No. 13-385C
(Judge Sweeney)

UNITED STATES COURT OF FEDERAL CLAIMS

WASHINGTON FEDERAL, MICHAEL McCREDY BAKER,
and CITY OF AUSTIN POLICE RETIREMENT SYSTEM,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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I. INTRODUCTION

In early September 2008, the U.S. Government saw a solution to the financial crisis that was then in full swing: it would nationalize Fannie Mae and Freddie Mac (collectively the "Companies") under the pretext of "rescuing" them from their own purported financial difficulties, and then use the Companies to buy up the toxic mortgages that were plaguing the economy. The thrust of that plan was to force the Companies, which were doing comparatively well during the crisis, to take the losses on those debts as the rest of the market began to recover. The Government's reasoning was clear—compelling the Companies and their shareholders to absorb these losses would be a relatively small price to pay to help rescue the economy. As the Supreme Court has recognized, however, the Fifth Amendment to the U.S. Constitution bars the Government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Indeed, from the instant the Federal Housing Finance Agency ("FHFA") imposed conservatorship on the Companies and took control over them as their conservator, shareholders lost all voting power and the value of their shares plummeted overnight. This action seeks to recover the more than $41 billion in shareholder losses caused by the Government's takeover of Fannie Mae and Freddie Mac.

In an attempt to justify its decision to place the Companies in conservatorship, the Government invoked the recently-enacted Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified in various sections of 12 U.S.C.). This was a shock to investors not only because "conservatorship" under HERA was a mechanism designed to "preserve and conserve" the Companies' assets in the event that they were in financial jeopardy, but also because the Companies were, at the time, in sound financial condition. Indeed,

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none of the statutorily-defined bases for conservatorship were satisfied when the Companies were nationalized.[1]

What FHFA did under the guise of "conservatorship" makes clear that, despite the Government's invocation of HERA, its intentions were not to conserve the assets of the Companies. Immediately after taking control, the Government used the Companies to warehouse bad mortgage debt from financial institutions the Government deemed "too big to fail." To facilitate that endeavor, the FHFA, purportedly acting as conservator, entered into agreements to grant the Treasury preferred stock in the Companies in exchange for the capital needed to purchase other institutions' debts (the "Preferred Stock Purchase Agreements," or "PSPAs"). In essence, the PSPAs gave the Treasury massive amounts of stock in the Companies virtually for free, forced the Companies to pay fixed quarterly dividends to the Treasury, and established a $100 billion line of credit for each Company. If the Companies were ever made to draw from the $100 billion lines of credit, their dividend payments would increase based on the amount drawn. The PSPAs did not provide any way for the Companies to pay down their draws or decrease their dividend obligations. Ironically, the PSPAs were designed to protect the Government's investment in the Companies while other shareholders had been shut out from receiving any future profits.

Under the Fifth Amendment to the United States Constitution, the Government cannot take private property without just compensation. Despite the extraordinary circumstances surrounding the 2008 financial crisis, the Government's imposition of the conservatorships and seizure of complete control over the Companies constituted a taking of shareholders' property interests and destroyed their rights as owners and significant voices in the Companies' direction. In the alternative, it constituted an illegal exaction in violation of the Due Process Clause of the

[1] All references to the Government's Amended Omnibus Motion to Dismiss [ECF No. 64] will appear as "Mot. at __."

Constitution. The Government's takeover caused direct financial harm to investors when the price of their shares plummeted in reaction to the news. Under either a takings or exaction theory, whether done in the guise of "conservatorships" or otherwise, the Government cannot seize control of privately-held corporations, force them to serve the Government's objectives and, in the process, wipe out the interests of millions of shareholders with no consequence. If the Government nevertheless does so, it must compensate those shareholders.

The Government's Motion fails to address the bulk of the allegations in Plaintiffs' First Amended Complaint ("FAC"). Instead, the Government focuses its fire on allegations in other actions that arise exclusively from the 2012 amendment to the PSPAs (the "Third Amendment"), which included a provision requiring the Companies to pay all of their future profits directly to the Treasury. *See* Mot. at 13-18. While that subsequent modification to the PSPAs further laid bare that the conservatorships were never intended to "rescue" the Companies, the Government nationalized the Companies and destroyed the value of their shares when imposing the unnecessary conservatorships in 2008—four years before the Third Amendment. This case challenges the constitutionality of the original imposition of the conservatorships, not the Third Amendment. As described herein, the Government's decision not to address the Plaintiffs' FAC except in two very limited ways constitutes a waiver of any other challenges that the Government could have raised in its Motion. The Court should thus rule in Plaintiffs' favor on any issues unaddressed in the Government's Motion.

Even proceeding from the dubious assumption that the Government intended to apply its Third-Amendment-related arguments to Plaintiffs' conservatorship-based claims, the Government falls short. First, the Government suggests that the FHFA was not acting on behalf of the United States when it imposed the conservatorships, and thus this Court does not have Tucker Act jurisdiction over these claims. This is not so, most fundamentally because the FHFA could not

have shed its regulatory mantle until *after* becoming a conservator. Even after the conservatorships began, the FHFA was at all times pursuing the Government's goal of propping up the economy on shareholders' backs. Whatever labels it grants its own actions, when the FHFA furthers the Government's policies it is acting as a regulator subject to jurisdiction under the Tucker Act. *Leon Cty., Fla. v. Fed. Hous. Fin. Agency*, 700 F.3d 1273, 1278 (11th Cir. 2012); *Slattery v. United States*, 635 F.3d 1298, 1301 (Fed. Cir. 2011) (*en banc*). As such, this Court has jurisdiction over Plaintiffs' claims.

Relying almost exclusively on *Perry Capital LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017), the Government further asserts that Plaintiffs' claims are derivative and therefore barred under HERA. But the Government ignores that *Perry Capital* acknowledged that HERA "does not prevent . . . constitutional claims," 864 F.3d at 614, and remanded certain direct shareholder claims for damages—claims which bear substantial resemblance to Plaintiffs' claims here. Plaintiffs' claims arise from harm they suffered due to the loss of their rights as shareholders in the Companies when the conservatorships were imposed. That is a compensable harm particular to the shareholders, not the Companies themselves. Therefore, the logical remedy should flow directly to the shareholders, and Plaintiffs' direct claims are not barred by HERA.

Plaintiffs have sufficiently alleged that the imposition of the conservatorships constituted an unconstitutional taking under the factors set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). As an initial matter, Plaintiffs had a cognizable property interest in their shares that remained intact while the Companies were financially sound and there was no basis for conservatorships, as was the case throughout 2008. And amid repeated assurances by Government officials during the financial crisis, Plaintiffs had a reasonable investment-backed expectation that the Government would leave the Companies intact so long as they remained viable, which they did throughout the relevant time frame. Though the Government attempts to

analogize the instant action with insolvent-bank takeover cases, the Companies were not part of the "highly regulated" banking industry, nor were the Companies insolvent when the Government took them over. However much the Government may have helped the mortgage market and the even nation's economy by using the conservatorships to force the Companies to absorb other financial institutions' losses during the 2008 financial crisis, the Government's conduct is "not rendered any more acceptable by worthiness of purpose." *Cienega Gardens v. United States*, 331 F.3d 1319, 1340 (Fed. Cir. 2003).

Plaintiffs have also stated an exaction claim under the Due Process clause in the alternative to their takings claim. Specifically, the Government illegally exacted shareholders' rights when it imposed the conservatorships absent any statutory basis for doing so. HERA established the FHFA's duty to preserve and conserve the Companies' assets, and that duty creates a money mandating obligation. Thus, shareholders are entitled to compensation for the Government's illegal exaction.

Finally, Plaintiffs' FAC is timely. The Government posits that a 30-day limitations period under HERA precludes Plaintiffs' claim for damages. However, the provision cited by the Government—12 U.S.C. § 4617(a)(5)—only restricts claims for declaratory and injunctive relief, neither of which are sought here. Instead, the six-year limitations period under 28 U.S.C. § 2501 applies to Plaintiffs' damages claims. Given that this action was initiated in June 2013, which is well within six years of the imposition of the conservatorships in September 2008, this action for damages is timely.

The Government cannot shirk its responsibility to the Companies' shareholders, whose rights and interests it seized. The Government's Motion fails to raise any basis for dismissal of Plaintiffs' claims. Thus, accepting Plaintiffs' account as true, as the Court must, dismissal is inappropriate. The Motion should be denied.

II. STATEMENT OF THE CASE

A. The Creation of Fannie Mae and Freddie Mac

Congress established Fannie Mae in 1938 to provide increased liquidity to the nation's home mortgage market. WF ¶ 25.[2] While the Company was originally operated by the Government, in 1968 Congress reorganized it as a government-sponsored enterprise ("GSE"), a federally-chartered private corporation charged with serving the self-supporting mortgage market. *Id.* In so doing, Congress transferred the ownership of Fannie Mae to its new shareholders and enabled the Company to raise capital from the private capital markets. *Id.* Beginning in 1968 and continuing until June 2010, Fannie Mae was publicly traded on the New York Stock Exchange. *Id.* ¶ 26.

Congress established Freddie Mac in 1970 to create a secondary market for conventional mortgages. WF ¶ 27. In 1989, the Company was reorganized as a for-profit corporation owned exclusively by private shareholders. *Id.* Beginning in 1984 and continuing until June 2010, Freddie Mac was publicly traded on the New York Stock Exchange. *Id.* ¶ 28.

Under that private ownership structure, for decades the Companies raised capital from investors through the private capital markets, generating profits and increasing shareholder value, and generally operated much like any other publicly traded, shareholder-owned company. WF ¶ 29. As with any publicly traded company, the bylaws and offering documents for the Companies' common stock enumerated specific rights held by each Company's common shareholders, including the right to transfer their shares and vote for candidates for those Companies' boards of directors and shareholder proposals. *Id.* ¶¶ 30-31. The owners of the Companies' common stock also had the right to receive a portion of the Companies' assets in the

[2] All references to "WF ¶ __" are to the Washington Federal Plaintiffs' March 8, 2018 First Amended Complaint, [ECF No. 57].

event of dissolution or liquidation. *Id.* ¶ 31. The offering documents for the Companies' preferred stock also enumerated specific rights held by their preferred shareholders typical of those rights often held by preferred stockholders in a shareholder-owned company, such as the right to transfer their shares, to receive a portion of the Company's assets in the event of dissolution or liquidation, and to vote on amendments to their series' certificate of designation. *Id.* ¶¶ 32-33. Indeed, private investors long considered Fannie Mae and Freddie Mac securities to be popular, sound, conservative investments. *Id.* ¶¶ 34-37. In fact, the Government created strong incentives for banks like Plaintiff Washington Federal and other institutions to invest in Fannie Mae's and Freddie Mac's preferred stock, including beneficial capital and tax treatment. *Id.* ¶ 15.

B. The Government Pushed the Companies to Increase Their Holdings in Riskier Mortgages and Mortgage-Backed Investments

Throughout their existence as public companies, the Companies were charged, to varying degrees, with attempting to increase home ownership in the United States. WF ¶¶ 25, 27, 40, 44. In the years leading up to the financial crisis, both Congress and the Office of Federal Housing Enterprise Oversight (the "OFHEO"), which had oversight responsibility for the Companies, repeatedly exerted pressure on Fannie Mae and Freddie Mac to delve deeper into the subprime and Alt-A mortgage market. *Id.* ¶¶ 43-47. Despite the Government's ill-advised policies, the Companies had less exposure to toxic mortgages than many other financial institutions, and they did not have significant amounts of risky mortgage debt on their books until 2006. *Id.* ¶¶ 49-50.

C. The Housing and Economic Recovery Act of 2008 and the Government's Continued Expressions of Confidence in the Companies and Their Financial Strength

As the financial crisis deepened, Congress enacted HERA on July 24, 2008, which, among other things, replaced the OFHEO with the FHFA. WF ¶ 51. Under HERA, Congress gave FHFA new authority to place the Companies into receivership and expanded authority to place them into conservatorship under certain enumerated conditions. *Id.* In justifying that grant of power, then-

Treasury Secretary Henry Paulson told the Senate that regulators needed "a bazooka" at their disposal, but said it was unlikely the "bazooka" would ever be used. *Id.* ¶ 52.

In supporting and enacting HERA, members of Congress and other Government officials repeatedly emphasized, in public and privately, the health and viability of both Fannie Mae and Freddie Mac and rejected the notion that a conservatorship would ever be imposed on either Company. WF ¶¶ 52-57. For example, in support of the bill, Senator John Isakson (R-GA) explained that:

> The bill we are doing tomorrow is not a bailout to Freddie Mac and Fannie Mae or the institutions that made bad loans. ***It is an infusion of confidence the financial markets need.*** Fannie and Freddie suffer by perception from the difficulties of our mortgage market. ***If anybody would take the time to go look at the default rates, for example, they would look at the loans Fannie Mae holds, and they are at 1.2 percent, well under what is considered a normal, good, healthy balance.*** The subprime market's defaults are in the 4 to 6 to 8-point range. That is causing that problem. That wasn't Fannie Mae paper, and it wasn't securitized by Fannie Mae. ***They have $50 billion in capital, when the requirement is to have $15 billion, so they are sound.***

WF ¶ 53 (emphasis added) (citing 154 Cong. Rec. S7436-01 (2008)). Relatedly, in the months before the Companies were placed into conservatorship, the OFHEO (and subsequently the FHFA after HERA was enacted) and Secretary Paulson stated that both Companies were "adequately capitalized." *Id.* ¶¶ 54-57.

1. Fannie Mae and Freddie Mac were suddenly and improperly placed into conservatorship.

On September 6, 2008, less than two months after the enactment of HERA, when their regulators and Government officials were unequivocal that the Companies were adequately capitalized, the FHFA and Treasury blindsided the Companies and their shareholders by placing

them into conservatorship and taking control away from the shareholders. WF ¶¶ 7, 66.[3] The Government had deliberately kept secret the plan to place the Companies into conservatorship until the last possible minute. *Id.* ¶¶ 58-61. As Secretary Paulson stated to President George W. Bush days before the conservatorships were publicly announced, "***[w]e're going to move quickly and take them by surprise. The first sound they'll hear is their heads hitting the floor***." *Id.* ¶ 64 (emphasis added).

To that end, the Government secretly concocted a financial rationale for placing the Companies in conservatorship, and engaged the investment firm Morgan Stanley to help provide that justification. WF ¶ 61. The purported rationale was, however, contradicted and undermined by other statements and findings made in the weeks leading up to the conservatorship. *Id.* ¶¶ 58, 61-63. For instance, on August 22, 2008, just two weeks before the conservatorships were imposed, the FHFA sent letters to both Fannie Mae and Freddie Mac stating that the Companies were adequately capitalized. *Id.* ¶¶ 58, 61. Similarly, an analysis by BlackRock issued on August 25, 2008 concluded that Freddie Mac's "long-term solvency does not appear endangered . . . even in stress case." *Id.* ¶ 61. Despite these clear indications that there was no real basis for a purported "rescue" to justify the conservatorships, the Government proceeded with its plan to nationalize the Companies. *Id.* ¶¶ 64, 66.

In his September 7, 2008 statement announcing the conservatorships, FHFA Director Lockhart misleadingly stated that "[t]he Boards of both companies consented yesterday to the conservatorship." WF ¶ 67. However, the Boards' "consent" was by no means voluntary. *Id.* In September 4, 2008 letters to the Companies' Boards, the FHFA informed the Companies of what the FHFA claimed were the Boards' failures, and the letter to Freddie Mac went so far as to say

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[3] Paragraph 66 of the FAC erroneously states that the conservatorships were imposed on September 7, 2008.

that the FHFA had "lost confidence" in Freddie Mac's Board and would hold them accountable for purported losses. *Id.* ¶ 90. . *Id.* ¶¶ 88-90. *Id.* ¶¶ 88-89. As Fannie Mae's former CEO Daniel Mudd later stated, "the purpose of the letter was really to force conservatorship." *Id.*

On the day before the conservatorships were imposed, the senior executives and directors at Fannie Mae and Freddie Mac were summoned to secret meetings where they were told in no uncertain terms that they could either accept Government control within 24 hours or the Government would impose it by force. WF ¶¶ 92-93, 95. *Id.* ¶ 92. They did precisely that, and Secretary Paulson specifically (and inaccurately) stated at one meeting that the Government had "the grounds to do this on an involuntary basis, and we will go that course if needed." *Id.* ¶ 93. As Fannie Mae's former CEO Mudd described, the Boards "were given 24 hours to accede to a government takeover – or else the government would effectively go to war against the company." *Id.* ¶ 95. The Financial Crisis Inquiry Commission subsequently concluded that "[e]ssentially the [Companies] faced a Hobson's choice: take the horse offered or none at all." *Id.* ¶ 98.

a. The Government's motive for imposing the conservatorships was to maintain liquidity in the U.S. mortgage market, in part, by bailing out other financial institutions holding high-risk mortgages and mortgage-backed instruments.

The decision to impose the conservatorships was not based on the statutory grounds set forth in HERA, but rather on the broader public policy objective of restoring confidence and liquidity in the nation's financial markets by, among other things, providing a mechanism for other financial companies to unload their bad mortgage debts. WF ¶¶ 68, 73, 82. As a result of the Government's actions, the Companies became a warehouse of such toxic debts, to the severe detriment of shareholders. *Id.* Whatever the validity of these goals from a public policy perspective, they did not constitute a valid legal basis for imposing conservatorships over the Companies and taking control away from their shareholders, and they had very little to do with the Companies' health. *Id.* ¶¶ 82-83.

b. The conservatorships obliterated shareholder value.

Under the terms of the conservatorships, the FHFA assumed the powers of the Companies' boards of directors and management, and the Companies' CEOs were dismissed. WF ¶ 77. It terminated all shareholder meetings and all shareholder voting rights. *Id.* These Government actions caused the Companies' preferred and common stock values to plummet, destroying both shareholder value and the rights and property interests of the Companies' preferred and common shareholders. *Id*. The Companies were ordered to cease paying dividends on their preferred and common stock. *Id.* ¶ 78. On June 16, 2010, the FHFA ordered the Companies to delist their common and preferred shares from the New York Stock Exchange. *Id.*

In total, preferred and common shareholders of the two Companies suffered a loss in value of more than $41 billion. *See* WF ¶¶ 206-08.

2. The Government's invocation of HERA was pretextual, as none of the criteria under HERA for appointing a conservator was satisfied.

HERA provides for 12 circumstances under which the FHFA could place the Companies into conservatorship. 12 U.S.C. § 4617(a)(3)(A)-(L); WF ¶ 83. None of these statutory grounds existed with respect to either Company at the time conservatorship was imposed. Specifically: (1) the Companies' assets were greater than their obligations to their creditors and others, *see id.* ¶¶ 103-06; (2) neither of the Companies had experienced a substantial dissipation of assets or earnings due to: (i) any violation of any provision of federal or state law or (ii) any unsafe or unsound practice, *id.* ¶¶ 107-11; (3) neither Company was operating in an unsafe or unsound condition to transact business, *id.* ¶¶ 112-15; (4) neither Company was in violation of a cease or desist order, *id.* ¶ 116; (5) neither Company concealed or refused to submit any books and records, *id.* ¶¶ 117-18; (6) the Companies were able to pay their obligations and meet the demands of their creditors, *id.* ¶¶ 119-23; (7) neither Company had incurred or was likely to incur losses that would deplete all or substantially all of their capital, *id.* ¶¶ 124-28; (8) neither Company violated any law or regulation, or engaged in any unsafe or unsound practice or condition that would likely cause insolvency, a substantial dissipation of assets or earnings, or a weakening of its condition, *id.* ¶¶ 129-31; (9) the Companies did not consent to the appointment of a conservator, *id.* ¶¶ 85-101; (10) neither Company was undercapitalized, *id.* ¶¶ 132-39; (11) or critically undercapitalized, *id.* ¶¶ 140-42; and (12) neither Company was found guilty of money laundering, *id.* ¶ 143.

Thus, there was no legal basis for the Government to place the Companies into receivership or conservatorship.

D. The PSPAs Improperly Appropriated the Private Property of the Companies' Preferred and Common Shareholders

1. The Original PSPAs

When the Companies were placed into conservatorship, the Secretary of the Treasury entered into the PSPAs with both Companies, which were acting at the direction of the FHFA as conservator. WF ¶ 68. Those Agreements provided that, in exchange for making available to each Company a $100 billion line of credit, which the Companies never sought or needed, the Treasury would receive: (a) $1 billion in preferred stock issued by the Companies with a cumulative 10% dividend; (b) additional senior preferred stock equal to the amount of any credit the Treasury extended to the Companies; (c) preferential rights for the Treasury's senior preferred stock that placed it ahead of all other stockholders; and (d) warrants to acquire 79.9% of each company's common stock for one-thousandth of one cent per share, which translated to a total exercise price of approximately $8,000 for each Company. *Id.* ¶¶ 8, 68-69, 80. Any amounts borrowed from the Treasury could never be repaid; instead, any borrowings would subject the Companies to an annual 10% interest rate on amounts borrowed forever. *Id.* ¶ 8. Under this arrangement, the Companies were subjected to an ever-worsening cycle in which their dividend obligations to the Treasury—which existed whether or not the Companies were profitable—raised the possibility that the Companies would need to take draws to make the dividend payment, which would in turn increase the dividend owed each quarter. The PSPAs were amended in May 2009 to increase the line of credit to $200 billion for each Company, and later in 2009 to make that maximum line of credit unlimited through 2012, and then for future years subject to a cap. *Id.* ¶ 74-75.

2. The Third Amendment

By mid-2012, after years of being forced to pay harmful and excessive dividends to the Treasury that had siphoned virtually all of the Companies' earnings to the Government, Fannie Mae and Freddie Mac had once again achieved positive net worth and began generating positive

net income despite the onerous terms of the PSPAs. WF ¶¶ 168-72. The Government, however, sought to continue its policy of preventing any Company profits from benefitting shareholders, and amended the PSPAs for the third time in August 2012. *Id.* ¶¶ 165-72. Under the Third Amendment, beginning in January 2013, the Companies would pay the entirety of their positive earnings to the Treasury on a quarterly basis. *Id.* ¶¶ 172, 174-75. As the *Wall Street Journal* reported, "Fannie and Freddie are simply making interest payments on a loan that can't ever be paid off." *Id.* ¶ 177. While the Government continues to reap a fortune from its nationalization of the Companies through the billions of dollars transferred to the Treasury in dividends each quarter, the Companies' shareholders have been left with virtually nothing, and without any compensation. *See id.* ¶¶ 182-84.

E. The Government's Motion Primarily Addresses the Third Amendment

On June 10, 2013, Plaintiffs Washington Federal, Michael McCredy Baker, and City of Austin Police Retirement System filed the instant action in this Court on behalf of shareholders of Fannie Mae and Freddie Mac, challenging conduct by the Government in imposing conservatorships over the Companies. ECF No. 1. Unlike the other consolidated actions, this action specifically alleges that the imposition of the conservatorships themselves constituted a taking and an illegal exaction. Consequently, unlike the plaintiffs in the related actions, many of whom, according to the Government, "did not purchase stock until after the [Third Amendment's] execution" (Mot. at 2), Plaintiffs purchased their shares in the Companies *prior* to the implementation of the conservatorships and were completely blindsided by that unexpected and unwarranted Government action, as alleged in the FAC. WF ¶¶ 17-19.

The Government moved to dismiss and Plaintiffs opposed. ECF Nos. 31, 37, 38. But, due to a stay to permit jurisdictional discovery in the *Fairholme* action, the Government did not file a reply brief and the first dismissal motion was not litigated to a ruling. ECF No. 41-44. It was later

denied without prejudice. ECF No. 53 at 2. Once the parties in *Fairholme* completed the "quick peek discovery" this Court had authorized on jurisdiction, the Court set a new briefing schedule on the Government's motion to dismiss. ECF No. 53. In March 2018, the *Washington Federal* Plaintiffs filed their FAC, the operative pleading now challenged by the Government. ECF No. 57. Thus, although the *Washington Federal* action has been pending for five years, the FAC is Plaintiffs' first pleading subject to adversarial testing for legal sufficiency. Consistent with this posture, the Government does not seek dismissal with prejudice and does not contend that leave to amend, if necessary, would be prejudicial or otherwise unfair. Mot. at 5, 81.

Early in this action, the Court consolidated related cases and, after jurisdictional discovery, granted the Government's unopposed request for a page extension on its omnibus motion to dismiss. ECF Nos. 28, 53, 61. The Government then filed an initial omnibus motion and, two months later, its current amended motion. ECF Nos. 62, 64. Yet as elaborated below, despite multiple opportunities to frame its arguments against the *Washington Federal* Plaintiffs, the Government primarily targets allegations and claims brought by *other* shareholders in the *other* cases. The Government challenges Plaintiffs' FAC in only limited respects. Because Plaintiffs' allegations arise from the original imposition of the conservatorships and not the Third Amendment, the Government's failure to address much of the FAC is fatal to its Motion.

III. ARGUMENT

The burden of moving forward on a motion to dismiss is "minimal." *Colonial Chevrolet Co. v. United States*, 103 Fed. Cl. 570, 574 (2012). In deciding a motion to dismiss for lack of subject matter jurisdiction, the Court must accept as true the allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. *Laudes Corp. v. United States*, 86 Fed. Cl. 152, 159 (2009). The plaintiff "need only make a *prima facie* showing of jurisdictional facts in order to survive a motion to dismiss." *Mastrolia v. United States*, 91 Fed. Cl. 369, 376 (2010).

To defeat a motion to dismiss for failure to state a claim, a plaintiff need only state a claim to relief that has "facial plausibility." *Ambrose v. United States*, 106 Fed. Cl. 152, 155 (2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). As with a motion to dismiss for lack of subject matter jurisdiction, in deciding a motion to dismiss for failure to state a claim, the Court must also accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009); *Laudes*, 86 Fed. Cl. at 160.

A. The Government Has Waived Arguments Not Raised in its Motion to Dismiss

As to the *Washington Federal* Plaintiffs, the motion to dismiss is most striking for the contentions the Government does not make. The Government's Motion assumes "the core allegation [of the amended complaints] remains the same: ***the Third Amendment*** represented a Government 'expropriation' of the Enterprises' net worth, which harmed plaintiffs' 'economic interests' in their Fannie Mae and Freddie Mac stock." Mot. at 13 (emphasis added). The Government therefore contends that "[f]ederal courts have uniformly dismissed other ***Third Amendment*** shareholder challenges." Mot. at 16 (emphasis added). As the Government acknowledges in the one section of its brief devoted solely to the *Washington Federal* Plaintiffs' claims (Section XII), the *Washington Federal* Plaintiffs' claims "stem[] from FHFA's Appointment As Conservator." Mot. at 79. Yet the Government fails to respond to the bulk of these claims. As such, Plaintiffs' FAC is essentially treated as an afterthought, and the Government has offered almost no support for its assertion that Plaintiffs' claims should be dismissed.

Because of the near exclusive focus of the Government's Motion on other plaintiffs' claims, most theories floated by the Government for dismissal do not apply to the allegations made by Plaintiffs in this action. *See, e.g.*, Mot. at 23-26 (Section II.B), 40-50 (Sections IV-VII), 54-58

(Sections VIII.B-C), 59-61 (Section VIII.D.1), 71-78 (Sections X-XI). Except for standing and timeliness, *id.* at 30, 79, the Argument portion of the Government's Motion (more than 60 pages) refers to Plaintiffs' FAC *just once*—and does so only to make the untenable argument that Plaintiffs have asserted "tort-like allegations" of "misrepresentation." *Id.* at 45. However, the sole cited paragraph of the FAC does not so allege.[4] In any event, the Government fails to make a "developed argument" on the point. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006). The Government's "perfunctory" treatment—a "skeletal argument," the Federal Circuit instructs, is even more inadequate "when the brief presents a passel of other arguments"—waives any objection grounded on misrepresentation. *Id.*

New theories, of course, cannot be raised against Plaintiffs for the first time on reply. "[B]oth fairness to the opposing party and to the trial court support the rule that a party waives issues not raised in its opening brief." *Brooks Range Contract Servs., Inc. v. United States*, 101 Fed. Cl. 699, 708 (2011). As the Federal Circuit has explained: "Raising the issue for the first time in a reply brief does not suffice; reply briefs *reply* to arguments made in the response brief—they do not provide the moving party with a new opportunity to present yet another issue for the court's consideration." *Novosteel SA v. U.S., Bethlehem Steel Corp.*, 284 F.3d 1261, 1274 (Fed. Cir. 2002). In line with the prevailing practice, this Court "will not consider arguments that were presented for the first time in a reply brief or after briefing was complete." *Arakaki v. United*

[4] "The damage to Fannie Mae and Freddie Mac and, in turn, to their shareholders' interests was further exacerbated by the otherwise ***unwarranted accounting changes*** forced upon the Companies by the Government. Specifically, by forcing the Companies to dramatically increase their loan loss reserves, in large part to account for the assumption of additional toxic assets instructed by the Government, and unreasonably write down the value of their deferred tax assets, the Government squandered the value of the Companies and, accordingly, the equity interests held by their shareholders, creating the false perception at the time that they were less adequately capitalized than was actually the case and thereby necessitating further draws from the Treasury." WF ¶ 200 (emphasis added).

States, 62 Fed. Cl. 244, 246 n.9 (2004) (citing *Novosteel*, 284 F.3d at 1274); *see also Ross-Hime Designs, Inc. v. United States*, 109 Fed. Cl. 725, 739 n.14 (2013) (collecting cases). Thus, to the extent the Government intends to resurrect abandoned arguments in its reply brief, it should not be permitted to do so.[5]

B. This Court Has Tucker Act Jurisdiction to Entertain Plaintiffs' Claims

The Government contends that even though the FHFA seized control of the Companies at the direction of federal government officials and pursuant to statutory authority that purported to install FHFA as the Companies' "conservator," those actions were not taken on behalf of the United States for purposes of Tucker Act jurisdiction. 28 U.S.C. § 1491(a)(1). The Government is mistaken. "The jurisdictional criterion is not how the government entity is funded or its obligations met, but whether the government entity was acting on behalf of the government." *Slattery*, 635 F.3d at 1301 (*en banc*). Here, Plaintiffs challenge the FHFA's conduct as a government regulator in ***imposing*** the conservatorships. HERA created the FHFA to "regulate and oversee Fannie Mae and Freddie Mac," and, if certain statutory prerequisites were satisfied, "act as conservator or receiver" for the Companies. *Leon Cty.*, 700 F.3d at 1276. Thus, while Plaintiffs allege that none of the statutory triggers for conservatorship were met, once FHFA purported to invoke that authority, FHFA could ***only*** be acting as a regulator in imposing the conservatorships. At the risk of stating the obvious, no arm of the federal government can act "as a conservator" before a conservatorship begins.

The Government's one-size-fits-all approach of arguing that the FHFA was acting as a conservator rather than a regulator improperly shoehorns this action into the Third Amendment

[5] If the Court considers arguments raised for the first time in the Government's reply brief, Plaintiffs respectfully request leave to file a sur-reply opposition.

box.[6] As the Court observed in the *Fairholme* action: "rather than turning a blind eye to a case and immediately dismissing it from its docket merely because the case concerns the FHFA, the proper approach is for a court to examine the factual underpinnings and legal contentions presented by the complaint, in order to determine whether the exercise of its jurisdiction is proper." *See* Opinion and Order at 3, *Fairholme Funds, Inc. v. United States*, No. 13-465 (Fed. Cl. July 16, 2014), ECF No. 72 (quoting *County of Sonoma v. Fed. Hous. Fin. Agency*, 710 F.3d 987, 994 (9th Cir. 2013) ("Analysis of any challenged action is necessary to determine whether the action falls within the broad, but not infinite, conservator authority.")). The factual underpinnings of Plaintiffs' claims are not the same as the factual underpinnings of the Third Amendment plaintiffs' claims, which are not determinative of the role the FHFA played when the conservatorships were imposed.

Contending that the FHFA merely stepped into the Companies' shoes as private entities, the Government emphasizes the FHFA's statutory power to succeed to "all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director[.]" Mot. at 22 (quoting 12 U.S.C. § 4617(b)(2)(A)(i)). This argument fundamentally conflates two discrete concepts that, in determining Tucker Act jurisdiction, must be kept separate: (1) the capacity in which a government agency acted in imposing a conservatorship; and (2) the rights acquired once

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[6] *See, e.g.,* Mot. at 20 ("FHFA Is Not The United States For Tucker Act Purposes ***When Acting As The Enterprises' Conservator***"); *id.* at 21 ("Whatever plaintiffs may think about the propriety of the Enterprises ***entering into the Third Amendment***, their disagreement with FHFA as conservator's decision does not create a takings claim against the Federal Government."); *id.* ("Because plaintiffs' ***Third Amendment claims*** are not against the United States, they should be dismissed for lack of jurisdiction.") (emphasis added). Relatedly, the Government's cited authorities, which exclusively examine conduct occurring after conservatorship (or receivership) has been initiated, are inapplicable to the present context. *E.g.*, *Tenerife Real Estate Holdings, LLC v. United States*, 136 Fed. Cl. 156, 160 (2018) (stating that "the FDIC is not the United States when it acts as a ***receiver*** for a failed bank") (emphasis added).

a conservatorship has begun. The Government's cited cases are off point; none involved the FHFA's conduct before becoming a conservator.

The FHFA's conduct in deciding to impose the conservatorships, for reasons having nothing to do with any of the preconditions under HERA, reflected its role as a Government regulator, not conservator. The FHFA is therefore subject to jurisdiction under the Tucker Act.

C. Plaintiffs Have Standing to Bring a Direct Claim

Relying heavily on *Perry Capital LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017), the Government contends that Plaintiffs' claims are derivative and thus barred by HERA. To be sure, *Perry* held that derivative claims arising out of the same FHFA conservatorship are not viable and there is no conflict-of-interest exception under HERA that would otherwise confer shareholder standing for such claims. But the Government does not mention *Perry*'s further holding that HERA permitted certain direct shareholder claims for damages. Those direct claims are analogous to Plaintiffs' constitutional takings claim. This Court should follow *Perry*'s reasoning and reject the Government's argument for dismissal.

In *Perry*, Fannie and Freddie stockholders brought various causes of action, including contract-based theories, challenging the Third Amendment. 864 F.3d at 602-03. HERA's Succession Clause, emphasized by the Government in its Motion, was central to the viability of the claims. This clause provides that the FHFA "shall, as conservator or receiver, and by operation of law, ***immediately succeed to (i) all rights, titles, powers, and privileges*** of the regulated entity, and ***of any stockholder***, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added). Interpreting this language, the D.C. Circuit "conclude[d] the Succession Clause transfers to the FHFA without exception the right to bring derivative suits but not direct suits. The class plaintiffs' claims for breach of fiduciary duty are derivative and therefore barred, but ***their contract-based***

claims are direct and may therefore proceed." 864 F.3d at 624 (emphasis added). Specifically, *Perry* held that a contract-based cause of action grounded on loss of dividend rights could proceed as a direct claim for damages. *Id.* at 629-31.

Although a takings claim was not before the D.C. Circuit in *Perry*, the substantive nature of the contract claim there turned on rights and claims "against the assets or charter of the regulated entity," which included the plaintiffs' reasonable expectations that certain shareholder rights would not be unreasonably denied. *Id.* at 624. This is analogous to Plaintiffs' regulatory taking claim that the imposition of the conservatorships wrongfully terminated all shareholder voting rights, eliminated shareholder meetings, dismissed the Companies' chief executives, and allowed the Government to assume the powers of the Companies' board of directors and management.

Delaware's ubiquitous two-part inquiry for determining whether a claim is direct or derivative leads to the same conclusion. Under this test, the court considers two questions: "Who suffered the alleged harm – the corporation or the suing stockholder individually – and who would receive the benefit of the recovery or other remedy?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004). Generally stated, the stockholder must have "suffered an injury that is not dependent on an injury to the corporation." *Id.* at 1036. The "second prong of the analysis"—who would receive the benefit—"should logically follow" from who suffered the harm. *Id.*

Here, the stockholder injury alleged is individual, not derivative, in character and does not depend on harm to the Companies. As detailed in Plaintiffs' FAC, their rights as Fannie or Freddie shareholders "were typical of those rights usually associated with the private property interest represented by common stock." WF ¶ 31. The full panoply included the right to transfer their shares, to vote on various matters, and to receive a portion of the Companies' assets in the event of dissolution or liquidation. *Id.* Preferred stockholders enjoyed the same rights and additional

ones, including the right to vote on amendments to their series' certificate of designation, subject only to narrow exceptions. WF ¶¶ 32-33. These diverse shareholder protections went out the window when the Government imposed the conservatorships on the Companies. Even assuming for sake of argument that the conservatorships were legally permissible, the United States is, as in *Perry*, accountable by law for eviscerating Plaintiffs' rights and the consequent destruction of value that this caused to their shares in the Companies.

Cherry picking from different sections of the FAC, the Government emphasizes certain allegations that, viewed in isolation, might be classified as derivative. Mot. at 30. These include "overpayment of Enterprise dividends to Treasury" and "loss of shareholder value." *Id.* However, the jarring decline in the Companies' aggregate value resulting from the governmental seizure is most reasonably viewed as the damages suffered by shareholders due to the loss of their rights in the Companies. WF ¶ 77. Indeed, the stock lost value because it ceased to represent a significant ownership or economic right in the Companies. For instance, just like the unlawful conduct held direct in *Perry*, "the Companies were ordered to cease paying dividends on their preferred and common stock." WF ¶ 78. That Plaintiffs may bring a direct claim for damages, in this case under the Fifth Amendment, logically follows from the harms to them as stockholders.[7] *See Tooley*, 845 A.2d at 1036.

[7] Even if Plaintiffs' claims were derivative in nature—and they are not—the FHFA's role in imposing the conservatorships and its close work with the Treasury in effecting the Government's goals create a conflict of interest that prevents the FHFA from pursuing these claims under the Succession Clause. *See Delta Sav. Bank v. United States*, 265 F.3d 1017 (9th Cir. 2001) (permitting shareholders to bring derivative claims when the Government's pre-receivership conduct created a conflict of interest); *see also First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999) (same). As such, shareholders should be permitted to pursue these claims even if the Court deems them to be derivative.

D. Plaintiffs Have Alleged Violations of the Takings Clause

At the height of the financial crisis in 2008, and after years of promising that the Companies would remain in shareholders' hands, the Government seized the Companies without warning and used them to rescue other struggling financial institutions and the economy at large, all to the detriment of the Companies' shareholders. That seizure included the termination of all shareholder voting rights, the elimination of shareholder meetings, the dismissal of the Companies' chief executives, and the Government's assumption of the powers of the Companies' board of directors and management. As already explained, those rights were in the hands of the Companies' shareholders immediately prior to the imposition of the conservatorships, and the Government's appropriation of those rights caused the price of their shares—which were suddenly rendered virtually worthless—to plummet. Plaintiffs were injured by the Government's conduct, and the Fifth Amendment requires that the Government compensate Plaintiffs accordingly.

1. Plaintiffs have a cognizable property interest in their shares.

It is well settled that the existence of a cognizable property interest is determined by "looking to existing rules or understandings and background principles derived from an independent source such as state, federal, or common law." *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1376 (Fed. Cir. 2004) (internal quotation marks and citations omitted). The *laissez faire* framework under which the Companies operated prior to the imposition of the conservatorships reveals that the Companies' shareholders retained protected property interests in their shares.

As described in the FAC, the Companies were privately—and successfully—run for decades on capital raised from investors through private capital markets. WF ¶ 29. Although they had initially been operated by the Government, the Companies were made private entities by acts of Congress in 1968 and 1989. WF ¶¶ 25, 27. Congress first approved the Government's

conservatorship authority over the Companies in 1992 under the Safety and Soundness Act, but investors in Fannie Mae and Freddie Mac were given every indication that the authority conferred by that Act was toothless, and Congress made clear at the time that the Companies posed "low financial risk of insolvency." WF ¶¶ 38, 41. Indeed, despite serious mismanagement and an accounting scandal at Freddie Mac in 2003 that resulted in the Company restating its financial reports for several years, the Government never found a reason to exercise its conservatorship authority. *See id.* ¶ 42.

Even the enactment of HERA did nothing to change the fact that Plaintiffs' rights were protected. This is because government officials repeatedly emphasized that the Companies were healthy and that the authority conferred by HERA—which included new receivership authority and expanded conservatorship authority—***would not be used***. This view was pressed by Treasury Secretary Paulson, WF ¶ 52 (stating that regulators needed a "bazooka" but emphasizing that there was little likelihood it would ever be used); Senator John Isakson, who worked to pass HERA, WF ¶ 53 (explaining that the legislation constituted "***an infusion of confidence***" into financial markets by showing that the Companies were "***strong***"); Federal Reserve Chairman Bernanke, WF ¶ 54; [redacted] And all the while, the Government promoted Fannie Mae and Freddie Mac securities to investors through beneficial capital treatment and beneficial tax treatment. *Id.* ¶ 15. Thus, by its words and actions, the Government established that the terms of the regulatory framework applicable to the Companies did nothing to limit the rights of their shareholders.

The Government passes over these considerations, and instead argues that "shareholders lack any property right, cognizable under the Takings Clause, when the corporations are in

conservatorship or receivership." Mot. at 51. Indeed, the entirety of the Government's argument focuses on the circumstances leading up to the Third Amendment, which took place many years after the Companies had already been placed in conservatorship. That argument is entirely beside the point, given that the claims in the instant action concern the original creation of the conservatorships, and the class consists only of those shareholders whose interests in the Companies predated the conservatorships. WF ¶ 209.

The Government's broader suggestion that the existence of a regulatory framework is sufficient to vitiate any cognizable property interests is also misplaced, and leads to a manifestly absurd result: if the Government's ability to exercise *some* control over a company were sufficient to eliminate a cognizable property interest, there could never be a basis for a regulatory taking claim. This oversimplification is not the law. *See Maritrans, Inc. v. United States*, 40 Fed. Cl. 790, 796 (1998) ("The inquiry is not so simple as examining whether the Government prevents the exercise of a property right by regulating it, transforming the property right into one 'totally dependent' on the Government's regulatory regime. That is a tautology; the inquiry is considerably more nuanced."). As the Federal Circuit held in *Cienega Gardens v. United States*, 331 F.3d 1319, 1350-51 (Fed. Cir. 2003), the mere existence of a regulatory framework does not warrant the conclusion that an industry is "highly regulated":

> Nor is the fact that the industry is regulated dispositive. A business that operates in a heavily-regulated industry should reasonably expect certain types of regulatory changes that may affect the value of its investments. ***But that does not mean that all regulatory changes are reasonably foreseeable or that regulated businesses can have no reasonable investment-backed expectations whatsoever***.
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> [A]t the extremes, where history shows consistent, intrusive and changing government regulation of all facets of all transactions even arguably within a field, for example, banking, the effect of being in so highly a regulated field is clear. We have no evidence that the housing programs involved here were part of such an extreme field

> and therefore ***cannot . . . rely solely on the fact of regulation, but must probe into its content and other considerations***.

331 F.3d at 1350-51 (emphasis added and internal citations omitted). Notably, the *Cienega Gardens* court observed that "the field of private mortgage lending is one which cannot be considered highly regulated." *Id.* at 1351 n.45.

The Government draws from case law arising from the highly regulated banking industry, arguing that, as with investors in banks, Fannie Mae and Freddie Mac shareholders lack protected property interests. The problem with this argument is twofold. First, it is inapt to compare the regulatory framework applicable to the Companies to that of the banking industry. "[It] is well known that '[b]anking is one of the longest regulated and most closely supervised of public callings.'" *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992) (quoting *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947)). In contrast to the Government's historically hands-off approach with Fannie Mae and Freddie Mac prior to the conservatorship, the regulatory framework applicable to banks has historically limited the rights of banks' investors. Nor does it matter that the Companies here were operating under some threat of regulation that could conceivably limit the Companies' investors in the use of their property.[8] "[T]he ability to exercise every one of the 'sticks' (rights) in the 'bundle' of fee simple rights at the time of a taking is not a prerequisite to establishing a valid property interest under the Fifth Amendment." *Cienega Gardens*, 331 F.3d at 1329. Here, the ability to impose the conservatorships in the first instance

[8] HERA's use of the term "regulated entities," in contrast to the Safety and Soundness Act's references to "enterprises," is a red herring. That change merely reflects the reorganization of provisions within the statute to encompass both the Companies and the Federal Home Loan Banks. *Compare* 12 U.S.C. § 4617(a) (West 1992) (applying to "enterprises"), *with* 12 U.S.C. § 4617(a) (West 2013) (applying to "regulated entities," defined at 12 U.S.C. § 4502(20) as Fannie Mae, Freddie Mac, and the Federal Home Loan Banks).

does not mean that shareholders should have expected them to be imposed in *any* circumstance, particularly in the circumstances alleged here.

The second problem with the Government's argument is that it relies upon cases with only superficial resemblance to the facts of the instant action. The cases cited by the Government, including *Golden Pacific Bancorp v. United States*, 15 F.3d 1066 (Fed. Cir. 1994) and *California Housing Securities, Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992), merely stand for the proposition that a plaintiff's rights are not infringed for purposes of the Takings Clause when the Government, acting pursuant to a regulatory framework, engages in conduct that is entirely consistent with that framework. For instance, in *Golden Pacific*, the court reasoned that a defunct bank's majority shareholder lacked a cognizable property interest affected by the bank's seizure because, given the regulatory framework and the actual insolvency of the bank, the shareholder's "expectations could only have been that the FDIC would exert control over the Bank's assets if the Comptroller became satisfied that the Bank was insolvent and [consistent with the governing statute] chose to place it in receivership." 15 F.3d at 1074. A similar result was reached in *California Housing*, under essentially the same line of reasoning. 959 F.2d at 959 ("In exchange for the benefit of federal deposit insurance, Saratoga gave the government the right, among other rights, to place Saratoga in conservatorship or receivership *when warranted*.") (emphasis added); *see also Branch v. United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995) ("It is well established that it is not a taking for the government to close an insolvent bank and appoint a receiver to take control of the bank's assets. . . . Banking is a highly regulated industry, and an individual engaged in that industry is deemed to understand that if his bank becomes insolvent or is operated in violation of laws or regulations, the federal government may 'take possession of its premises and holdings[.]'" (internal citations omitted)). Those cases, importantly, all involved ***insolvent*** banks in need of rescuing. That key fact is not present here.

The Government also overplays its hand in regard to Judge Lamberth's opinion in *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014), suggesting that Judge Lamberth held the Companies' "history of Federal oversight and regulation" vitiated any compensable property right because the "specter of conservatorship" was always present. Mot. at 52-53. To the contrary, Judge Lamberth corrected the FHFA when it argued that very point:

> The Court notes that FHFA overreads the Federal Circuit holdings. Unlike FHFA's contention that "shareholders had no cognizable property interest within the meaning of the Takings Clause *before* conservatorship," the shareholders only lose their cognizable property interests "when [the GSEs are] in conservatorship."

70 F. Supp. 3d at 241 n.50 (emphasis in original) (internal citations omitted).

Indeed, the Government actions challenged by Plaintiffs here went far beyond anything contemplated by the regulatory environment under which the Companies were operating. Instead, the FHFA and Treasury took the unprecedented move of placing the Companies into conservatorship despite their sound financial condition, so that the Government could use the Companies to prop up the nation's financial markets. That action, which was part of a broad governmental effort to support the nation's economy during turbulent times, had nothing to do with the statutorily-defined purpose of a conservatorship—to preserve and conserve the assets of a troubled institution. The Government admitted as much. *E.g.*, WF ¶¶ 73, 82. Until the Companies became insolvent and a true need for conservatorship arose, Plaintiffs and other shareholders retained the right to continue their unfettered ownership of the Companies.

Thus, the Companies' shareholders had a cognizable interest in their shares that was protected from governmental interference.

2. Plaintiffs have adequately pleaded a *Penn Central* regulatory taking.

In light of the factors set forth in *Penn Central*, 438 U.S. at 124, Plaintiffs have alleged facts that give rise to a takings claim.[9]

Courts examine the following factors when assessing whether a regulatory taking occurred: (1) the economic impact of the regulation; (2) the extent to which the regulation interfered with investment-backed expectations; and (3) the character of the governmental action. *Id.* Here, by nationalizing the Companies at the expense of their shareholders in order to support the nation's economy, the Government effected a regulatory taking of Plaintiffs' and other shareholders' property interests in the Companies. *See Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir.

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[9] The Government argues separately that a categorical regulatory taking has not been pled—but only makes that argument with regard to the Third Amendment. While the Government's failure to raise that argument against Plaintiffs in the instant action constitutes a waiver, *see* § III.A *supra*, two points merit brief discussion. First, a regulatory "total wipeout" taking claim, as articulated in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014-19 (1992), is not limited to claims involving real property. Although *Lucas* and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), dealt only with land, neither case expressly held that interests unrelated to real property could not be the subject of a categorical taking. And the Federal Circuit has previously applied the categorical takings analysis to alleged takings of property other than real property. *See, e.g.*, *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1352-55 (Fed. Cir. 2003) (rejecting Government's argument that "the concept of a categorical taking cannot be extended to regulations that restrict the use of personal property," but concluding that no categorical taking occurred); *see also A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1151 (Fed. Cir. 2014) ("We have applied the categorical test to personal property on occasion.") (listing cases). Second, the initiation of the conservatorships did constitute a total wipeout of shareholders' interests in the Companies. *See, e.g.*, WF ¶ 80 (Director Ed DeMarco explaining that shareholder value "has essentially vanished" because equity holders' claims on the Companies are subordinate to taxpayer claims, and "taxpayers are not likely to be repaid in full"); *id.* at ¶ 73 (Freddie Mac's then-CEO Charles Haldeman: "the terms of Freddie Mac's [PSPA] were explicitly designed to make it difficult if not impossible for [Freddie Mac] to emerge from conservatorship and for shareholders to recoup any value from their investments"); *id.* at ¶ 78 (noting that the Companies were ordered to cease paying dividends to shareholders following the initiation of the conservatorships); *id.* at ¶ 81 (Haldeman: "[The conservatorship] wasn't a bailout . . . common and preferred shareholders ***were being wiped out.***") (emphasis added).

1994) ("A 'partial taking' occurs when a regulation singles out a few property owners to bear burdens, while benefits are spread widely across the community.").

"Neither the Supreme Court nor the Court of Appeals for the Federal Circuit has limited takings cases to strict or formulaic theories at the pleading stage." *Colonial Chevrolet Co., Inc. v. United States*, 103 Fed. Cl. 570, 575 (2012). Instead, the existence of a taking "'depends largely upon the particular circumstances'" of the case and there is no "'set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government.'" *Id.* (quoting *Penn Central*, 438 U.S. at 123-24). Accordingly, "reference to isolated facts in other takings cases provides limited guidance." *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1282 (Fed. Cir. 2009). For the reasons discussed below, the Government's nationalization of the Companies despite their sound financial health constituted a regulatory taking, and the Companies' shareholders are entitled to reimbursement for their losses.

a. The Government's actions have resulted in severe economic impact.

Plaintiffs have pleaded ***more than $41 billion*** in concrete, direct, substantial economic harm resulting from the Government's conduct. WF ¶¶ 206-07. The Government cannot—and does not—contend that this amount is insufficient to state a *Penn Central* claim. *See Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994) (holding that the economic impact analysis should include consideration of "the fair market value before the alleged taking to the fair market value after the alleged taking").

Instead, the Government focuses its argument on the Third Amendment, which the Government claims had no economic impact because "the regulatory regime in existence before the Third Amendment already gave Treasury a preferential right to dividends, to the effective exclusion of other stockholders." Mot. at 62 (internal quotation marks and citation omitted). The Government continues, emphasizing that the "Third Amendment simply locked in an exclusive

allocation of dividends to Treasury that was already made possible by—and had been in practice under—previous agreements." *Id.* at 62-63 (internal quotation marks and citation omitted). As with many of the arguments the Government makes in its omnibus motion to dismiss, the Third Amendment's impact on shareholders is beside the point with respect to Plaintiffs' claims in the instant action, which focus primarily on the initial imposition of the conservatorships years prior. And the Government's argument that the Third Amendment had no economic impact because shareholders were by that time already shut out of the Companies' dividends only supports Plaintiffs' allegation that the imposition of the conservatorships crippled investors' property interests in the Companies.

Even putting lost dividends aside, the Government fails to rebut the many other ways that the conservatorships and their immediate aftermath undermined shareholders' rights, including the FHFA's assumption of the powers of the Companies' boards of directors, the termination of shareholder meetings and shareholder voting rights, and the precipitous declines in the price of the Companies' securities. *See* WF ¶ 77 (explaining, *inter alia*, that the Companies' securities lost more than 80% of their value when the conservatorships were imposed); *Fla. Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 38 (1999) (finding that a regulatory taking occurred when the value of a parcel of land "was diminished by almost three fourths"). Moreover, since the establishment of the conservatorships the Government's actions as the Companies' purported "conservator," including the enactment of the Third Amendment, have demonstrated the Government's intent that shareholders' rights and economic interests in the Companies will never be restored. *See* WF ¶ 174 [redacted] [redacted] *id.* at ¶ 176 (Director DeMarco admitting that the plan was to "gradually contract[] [the Companies'] operations").

Simply put, in focusing so narrowly on the Third Amendment, the Government concedes Plaintiffs' very point regarding the imposition of the conservatorships: that shareholders' economic rights were significantly harmed when the Government nationalized the Companies.

b. Plaintiffs reasonably expected that the Government would not interfere with their rights as shareholders in the Companies.

Whether a plaintiff has a reasonable investment-backed expectation depends on:

> (1) whether the plaintiff operated in a "highly regulated industry;" (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have "reasonably anticipated" the possibility of such regulation in light of the "regulatory environment" at the time of purchase.

Kemp v. United States, 65 Fed. Cl. 818, 821 (2005) (quoting *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004)). As discussed in § III.D.1 above, Fannie Mae's and Freddie Mac's shareholders reasonably expected that the Government would not infringe upon their property interests because the Companies operated under a unique, permissive regulatory structure and because Government officials expressly represented that the Companies would not be interfered with, especially in light of their stated belief that the Companies were financially secure.

Ignoring these facts, and leaning heavily on distinguishable cases arising in the banking context, the Government argues that Plaintiffs' expectations were unreasonable based solely on the notion that the Companies were participating in a "highly regulated" industry. But the Government ignores that not all regulated industries are "highly regulated industries," and even participation in a "highly regulated industry" does not preclude a conclusion that the reasonable investment-backed expectations factor weighs in favor of a plaintiff. *See, e.g.*, *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1191 (Fed. Cir. 2004) (approving trial court holding that new regulations applicable to company in highly regulated poultry and egg industry were not merely an extension of previous regulations, but a wholesale change).

As discussed above in § III.D.1, the Government's banking cases do not apply to the instant action. First, the Government assumes that Fannie Mae and Freddie Mac operated in a "highly regulated industry" similar to federally-insured banks, seemingly because the Companies were subject to the possibility of conservatorship under certain circumstances. That assumption fails, because the "potential appointment of a conservator or receiver" in the event that a federally-insured bank becomes insolvent is only "[o]ne small part of the extensive regulatory framework" under which such banks operate. *Am. Continental Corp. v. United States*, 22 Cl. Ct. 692, 696 (1991). Moreover, the Federal Circuit in *Cienega Gardens* recognized that the banking industry is "at the extremes" in the extent of its regulations due to its "consistent, intrusive and changing government regulation." 331 F.3d at 1350-51. Consequently, drawing upon case law from that industry is not instructive unless being used in a case where the relevant industry is also "part of such an extreme field." *Id.* at 1351. Other than pointing to the possibility of conservatorship, the Government offers no other basis for claiming that the Companies here operated in a highly regulated industry. *Cf. id.* at 1351 n.45 ("the field of private mortgage lending is one which cannot be considered highly regulated").

Even if, as the Government insists, the Companies operated in a highly regulated industry prior to the conservatorship, the inquiry remains whether the Government regulation interfered with reasonable investment-backed expectations, which can nevertheless occur in highly regulated industries. *Cienega Gardens*, 331 F.3d at 1348-49; *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990). In *Cienega Gardens*, for instance, the plaintiffs were real-estate developers who received loans for projects under programs established by the National Housing Act. 331 F.3d at 1325. The Department of Housing and Urban Development ("HUD") provided their mortgage insurance, which required participants to enter into a "regulatory agreement" with HUD in exchange for forty-year, low-interest mortgages. *Id.* The regulatory agreements placed a

number of restrictions on the plaintiffs, but did permit them to prepay their forty-year mortgages after 20 years. *Id.* That changed when Congress enacted a new law that required HUD approval for mortgage prepayments after 20 years, and set conditions for when HUD could provide such approval. *Id.* at 1326. The plaintiffs sued, alleging that the new statute amounted to an unconstitutional taking of their contractual prepayment rights. In examining the plaintiffs' reasonable investment-backed expectations, the Federal Circuit recognized that the plaintiffs could not be "reasonably on notice for every possible change" to the regulatory environment in which they operated, and that "[s]ome changes would have been outside the realm of the reasonably expected." *Id.* at 1348. Following that line of reasoning, the Federal Circuit determined that the loss of the ability to prepay mortgages after 20 years was indeed an unexpected change because prepayment was a material feature of the plaintiffs' contracts, and "[o]nce a plaintiff has shown that its expectation is reflected by a material contract term of which the government is aware, the government cannot establish a lack of reasonable expectations simply by showing that the regulations were amendable by HUD or nullifiable by Congress." *Id.* at 1348-49. As such, the Federal Circuit concluded that the new legislation interfered with the plaintiffs' reasonable investment-backed expectations. *Id.*

The Federal Circuit's opinion in *United Nuclear* is similarly instructive. In that action, the plaintiff held leases with the Navajo Tribal Council that authorized the plaintiff to conduct uranium mining in the Navajo Reservation. 912 F.2d at 1433. When the plaintiff uncovered valuable uranium deposits, it submitted a required mining plan to the Secretary of the Interior for approval. *Id.* Although the plan satisfied all regulatory requirements, the Secretary refused to approve it without tribal approval, which the plaintiff was thereafter unable to obtain. *Id.* As a result, the lease terminated because the plaintiff was unable to begin mining within the period specified in the lease. *Id.* The plaintiff brought suit against the United States, asserting that the Secretary's

refusal to approve the mining plan constituted a taking of its lease. *Id.* The Federal Circuit agreed, rejecting the notion that the mere possibility of future regulation would cause the plaintiff to reasonably expect a new policy of requiring tribal approval of mining plans. *Id.* at 1436 ("The fact that [the plaintiff] agreed that the leases would be subject to future regulations does not indicate that [the plaintiff] fairly can be said to have anticipated that the Secretary would apply a new policy requiring tribal approval of mining plans to leases entered into almost six years earlier, in reliance on which United had expended some $5 million."). The Federal Circuit reasoned that the plaintiff "had no indication or even suggestion that tribal approval of the mining plan would be required before the Secretary would approve it," and noted that previous mining plans had not required tribal approval. *Id.* Moreover, the "new requirement of tribal approval of the mining plan was not adopted or included in any regulation," depriving the plaintiff of the opportunity to oppose it. *Id.* In light of these considerations, the Federal Circuit concluded that the tribal approval requirement interfered with the plaintiff's reasonable investment-backed expectations. *Id.*

The *Cienega Gardens* and *United Nuclear* cases show that government action that is theoretically possible may still constitute a taking when the Government makes an unforeseeable change in policy. For this same reason, the insolvent-bank cases are irrelevant to the present discussion—they merely reflect that a regulatory taking does not occur when the Government acts consistently with both regulations and historical precedent in taking over an insolvent bank. *See, e.g.*, *Am. Continental*, 22 Cl. Ct. at 698 (finding that the plaintiffs "were on reasonable notice as to what the 'rules of the game' were"). By nationalizing Fannie Mae and Freddie Mac when the Companies remained solvent, the Government not only upended its decades-long policy of non-interference with the Companies' operations, but also defied the very purpose of conservatorship: to conserve the Companies assets or wind them up in the event of insolvency, violations of the law, or other related circumstances. *See* 12 U.S.C. § 4617. Unless and until the Companies

became insolvent—and they were not—investors had no reasonable expectation that the Government would place the Companies into conservatorship. The Government reinforced that expectation when it repeatedly assured investors that it would not place them into conservatorship. WF ¶¶ 52-57. Secretary Paulson recognized this immediately prior to imposing the conservatorships, when he informed President Bush that "[w]e're going to move quickly and ***take them by surprise***. The first sound they'll hear is their heads hitting the floor." WF ¶ 64 (emphasis added).

It is no answer for the Government to contend, as it likely will, that the Companies' boards of directors consented to the conservatorship. [REDACTED] WF ¶¶ 88-90. Even assuming that the boards validly consented to the conservatorship and that the imposition of the conservatorship was therefore authorized by HERA, the FAC makes clear that, whatever troubles the Companies may have faced, they were not in such dire straits that the imposition of a conservatorship could be expected. WF ¶¶ 48-50, 52-56, 82-84, 102-143. This is especially the case where, as here, the FHFA, in collusion with the Treasury, has used the conservatorship vehicle to shore up the foundering economy, something well beyond HERA's contemplation. *Id.* ¶¶ 68-76, 81, 186, 197-201.

Taking these facts as true, the Court must conclude that Plaintiffs reasonably expected to be able to exclude the Government from interfering with their property interests in this manner.

c. The Government imposed the conservatorships to allocate market losses to the Companies and their shareholders.

Penn Central's "character of the governmental action" factor looks to "'the actual burden imposed on property rights, or how that burden is allocated.'" *Rose Acre Farms*, 559 F.3d at 1278

(quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005)). Here, the Government's conduct was not a "rescue" of the Companies, but was rather an effort to achieve policy objectives by warehousing toxic debt from distressed financial institutions. Importantly, the FAC pleads in detail that the Companies were not, in fact, in a financial condition requiring Governmental rescue. WF ¶¶ 48-50, 52-56, 82-84, 102-143. Rather, they were taken into conservatorship and manipulated to accomplish the Government's goal of stabilizing the economy; the Companies' shareholders alone were forced to bear this public burden despite the availability of less punitive measures that the Government could have taken to achieve its goals. *Id.* ¶ 66 (Secretary Paulson stating that the Treasury had ruled out "simply mak[ing] an equity investment in these enterprises in their current form"); *see also id.* ¶¶ 68-76, 81, 186, 197-201.

In that vein, the Government's nationalization of the Companies effected the very outcome that takings law is designed to prevent. While the Federal Circuit admonished in *Branch* that the Fifth Amendment is designed to "bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," 69 F.3d at 1583 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)), that is exactly what the Government did here when it placed the Companies into conservatorship while they were still solvent, and then loaded them with unrelated institutions' toxic debts in an effort to aid the economy. *See* WF ¶¶ 197-201. The Government's conduct is "not rendered any more acceptable by worthiness of purpose." *Cienega Gardens*, 331 F.3d at 1340.

The Government frames this issue backwards, claiming that Plaintiffs "offer no basis why they should be able to shift [their] alleged losses onto taxpayers[.]" Mot. at 68. In regard to the Companies as they stood prior to the conservatorships in 2008—that is, they were solvent—the Government's rhetorical point finds no support in the facts. The better question is why taxpayers, or at least the investing public at large, should be able to shift their losses to the Plaintiffs. As the

Supreme Court opined in *Armstrong*, they should not. 364 U.S. at 49. Thus, the Government's Motion should be denied.

E. Plaintiffs State an Exaction Claim

Separate and apart from Plaintiffs' taking claim, the Government improperly imposed the conservatorships on the Companies without satisfying the criteria set forth in HERA for doing so. WF ¶¶ 82-143. The sudden, unexpected, and unlawful appropriation of shareholder rights resulted in significant damages to investors, for which the Government is liable.

The Government nevertheless asserts that Plaintiffs' exaction claim fails because: (1) it does not have any of the Plaintiffs' property "in its pocket"; and (2) HERA is not a money mandating statute. Those arguments are legally groundless and factually unsupported. Moreover, the Government ventures no argument as to why the imposition of the conservatorships was legally justified, and has thus conceded that issue.

1. The Government exacted something from Plaintiffs by appropriating their rights as shareholders.

The Government argues that Plaintiffs' exaction claim fails because the Government purportedly doesn't have any of Plaintiffs' money "in its pocket." Mot. at 70. Although the Government presumes only one, there are actually two types of exaction claims: (1) those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of that sum; and (2) those demands in which money has not been paid but the plaintiff asserts that it is nevertheless entitled, under a money mandating statute, to a payment from Treasury for damages sustained. *United States v. Testan*, 424 U.S. 392, 401-02 (1976); *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1007-08 (Ct. Cl. 1967). In the second scenario, where no payment has been made, the plaintiff must allege that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum. *Id.* That provision exists here.

Here, the Government illegally exacted shareholders' rights when it imposed the conservatorships even though the requirements for conservatorship under HERA had not been met. Broadly, the Government took away shareholders' power to control the direction of the Companies, but more specifically it exacted their voting rights, it cancelled all shareholder meetings, assumed the powers of the Companies' boards, and dismissed the Companies' chief executives. WF ¶ 77. In recognition that the Government had no intention of running the Companies to maximize profits and shareholder returns, the market responded to this seizure by sending the price of shares to only a small fraction of their worth immediately prior to the imposition of the conservatorships. WF ¶¶ 77-78. The Government is liable to shareholders for their resultant losses, which total more than $41 billion. WF ¶ 208.

2. The Government's contention that HERA is not money-mandating is inaccurate and does not defeat Plaintiffs' exaction claim.

The Government incorrectly asserts that Plaintiffs' exaction claim must fail because HERA is not money-mandating. Mot. at 70. In other words, as the Government would have it, Plaintiffs cannot show that an illegal exaction has taken place because HERA does not provide for monetary compensation or the return of unlawfully exacted money to the Companies' shareholders. *Id.* For an array of reasons, this contention is faulty.

a. HERA is money-mandating.

It is telling that the Government fails to cite a single case for the proposition that HERA is not money-mandating. *See id.*[10] This is because this assertion is entirely unsupported by the case law. Indeed, no court has declared that HERA is not money-mandating.

[10] Instead of citing any cases, the Government cites generally to the statute, 12 U.S.C. § 1451, *et seq.*, leaving the assertion utterly undeveloped.

As the Federal Circuit has repeatedly recognized, "[t]o invoke Tucker Act jurisdiction over an illegal exaction claim"—as Plaintiffs do here—"a claimant must demonstrate that the statute or provision causing the exaction itself provides, either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (quoting *Cyprus Amax Coal Co. v. U.S.*, 205 F.3d 1369, 1373 (Fed. Cir. 2000). In other words, to pursue an illegal exaction claim, "'a plaintiff must identify a separate source of substantive law that creates the right to money damages.'" *Starr Int'l Co. v. United States*, 856 F.3d 953, 977 (Fed. Cir. 2017) (Wallach, J., concurring) (quoting *Fisher v. U.S.*, 402 F.3d 1167, 1172 (Fed. Cir. 2005)).

Critically, the statute need not expressly mandate the return of money.[11] *See Kentera v. United States*, 2017 WL 401228, at *5 (E.D. Wis. Jan. 30, 2017) ("the absence of money-mandating language is not fatal to jurisdiction so long as a monetary remedy can be implied for an illegal exaction under the relevant statute"). *See Norman*, 429 F.3d at 1095 (return of money is a remedy "either expressly or by necessary implication") (quotation omitted). As the Supreme Court has stated, all that is required is a "fair interpretation" that the statute is money-mandating:

> [A] statute creates a right capable of grounding a claim within the waiver of sovereign immunity if, but only if, it "can ***fairly be interpreted as mandating compensation*** by the Federal Government for the damage sustained."

United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003) (quoting *U.S. v. Mitchell*, 463 U.S. 206, 217 (1983)) (emphasis added). This is not an onerous standard: "[i]t is enough, then, that a statute creating a Tucker Act right be ***reasonably amenable*** to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be

[11] It is for this reason that the Government's bare citation to HERA—and not to any cases whatsoever—gets it nowhere.

lightly inferred, ***a fair inference will do***." *White Mountain*, 537 U.S. at 473 (quotation omitted) (emphasis added).

The appropriate question for the Court to ask is "what would be the explicit or implicit remedy for the Government's violation of the statute." *N. Cal. Power Agency v. United States*, 122 Fed. Cl. 111, 115-16 (2015). "If, 'by necessary implication, the remedy would be a return of the payments that were assessed . . . in violation of [the statute],' jurisdiction exists." *Kentera*, 2017 WL 401228, at *5 (quoting *N. Cal. Power Agency*, 122 Fed. Cl. at 115-16). *See Greene v. United States*, 124 Fed. Cl. 636, 641 (2015) (monetary remedy could be fairly implied for illegal offset against tax refund because there is no other recourse for the taxpayer); *Kentera*, 2017 WL 401228, at *5 ("Though the [Bank Secrecy Act] admittedly lacks money-mandating language, it is by necessary implication that the taxpayer has a monetary remedy—the return of his illegally exacted funds—when the statute is violated.").

In the instant case, it is abundantly clear that, as the Supreme Court has framed the issue, HERA can "'fairly be interpreted as mandating compensation' through money damages if the Government faltered in its responsibility." *See White Mountain*, 537 U.S. at 474 (quoting *Mitchell*, 463 U.S. at 226). HERA authorizes the FHFA to act as conservator for the Companies "for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2). Among the FHFA's obligations is the duty to "preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(B)(iv). Moreover, the FHFA may take action that is: "(i) necessary to put the regulated entity in sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D). As Plaintiffs have alleged that the Government abrogated its statutory responsibilities to the Companies (*see e.g.,* WF ¶¶ 9, 46-47, 58-61, 64-67, 73, 77, 145-47, 154, 177, 183-84), Plaintiffs are entitled to recover damages.

White Mountain is instructive. There, the Supreme Court held that a federal statute requiring the Government to "maintain, protect, repair and preserve" property for the White Mountain Apache Tribe gave rise to a fiduciary trust relationship that subjected the Government to potential liability in damages for breach of that duty. "This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." *White Mountain*, 537 U.S. at 475. The Court concluded that "[g]iven this duty on the part of the trustee to preserve corpus, 'it naturally follows that ***the Government should be liable in damages for the breach of its fiduciary duties***.'" *Id.* at 475-76 (quoting *Mitchell*, 463 U.S. at 226) (emphasis added).

In addition, HERA contains an anti-injunction provision, 12 U.S.C. § 4617(f), which courts have described as "bar[ring] only equitable relief, and only does so if the challenged action is within the powers given FHFA by HERA." *Saxton v. Fed. Hous. Fin. Agency*, 901 F.3d 954, 957 (8th Cir. 2018) (emphasis added); *see also Roberts v. Fed. Hous. Fin. Agency*, 889 F.3d 397, 402 (7th Cir. 2018) ("because the Agency acted within its powers as conservator . . . declaratory and injunctive relief cannot run against it"); *Robinson v. Fed. Hous. Fin. Agency*, 876 F.3d 220, 228 (6th Cir. 2017); *see also, Perry Capital*, 864 F.3d at 606. This provision has no bearing on Plaintiffs' constitutional claim for damages. Nor does any other provision of HERA suggest that damages or the return of monies improperly taken by the FHFA are barred.

b. The Government's contention that Plaintiffs have alleged unauthorized—as opposed to unlawful—conduct on the part of the FHFA does not apply to Plaintiffs' claims, and in any event, mischaracterizes the FAC's allegations.

Lastly, the Government claims it cannot be liable for an illegal exaction because its conduct was authorized by HERA. Mot. at 71. As the lion's share of arguments in its Motion, this contention is not applicable to Plaintiffs' claims, as it rests exclusively on allegations relating to the Third Amendment. *See* Mot. at 70-71 (citing the complaints in the *Fairholme*, *Cacciapalle*,

and *Owl Creek* actions) ("Although plaintiffs allege that FHFA exceeded its conservator authority when it executed the ***Third Amendment***. . ."; "Because HERA authorized the ***Third Amendment***, by definition, plaintiffs fail to properly allege anything 'illegal' in support of their illegal exaction claims.") (emphasis added). As Plaintiffs here challenge the FHFA's original imposition of the conservatorships and not the Third Amendment, the Government's assertion has no bearing on their exaction claim.

However, even viewed in the context of the imposition of the conservatorships, the Government's argument here fails, as it wholly mischaracterizes Plaintiffs' allegations. Simply put, it is of no consequence that the action taken by the FHFA was authorized by HERA, as Plaintiffs have not alleged that the FHFA "exceeded its statutory authority" in the sense that the Government suggests, or that any Government employees here acted *ultra vires*. Mot. at 71. The Government contends that HERA is not money mandating because it grants FHFA absolute discretion to take certain actions *as a conservator*. *Id.* However, Plaintiffs in this action do not challenge any actions where FHFA had absolute discretion. Instead, they allege that the Government "lacked the proper authority to impose the conservatorships" in the sense that the requirements for taking such action were not met, rendering the imposition of the conservatorships ***unlawful***. *See* WF ¶¶ 8, 102-43.

To be clear, unauthorized conduct is not the same as unlawful conduct. *See Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1363 (Fed. Cir. 1998) ("[G]overnment officials' conduct cannot be characterized as unauthorized merely because they may have been mistaken, imprudent, or wrongful.") (internal quotation marks and citations omitted). Importantly, Plaintiffs do not allege that the Government's conduct was explicitly prohibited or outside the normal scope of the FHFA's duties granted under HERA. HERA invests in the Director of the FHFA the "authority" to appoint the FHFA as conservator over the Companies when they are

critically undercapitalized, *see* 12 U.S.C. § 4617(a), and Plaintiffs do not challenge that the FHFA and Director Lockhart acted pursuant to that authority. Rather, the FAC alleges that the Government acted unlawfully in that it placed the Companies in conservatorship despite the fact that the requirements for conservatorship were not met. *See* WF ¶¶ 102-143. This does not constitute a basis for dismissal of an exaction claim.[12] *See Del-Rio*, 146 F.3d at 1362-63 ("[T]he mere fact that a government officer has acted illegally does not mean he has exceeded his authority for Tucker Act purposes, even though he is not 'authorized' to break the law. . . .") (internal quotation marks and citations omitted).[13]

F. Plaintiffs' Action is Timely

The Government contends that this Court lacks jurisdiction over Plaintiffs' claims because they are untimely. Mot. at 79. This argument suffers from a glaring and fundamental flaw—namely, that HERA's 30-day limitations period applies where declaratory or injunctive relief is sought, such as when a regulated entity seeks to have the FHFA removed as conservator, and not where a plaintiff seeks damages. Because Plaintiffs here expressly seek an award of damages for a constitutional violation, not the removal of the FHFA as conservator, the limitations period is six

[12] The Government is also wrong to argue that allegations of unauthorized conduct defeat Plaintiffs' takings claim because, as the Government suggests, those claims are inconsistent. Mot. at 68. Putting aside that the Government refers to "unauthorized" conduct when it really means "unlawful" conduct, the Court of Federal Claims has held that a plaintiff may advance a takings claim and, in the alternative, an unlawful exaction claim concurrently. *Figueroa v. United States*, 57 Fed. Cl. 488, 495-96 (2003); *see also Rith Energy v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001) ("[A]n uncompensated taking and an unlawful government action constitute 'two separate wrongs [that] give rise to two separate causes of action' . . . . To proceed on the second cause of action does not require that the plaintiff first litigate, and lose, on the first."). Plaintiffs are pleading such alternative claims here, and it is appropriate for this Court to consider both claims independently from one another.

[13] In the cases relied upon by the Government, the court addressed whether a regulator acted with its statutory authority. Mot. at 71 (citing *Perry Capital*, 864 F.3d at 607; *Perry Capital*, 70 F. Supp. 3d at 223-24; *Roberts*, 889 F.3d at 407). They are therefore entirely inapposite to Plaintiffs' claims.

years. *See* 28 U.S.C. § 2501. This action was instituted on June 10, 2013 (ECF No. 1)—well within six years of the September 2008 imposition of conservatorships on the Companies—and thus the Government's timeliness challenge fails.

1. HERA's limitations period applies to equitable relief, not a claim for damages, and is thus inapplicable here.

The Government's erroneous reliance on a 30-day limitations period stems from its false premise, advanced either intentionally or mistakenly, that Plaintiffs are "seek[ing] an order removing FHFA as conservator." Mot. at 79. Such an order, according to the Government, must be sought within 30-days after the appointment of a conservator. *Id.* (citing 12 U.S.C. § 4617(a)(5)).[14] But Plaintiffs are not seeking the removal of the FHFA as conservator.[15] As the clear language of the FAC shows, Plaintiffs have asserted that an impermissible taking or exaction has occurred in violation of the Fifth Amendment, and have requested that this Court "[d]etermin[e] and award[] Plaintiffs and the Classes ***damages*** suffered by them by virtue of the Defendant's taking and/or illegal exaction in the amount of $41 billion, or some other amount to be determined at trial." WF ¶ 82 (Prayer For Relief) (emphasis added).

The fact that Plaintiffs are seeking damages, not injunctive or declaratory relief—such as the setting aside of FHFA action—removes this case from the limitations period imposed by

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[14] The provision of HERA on which the Government relies states as follows:

> If the Agency is appointed conservator or receiver under this section, the regulated entity may, ***within 30 days*** of such appointment, bring an action in the United States district court for the judicial district in which the home office of such regulated entity is located, or in the United States District Court for the District of Columbia, ***for an order requiring the Agency to remove itself as conservator*** or receiver.

12 U.S.C. § 4617(a)(5) (emphasis added).

[15] Tellingly, the Government does not cite any language in the FAC bearing on the relief sought by Plaintiffs. Instead, it mischaracterizes the pleading, and launches a faulty argument upon that mischaracterization.

HERA, 12 U.S.C. § 4617(a)(5), and puts it squarely within that applicable to claims brought in this Court pursuant to the Tucker Act. It is well established that "[c]laims for damages under the Takings Clause of the Fifth Amendment are within [the Court of Federal Claims'] Tucker Act jurisdiction." *See Ministerio Roca Solida v. United States*, 129 Fed. Cl. 140, 145 (2016); *Summit Multi-Family Hous. Corp. v. United States*, 124 Fed. Cl. 562, 571 (2015) (same). "Normally a taking[s] claim against the federal government must be brought as a suit for money damages (*i.e.* the 'just compensation' that the Constitution assures) under the Tucker Act in the Court of Federal Claims[.]" *Detroit Int'l Bridge Co. v. Gov't of Canada*, 133 F. Supp. 3d 70, 96 (D.D.C. 2015). In fact, a federal district court recently dismissed a plaintiff's claim for damages under theories of contract and constitutional takings because exclusive jurisdiction for such claims lies with this forum. *See Carter v. United States*, 2018 WL 651369, at *2 (Fed. Cl. Jan. 31, 2018).[16]

The cases relied upon by the Government—not one of them decided by this Court—gain it no ground. Indeed, the very language cited by the Government in *Perry Capital LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017), contradicts its own position by emphasizing that Section 4617(a)(5) "permits judicial review *only* at the behest of a regulated entity itself and even then *only* of the Director's decision to appoint the FHFA as a conservator or receiver." *Id.* at 614 (emphasis in original); *see* Mot. at 79.[17] Neither of those two conditions applies here: it is not a regulated entity

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[16] If Plaintiffs were seeking the type of injunctive relief that the Government wrongly suggests they are, this case would need to be brought in the United States district court, not the instant forum. *See Altair Global Credit Opportunities Fund (A), LLC v. United States*, 2018 WL 3425051, at *15 (Fed. Cl. July 13, 2018) (quoting *U.S. v. Tohono O'Odham Nation*, 563 U.S. 307, 323 (2011) (Sotomayor, J., concurring)) ("'an action seeking injunctive relief to set aside an agency action must proceed in district court, but a claim that the same agency action constitutes a taking of property requiring just compensation must proceed in the [United States Court of Federal Claims].'"). *See also Ministerio Roca Solida v. United States*, 778 F.3d 1351, 1354 n.2 (Fed. Cir. 2015) (same).

[17] The *Perry Capital* court did, however, leave open the possibility of constitutional and damages claims. *Id.* at 614, 631.

that has initiated this action but shareholders of the Companies, and Plaintiffs are not seeking judicial review of the decision to appoint FHFA as conservator. Thus, *Perry Capital* has no applicability. Likewise, in *Gibson v. Resolution Trust Corp.*, 51 F.3d 1016 (11th Cir. 1995), the plaintiffs sought declaratory and injunctive relief—not damages, as Plaintiffs seek here—after a conservator of a bank repudiated a contract in which the bank was a party. *Id.* at 1019-20. And *Resolution Trust Corp. v. Commerce Partners*, 132 F.R.D. 443 (W.D. La. 1990), also involves a challenge to the appointment of a conservator, which—again—is simply not the case at bar. In sum, instead of offering a single applicable case, the Government has doubled down on its false premise that this suit seeks to remove the FHFA as conservator of the Companies. It does not. Therefore, the Government's authority is wholly off point.[18]

2. The statute of limitations applicable to Plaintiffs' claims is six years.

As Plaintiffs' claims must be brought in this Court, the limitations period applicable to the claims is six years. As the statute prescribes, "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within ***six years*** after such claim first accrues." 28 U.S.C. § 2501 (emphasis added). On this point, there is no ambiguity. *See e.g., Ayanuli v. United States*, 2018 WL 3486110, at *4 (Fed. Cl. July 19, 2018) (six-year limitations period applicable to every claim over which Court of Federal Claims has jurisdiction); *Davenport v. United States*, 2017 WL 5988354, at *4 (Fed. Cl. Dec. 4, 2017) (same); *Turping v. United States*, 134 Fed. Cl. 293, 304 (2017) (same). *See also, Sacramento Grazing*

[18] Nor could the Government argue that Section 4617(a)(5), the sole provision upon which its timeliness challenge hinges, precludes judicial review of constitutional claims. As the U.S. Supreme Court has stated, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988). The rationale for "this heightened showing" is evident: "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* Here, the Government cannot point to a clear intent to preclude constitutional claims through Section 4617(a)(5).

Ass'n, Inc. v. United States, 135 Fed. Cl. 168, 189 (2017); *Johnson v. United States*, 135 Fed. Cl. 565, 571 (2017); *Prakhin v. United States*, 131 Fed. Cl. 706, 713 (2017); *Parker v. United States*, 131 Fed. Cl. 1, 18 (2017).

Thus, because Plaintiffs instituted this action within six years of the taking or exaction—specifically, the Government's imposition of conservatorships in September 2008—the claims are timely, and Defendant's challenge must be rejected.

G. If the Court Finds Plaintiffs' Allegations to be Insufficient, Plaintiffs Should Be Permitted Leave to Amend

As set forth above, the Government has not established a basis for dismissal of Plaintiffs' claims at this early stage of ligation. However, if the Court finds the FAC deficient for any reason, Plaintiffs respectfully request leave to amend their FAC. Such amendment, if deemed necessary, is consistent with R.C.F.C. 15(a)(2), which provides that permission to amend should be freely given when justice so requires,[19] and is particularly appropriate in this case given the complexity of the facts and novel theories of law presented. The Government does not seek dismissal with prejudice and, in fact, would not be prejudiced by amendment if it is necessary.

IV. CONCLUSION

The Government nationalized Fannie Mae and Freddie Mac to serve the Government's public policy goals. It cannot avoid paying Plaintiffs just compensation for its actions by cloaking

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[19] *See Joint Venture of Comint Sys. Corp. & EyeIT.com, Inc. v. United States*, 100 Fed. Cl. 170, 171-72 (Fed. Cl. 2011) ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.'") (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

its actions in statutory authority that the Government ignored in imposing the conservatorships in the first instance. Its Motion should be denied.

V. REQUEST FOR ORAL ARGUMENT

Pursuant to R.C.F.C. 20(c), Plaintiffs respectfully request oral argument on the Government's Motion.

Dated: November 2, 2018

Respectfully submitted,

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