. The Restatement (Second) of Contracts § 264 states that "[i]f the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made." Restatement (Second) of Contracts § 264. However, the comments note that "[w]ith the trend toward greater governmental regulation, however, parties are

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ment. The FHFA notice proposing the golden parachute regulations provided little explanation on this point. *See* 73 Fed. Reg. 53356-01 (Sept. 16, 2008); 12 C.F.R. § 1231. However, notably, in a notice announcing nearly identical regulations resulting from a nearly identical provision of title 12 governing the FDIC's regulation of financial institutions, the FDIC stated that under the regulations an "employee who feels that he/she is being unfairly affected by the rule could apply for permission to receive a payment" as well. Regulation of Golden Parachutes and Other Benefits Which May Be Subject to Misuse, 60 Fed. Reg. 16069-01, 16074 (Mar. 29, 1995) (codified at 12 C.F.R. § 359.4); *see also Hill*, 2012 WL 694639, at *7 (noting that both the bank and the affected party are "equally eligible to apply for the exception to the golden parachute restrictions"). There is no indication in the complaint or the briefs that Mr. Piszel made a request to the FHFA to allow Freddie Mac to pay for any or all of his severance benefits. However, we need not decide this issue, which has not been identified by either party, because (as discussed), Mr. Piszel's complaint fails for other, independent reasons.

increasingly aware of such risks, and a party may undertake a duty that is not discharged by such supervening governmental actions." *Id. cmt. a; see also United States v. Winstar Corp.*, 518 U.S. 839, 868–69 (1996) (reading a contract promise there "as the law of contracts has always treated promises to provide something beyond the promisor's absolute control, that is, as a promise to insure the promisee against loss arising from the promised condition's non-occurrence. . . . Contracts like this are especially appropriate in the world of regulated industries, where the risk that legal change will prevent the bargained-for performance is always lurking in the shadows."). Certainly Freddie Mac operated in a regulated environment where a court may have concluded that Freddie Mac accepted the risk of regulatory action. In a breach action, the courts might have concluded that Freddie Mac bore the risk of regulatory intervention, thus depriving it of an impossibility defense.[8]

C

Under the circumstances, Mr. Piszel has failed to allege facts that would allow us to conclude that the government's actions substantially affected his contractual property right. He agrees that his breach claim survived.

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[8] As noted, we asked the parties to address whether recovery for a breach of contract claim would be limited by the sovereign acts doctrine. Both Mr. Piszel and the government take the position that the sovereign acts doctrine would not limit recovery in this case. Gov't Supp. Br. at 6–7; Piszel Supp. Br. at 12 n.10. We agree. We also agree with the parties that HERA's limitations on damages for breach of contract claims, 12 U.S.C. § 4617(d)(3)(A), would not affect Mr. Piszel's recovery in a breach of contract action against Freddie Mac. *See* Gov't Supp. Br. at 8–9; Piszel Supp. Br. at 12 n.10.

In his complaint, Mr. Piszel does not allege that the government action created an impossibility defense. Indeed, to some extent his complaint alleges to the contrary, stating the FHFA's instruction to Freddie Mac was invalid because his payment was not a "golden parachute" payment but rather deferred compensation exempt from the golden parachute provision (removing an impossibility defense), and that he did not engage in wrongdoing (thereby permitting Freddie Mac to request permission to make his severance payments). In other respects as well it appears possible that the right to enforce the terms of the contract may have been left substantially intact after the government's actions.[9] We affirm the Claims Court's dismissal of Mr. Piszel's regulatory takings claim.

III

We now address Mr. Piszel's remaining claims, which we conclude are without merit.

Mr. Piszel alleges that the government's actions amount to a per se or a categorical taking. Supreme Court precedent carves out two categories of regulatory action that constitute "per se" takings under the Fifth Amendment. "First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." *Lingle*, 544 U.S. at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)

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[9] We note that in *A & D*, the plaintiff had a theoretical claim against the bankruptcy estate, but as the government conceded, "there [was] no question that [the plaintiffs] have alleged that their [franchises] have no value" after the government action. *A & D Auto Sales, Inc. v. United States*, Nos. 13-5019, 13-5020, Oral Argument at 3:50–4:00.

(state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking)). Here, none of Mr. Piszel's property suffered permanent physical invasion. "A second categorical rule applies to regulations that completely deprive an owner of '*all* economically beneficial use' of her property." *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)). Even if the *Lucas* line of cases applies to intangible property like contract rights,[10] as we have discussed above, the government's actions did not amount to a total taking of Mr. Piszel's property because the government's actions left intact his potential breach of contract claim against Freddie Mac.

Mr. Piszel also alleges that the government's actions amounted to an illegal exaction. "[A]n illegal exaction claim may be maintained when the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum that was improperly paid, exacted, or taken from [him] in contravention of the Constitution, a statute, or a regulation." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572–73 (Fed. Cir. 1996) (internal quotation marks and citations omitted). Mr. Piszel does not allege that he paid any money to the government. Rather, his theory is that because the government (as conservator) caused Freddie Mac not to pay him his severance payments, his not receiving severance was in essence a payment sufficient to amount to an illegal exaction.[11] Even assuming that an illegal exaction

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[10] As we noted in *A & D*, "[w]e have not had occasion to address whether the categorical takings test applies to takings of intangible property such as contract rights," 748 F.3d at 1151–52, and we need not do so here.

[11] On appeal, Mr. Piszel also argues that HERA is money mandating. Mr. Piszel failed to plead such a

claim can involve payments to non-governmental entities, there was no exaction here because there was no payment. *See Westfed Holdings, Inc. v. United States*, 52 Fed. Cl. 135, 153 (2002) (no illegal exaction where money is "prevented from coming into [a] plaintiff's account"). Illegal exaction concerns the "recovery of monies that the government has required to be paid contrary to law." *Aerolineas*, 77 F.3d at 1572. No facts as alleged in the complaint concern the payment of money by Mr. Piszel; thus, Mr. Piszel's illegal exaction claim must also fail.

We affirm the dismissal of Mr. Piszel's claims.

AFFIRMED

COSTS

Costs to the government.

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claim. *See* J.A. 38–40. In any case, there is no basis for such an assertion.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Questions and Answers

Petitions for Panel Rehearing (Fed. Cir. R. 40)
and
Petitions for Hearing or Rehearing En Banc (Fed. Cir. R. 35)

Q. When is a petition for panel rehearing appropriate?

A. Petitions for panel rehearing are rarely considered meritorious. Consequently, it is easiest to first answer when a petition for panel rehearing is not appropriate. A petition for panel rehearing should not be used to reargue issues already briefed and orally argued. If a party failed to persuade the court on an issue in the first instance, they do not get a second chance. This is especially so when the court has entered a judgment of affirmance without opinion under Fed. Cir. R. 36, as a disposition of this nature is used only when the appellant/petitioner has utterly failed to raise any issues in the appeal that require an opinion to be written in support of the court's judgment of affirmance.

Thus, as a usual prerequisite, the court must have filed an opinion in support of its judgment for a petition for panel rehearing to be appropriate. Counsel seeking panel rehearing must be able to identify in the court's opinion a material error of fact or law, the correction of which would require a different judgment on appeal.

Q. When is a petition for rehearing en banc appropriate?

A. En banc decisions are extraordinary occurrences. To properly answer the question, one must first understand the responsibility of a three-judge merits panel of the court. The panel is charged with deciding individual appeals according to the law of the circuit as established in the court's precedential opinions. While each merits panel is empowered to enter precedential opinions, the ultimate duty of the court en banc is to set forth the law of the Federal Circuit, which merits panels are obliged to follow.

Thus, as a usual prerequisite, a merits panel of the court must have entered a precedential opinion in support of its judgment for a petition for rehearing en banc to be appropriate. In addition, the party seeking rehearing en banc must show that either the merits panel has failed to follow decisions of the Supreme Court of the United States or Federal Circuit precedential opinions, or that the merits panel has followed circuit precedent, which the party seeks to have overruled by the court en banc.

Q. How frequently are petitions for panel *rehearing granted by merits panels or petitions for rehearing en banc granted by the court?*

A. The data regarding petitions for panel rehearing since 1982 shows that merits panels granted some relief in only three percent of the petitions filed. The relief granted usually involved only minor corrections of factual misstatements, rarely resulting in a change of outcome in the decision.

En banc petitions have been granted less frequently. Historically, the court has initiated en banc review in a few of the appeals decided en banc since 1982.

Q. Is it necessary to have filed either of these petitions before filing a petition for certiorari in the U.S. Supreme Court?

A. No. All that is needed is a final judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

INFORMATION SHEET

FILING A PETITION FOR A WRIT OF CERTIORARI

There is no automatic right of appeal to the Supreme Court of the United States from judgments of the Federal Circuit. You must file a petition for a writ of certiorari which the Supreme Court will grant only when there are compelling reasons. (See Rule 10 of the Rules of the Supreme Court of the United States, hereinafter called Rules.)

Time. The petition must be filed in the Supreme Court of the United States within 90 days of the entry of judgment in this Court or within 90 days of the denial of a timely petition for rehearing. The judgment is entered on the day the Federal Circuit issues a final decision in your case. [The time does not run from the issuance of the mandate, which has no effect on the right to petition.] (See Rule 13 of the Rules.)

Fees. Either the $300 docketing fee or a motion for leave to proceed in forma pauperis with an affidavit in support thereof must accompany the petition. (See Rules 38 and 39.)

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Revised December 16, 1999