No. 2020-2190

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WASHINGTON FEDERAL, MICHAEL MCCREDY BAKER, CITY OF AUSTIN POLICE RETIREMENT SYSTEM, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

On Appeal from the Court of Federal Claims
The Honorable Margaret M. Sweeney, Chief Judge
No. 1:13-cv-00385-MMS

APPELLANTS' PRINCIPAL BRIEF (CORRECTED)

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2020-2190

Short Case Caption Washington Federal v. US

Filing Party/Entity Washington Federal, City of Austin Police Retirement System, and Michael McCredy Baker

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 11/19/2020

Signature: /s/ Steve W. Berman

Name: Steve W. Berman

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☐ None/Not Applicable
Washington Federal		Washington Federal, Inc.
City of Austin Police Retirement System		
Michael McCredy Baker		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Karl P. Barth	Andrew D. Abramowitz	
Jennifer Fountain Connolly	Joshua B. Kaplan	
James McGovern		

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable ☐ Additional pages attached

Fairholme Funds, Inc. v. US Fed. Cir. No. 20-1912*	Cacciapalle v. US Fed. Cir. No. 20-2037	Rafter v. US Ct. Fed. Claims No. 14-740C
Owl Creek Asia I, L.P. v. US Fed. Cir. No. 20-1934*	Fisher v. US Ct. Fed. Claims No. 13-608C	
Arrowood Indemnity Co. v. US Fed. Cir. No. 20-2020	Reid v. US Ct. Fed. Claims No. 14-152C	* Consolidated appeal number

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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I. STATEMENT OF RELATED CASES

The following are related cases under Federal Circuit Rule 47.5(b), pending in this Court: *Fairholme Funds, Inc. v. U.S.*, Nos. 20-1912 & -1914; *Owl Creek Asia I, L.P. v. U.S.*, No. 20-1934; *Mason Capital L.P. v. U.S.*, No. 20-1936; *Akanthos Opportunity Fund L.P. v. U.S.*, No. 20-1938; *Appaloosa Investment Limited Partnership I v. U.S.*, No. 20-1954; *CSS, LLC v. U.S.*, No. 20-1955; *Arrowood Indemnity Company v. U.S.*, No. 20-2020; and *Cacciapalle v. U.S.*, No. 20-2037 (collectively, "Related Actions"). Those appeals, along with this one, are being treated as companion cases to be assigned to the same merits panel. Only this appeal, however, is being briefed separately from the Related Actions.[1]

The following are also related cases, pending in the Court of Federal Claims ("CFC"): *Fisher v. U.S.*, No. 13-608C, *pet. to appeal denied*, No. 20-138 (Fed. Cir.); *Reid v. U.S.*, No. 14-152C, *pet. to appeal denied*, No. 20-139 (Fed. Cir.); and *Rafter v. U.S.*, No. 14-740C.

[1] Due to its different factual focus, this case warrants its own briefing. In any event, there was no opportunity to participate in the joint briefing governing the Related Actions because the undersigned counsel were not invited to do so. The collaborative briefing process in those appeals became known through public filings.

II. JURISDICTIONAL STATEMENT

On behalf of proposed shareholder classes, Plaintiffs-Appellants Washington Federal, Michael McCredy Baker, and City of Austin Police Retirement System ("Washington Federal Plaintiffs") assert claims for unconstitutional taking or illegal exaction. Appx165-168¶¶217-225. The CFC had subject matter jurisdiction over these claims under 28 U.S.C. §§ 1491(a) and 2501. Appx95¶21. On July 9, 2020, the CFC issued an Opinion and Order dismissing the operative First Amended Complaint ("FAC"). Appx1. Reaffirming its rationale, the CFC concurrently entered a separate judgment dismissing for "lack of standing." Appx34.

Under 28 U.S.C. § 2522 and Fed. R. App. P. 4(a)(1)(B)(i), the notice of appeal was timely filed on August 17, 2020. Appx290-291. This Court has appellate jurisdiction to review the "final decision" terminating this action at the pleading stage. 28 U.S.C.§ 1295(a)(3).

III. STATEMENT OF THE ISSUES

Asserting various legal theories, the shareholder plaintiffs in the Related Actions challenge the Net Worth Sweep imposed in 2012 by the Federal Housing Finance Agency ("FHFA"), as *conservator* of Fannie Mae ("Fannie") and Freddie Mac ("Freddie") (together, "Companies"). The Washington Federal Plaintiffs also seek relief for the Net Worth Sweep, but they primarily challenge FHFA's imposition of the conservatorships, as

regulator, in 2008. Although this is a basic factual difference, all actions are linked by the common legal thread of the federal government acting, from the outset of the conservatorships, in excess of its statutory powers.

Against this backdrop, this appeal raises the following issues:

1. As a result of the Government's unlawful coercion of the Companies' Boards of Directors to consent to the conservatorships, do the Washington Federal Plaintiffs have standing to seek relief for their individual injuries?

2. In light of the Third Amendment's nullification of all remaining shareholder value after imposition of the conservatorships, do the Washington Federal Plaintiffs have standing to seek relief for their individual injuries?

3. Because the law governing this case and the Related Actions has developed as the suits themselves have been litigated, is remand or leave to amend appropriate to give a fair opportunity to plead a claim for relief?

IV. STATEMENT OF THE CASE

Consistent with the Related Actions, this case alleges that the wrongful conduct by the Government began when it coerced the Companies into conservatorships. The Washington Federal Plaintiffs aver, in great detail, a coerced nationalization of the Companies starting in 2008 that

supplanted the Companies' stockholders, eliminated their ownership rights, and subsequently drained the Companies of value while using them to support other troubled financial institutions, without just compensation to the private stockholders forced to subsidize the public benefit that ensued from this takeover. *These allegations are not made in any Related Action*. Although granting a motion to dismiss cabined by familiar procedural protections, such as taking the complaint as true, the CFC gave the Washington Federal Plaintiffs' allegations short shrift. The dismissal order erroneously treated this case as little more than an offshoot of *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1 (2019)—when, ironically, the Washington Federal Plaintiffs were the first Fannie and Freddie shareholders to seek relief in the CFC. *Compare* Appx36 *with* Appx47.

The allegations relevant to the issues on appeal (and largely ignored by the CFC) are summarized below. These facts warrant particular attention because, in two key respects, they fatally undermine the CFC's holding on standing. *First*, directors coerced to "consent" to a conservatorship have not acted unlawfully in any manner that could either subject them to liability or, as in a shareholder derivative action, displace them from making a decision regarding the corporation's best interests. *Second*, if consent was compelled instead of voluntarily given as alleged,

then the Government has acted beyond the statutory powers bestowed by the Housing and Economic Recovery Act ("HERA")—resulting in direct harms for which the Companies' shareholders may seek relief, without making a pointless demand on the Company Boards for legal action.[2]

A. In operating for decades before the conservatorships, Fannie Mae and Freddie Mac functioned as financially stable enterprises with typical shareholder rights and protections.

In 1938, Congress established Fannie to provide increased liquidity to the nation's home mortgage market. Appx96¶25. Although originally operated by the Government, Congress reorganized Fannie in 1968 as a government-sponsored enterprise (meaning, a federally-chartered private corporation charged with serving the self-supporting mortgage market). Appx96-97¶25. In so doing, Congress transferred ownership to new shareholders and enabled Fannie to raise capital from private markets. Appx97¶25. Beginning in 1968, and continuing until June 2010, Fannie was publicly traded on the New York Stock Exchange. Appx97¶26.

In 1970, Congress established Freddie to create a secondary market for conventional mortgages. Appx97¶27. In 1989, similar to Fannie, Freddie became a for-profit corporation owned exclusively by private

[2] The CFC's Opinion and Order is published at *Washington Fed. v. United States*, 149 Fed. Cl. 281 (2020); Appx17 (reissuing for publication).

shareholders. *Id*. Beginning in 1984, and continuing until June 2010, Freddie was also publicly traded on the New York Stock Exchange. Appx97¶28.

For decades under private ownership, Fannie and Freddie raised capital from investors through the private capital markets, generating profits and increasing shareholder value. Appx98¶29. Much like any other publicly traded company, the bylaws and offering documents for Fannie and Freddie common stock enumerated specific rights held by each Company's common and preferred shareholders. *Id*.

For common stock, these rights included the ability to transfer their shares and vote for candidates for boards of directors and shareholder proposals. Appx98¶31. Holders of common stock also had the right to receive a portion of the Companies' assets in any dissolution or liquidation. *Id*. The offering documents for preferred stock also enumerated rights typical of those held by preferred stockholders in a shareholder-owned company. Appx99¶32. Those rights included the ability 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. Appx99¶¶32-33.

Private investors long considered Fannie and Freddie securities, much like General Motors a generation ago and Apple today, to be among the most sound and conservative investments. Appx99-101¶¶34-37. Beyond this, the Government created strong incentives for banks like Plaintiff Washington Federal and other institutions to invest in the Companies' preferred stock, including beneficial capital and tax treatment. Appx94¶15.

B. Exceeding its statutory powers under HERA, the Government coerced Fannie and Freddie, although financially sound, into conservatorships.

The Companies' paramount mission for decades was increasing home ownership by making mortgages more accessible. Appx96¶25; Appx97¶27; Appx102¶40; Appx103-104¶44. Ostensibly to this end, in the years preceding the 2008 financial crisis, both Congress and the Office of Federal Housing Enterprise Oversight, which supervised Fannie and Freddie at that time, repeatedly pressured the Companies to delve into questionable lending territory—the subprime and Alt-A mortgage market. Appx103-104¶¶43-47. Despite the Government's ill-advised policies, the Companies were less exposed to toxic mortgages than many other financial institutions

and did not have significant risky mortgage debt on their books until 2006. Appx105-106¶¶49-50.

As the housing bubble burst and the financial crisis deepened, Congress enacted HERA on July 24, 2008.[3] This statute created FHFA, a new regulatory entity to oversee the Companies. Appx106¶51. Congress gave FHFA expanded powers to place the Companies into conservatorship but, crucially as discussed later, only under specifically enumerated preconditions. *Id*. In justifying that grant of power, Treasury Secretary Henry Paulson testified before the Senate that regulators needed a "bazooka"—while assuring legislators it was unlikely to be used. Appx106¶52.

In the debate over HERA's enactment, members of Congress and other Government officials emphasized, likewise, that Fannie and Freddie were financially sound and even rejected the notion that a conservatorship would ever be imposed. Appx106-109¶¶52-57. Explaining his support, Senator John Isakson (R-GA) cautioned that HERA was "not a bailout" for the Companies but, rather, "an infusion of confidence the financial markets need[ed]" given the financial crisis. Appx106-107¶53. Noting that "Fannie and Freddie suffer by perception from the difficulties" plaguing the broader

[3] Unless otherwise specified, all dates are 2008.

mortgage market, Senator Isakson identified key differences in the Companies' loan portfolios:

> 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.

Appx106¶53. The Companies had on their books "$50 billion in capital," Senator Isakson added, "when the requirement is to have $15 billion, so they are sound." *Id*. Similarly, after HERA passed and before the conservatorships were imposed, FHFA and its predecessor agency stated repeatedly—along with Secretary Paulson—that both Fannie and Freddie were "adequately capitalized." Appx107-109¶¶54-57.

1. The Government coerced the conservatorships to create a national warehouse for toxic mortgage debt effectively financed by the Companies' shareholders.

On September 6, less than two months after HERA's enactment, FHFA and Treasury blindsided the Companies by placing them into conservatorships and seizing control from the stockholders. Appx89-90¶7; Appx112¶66.[4]

[4] In a typographical error, FAC paragraphs 66 misstates that the conservatorships were imposed on September 7.

One common narrative misleadingly asserted by the Government is that its officials acted to save the Companies from financial doom, but the facts alleged tell a more disturbing story—and an inherently credible one. The Government forcefully imposed the conservatorships for reasons that were not covered by HERA's provisions. To support their central factual allegation that the Government exceeded HERA's limits by imposing the conservatorships through coercion, not consent, the Washington Federal Plaintiffs, in amending their complaint, drew upon government documents produced during jurisdictional discovery. Appx96 n.1. These documents memorialized internal deliberations, in emails and other records, as events unfolded in late-summer 2008 and reveal the inside story of why, in fact, the Government imposed the conservatorships. The CFC's dismissal order made no effort to grapple with the following allegations bearing on the Washington Federal Plaintiffs' standing to seek relief.

Despite the vast economic consequences, the Government deliberately kept its takeover plan secret until the last possible minute. Appx109-110¶¶58-61. In a communication with President George W. Bush days before the conservatorships were publicly announced, Secretary Paulson described the takeover graphically as akin to a military ambush. "We're going to move quickly," he advised the president, "and take them

[the Companies' Boards] by surprise. *The first sound they'll hear is their heads hitting the floor*." Appx111¶64 (emphasis added).

In an effort to conceal the true nature of its actions to nationalize the Companies for other purposes, and avoid compensating the shareholders, Government officials concocted an unsubstantiated and undisclosed financial rationale—a pretext—to explain the conservatorships. But this was all a ruse, because the Companies were in fact adequately capitalized, which the Government itself had recently acknowledged before suddenly, and inexplicably, reversing its position. Appx109-110¶58. On August 22, just two weeks before the conservatorships were imposed, FHFA sent letters to both Fannie and Freddie stating that the Companies were adequately capitalized. Appx109¶58; Appx110¶61. BlackRock's independent analysis, issued three days later, likewise concluded that Freddie's "long-term solvency does not appear endangered . . . even in stress case." Appx110¶61.

Although there was no valid justification grounded on the Companies' financial stability for a takeover of these mammoth financial institutions, the Government proceeded with its plan to nationalize the Companies and use them for other purposes aimed at shoring up the nation's economy. By letter on September 4, FHFA vaguely informed Fannie of claimed "failures

by the board and senior management." Appx122¶90. The letter on the same date to Freddie abruptly asserted that FHFA had "lost confidence" in its Board and accused directors of "a series of ill-advised and poorly executed decisions and other serious misjudgments." Appx122-123¶90.

The September 4 letters followed a planned governmental script to suggest the Boards would face significant personal liability to shareholders if they did *not* consent to the conservatorships. Appx121-122¶¶88-89. Leveraging an unusual HERA provision, the Government observed that, by statute, the Companies' directors would be immunized against liability if they simply consented to FHFA's appointment as conservator. Appx121-122¶¶88-89 (discussing 12 U.S.C. § 4617(a)(6)). As Fannie's former CEO Daniel Mudd stated, "the purpose of the letter was really to force conservatorship." Appx123¶90. The Boards' *bona fide* agreement was vital because under HERA, as discussed below, consent was the only possible statutory precondition supporting a conservatorship over Fannie and Freddie, since none of the others were satisfied. Appx119¶83 (discussing 12 U.S.C. § 4617(a)(3)).

In a statement issued on September 7, FHFA Director James Lockhart misleadingly stated that "[t]he Boards of both companies consented yesterday to the conservatorship." Appx112¶67. In reality, the

Boards' agreement was coerced and involuntary. *Id*. On September 5—the day before the conservatorships were imposed—the senior executives and directors at Fannie and Freddie were instructed, in secret meetings, that they could either "consent" within 24 hours or the Government would impose conservatorships by force. Appx123-124¶¶92-93, 95. According to internal Treasury documents, the plan was for Secretary Paulson, FHFA Director Lockhart, and Federal Reserve Chairman Ben Bernanke to meet with the Companies' directors not to seek their consent, but "to tell them what will happen." Appx123¶92. These high-level officials did precisely that.

At one meeting, Secretary Paulson stated, inaccurately, that the Government had "the grounds to do this on an involuntary basis, and we will go that course if needed." Appx124¶93. As Fannie's former CEO Mudd described the rushed circumstances, the Boards "were given 24 hours to accede to a government takeover—or else the government would effectively go to war against the company." Appx124¶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." Appx125¶98.

The Government's heavy-handed takeover of the Companies was not based on any statutory ground set forth in HERA, but rather on the policy objective of using them to restore confidence and liquidity in the nation's financial markets in 2008. Appx91-92¶9; Appx112-113¶68; Appx124¶94. Shareholders' rights were eviscerated by the Companies' resulting transformation, under Government control, into a repository for other financial institutions to unload bad mortgage debts (meaning, where the borrower's repayment was improbable). Appx112-113¶68; Appx114-116¶73. However laudatory the goal of stabilizing the national mortgage market may have been at the time, the conservatorships had little to do with the Companies' actual financial health or any of the other intended purposes of imposing a conservatorship under HERA. Appx118-120¶¶82-84.

Upon imposition of the conservatorships, the Companies' CEOs were dismissed and FHFA immediately assumed the powers of the boards of directors and management. Appx116¶77. The takeover terminated all shareholder meetings and all shareholder voting rights. Appx117¶77. The Government's blitzkrieg caused the Companies' preferred and common stock values to plummet, thereby destroying both shareholder value and the rights and property interests of the Companies' preferred and common

shareholders. Appx117¶77. Fannie and Freddie were ordered to cease paying dividends on both preferred and common stock. Appx117¶78.

On June 16, 2010, FHFA further ordered the Companies to delist their common and preferred shares from the New York Stock Exchange. *Id*. The preferred and common shareholders who subsidized national mortgage stabilization lost approximately $41 billion, and have not been compensated in any way for their loss. Appx162-163¶¶206-208.

2. None of the HERA preconditions for appointing a conservator were satisfied.

To ensure FHFA did not overreach, Congress specified twelve circumstances under which the regulatory agency could place Fannie or Freddie into conservatorship:

1. Assets were insufficient to meet obligations;
2. Assets or earnings were substantially dissipated due to unlawful conduct or unsafe or unsound practices;
3. The Company was in an unsafe or unsound condition to transact business;
4. Willfully violating a cease and desist order;
5. Concealing books and records from the FHFA Director;
6. The Company became unlikely to be able to pay its obligations or meet creditor demands in the normal course of business;

7. The Company incurred, or became likely to incur, losses that would deplete substantially all of its capital with no reasonable prospect of becoming adequately capitalized;

8. Violating the law;

9. The board of directors or shareholders passed a resolution *consenting to a conservatorship* or receivership;

10. The Company became undercapitalized or significantly undercapitalized, as defined by the governing statute, and could not or would not take corrective measures;

11. The Company became critically undercapitalized, as defined by the governing statute; or

12. Engaging in money laundering.

Appx119¶83 (discussing 12 U.S.C. § 4617(a)(3)(A)-(L)) (emphasis added).

None of these statutory grounds existed with respect to either Fannie or Freddie when the conservatorships were imposed. Given the CFC's theory for dismissal—purported lack of standing—it is unnecessary to parse each ground on this appeal. The FAC methodically explains why no HERA precondition was satisfied. Appx120-126¶¶85-101; Appx127-136¶¶103-143. The absence of any HERA justification explains the Government's focus on obtaining the Boards' consent but, as detailed above, their agreement was coerced and thus legally invalid. Appx126¶102.

C. The Preferred Stock Purchase Agreements facilitating the conservatorships appropriated the private property of the Companies' preferred and common shareholders.

1. The Original PSPAs dictated draconian terms placing Treasury in control as a majority shareholder for a nominal cost.

When the Companies were placed into conservatorships, the Secretary of the Treasury, on behalf of FHFA, entered into the original stock purchase agreements with both Fannie and Freddie. Appx112¶68. These agreements would subsequently be amended, most notably the Third Amendment, but the terms were wholly one-sided from the start.

Under the original agreements, in exchange for making available to each Company a $100 billion line of credit, which neither sought nor needed, Treasury received:

- $1 billion in preferred stock issued by the Companies with a cumulative 10% dividend;
- additional senior preferred stock equal to the amount of any credit the Treasury extended to the Companies;
- preferential rights for the Treasury's senior preferred stock that placed it ahead of all other stockholders; and
- most glaringly, warrants to acquire 79.9% of each Company's common stock for $0.00001 per share or a total exercise price of approximately $8,000 for each Company.

Appx90-91¶8; Appx112-113¶¶68-69.

So began two conservatorships without end and, by governmental design, without any path to return to shareholder control or profitability. The terms ensured potential Government control in perpetuity—now exceeding twelve years— along with gutting the value of Fannie and Freddie common and preferred stock. Any amounts borrowed from Treasury could never be repaid; instead, any borrowing would subject the Companies to an annual 10% interest rate on amounts borrowed forever. Appx91¶8. Under this arrangement, Fannie and Freddie were subject to an ever-worsening cycle. Their dividend obligations to Treasury were always due *apart from whether the Companies were profitable*. *Id*. This 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. *Id*.[5]

2. The Third Amendment ensured that Fannie and Freddie would never return to profitability and eviscerated all remaining shareholder value.

As the CFC noted in its dismissal order, the Washington Federal Plaintiffs also ground their constitutional claims on takings effectuated by

[5] In 2009, the Government amended the stock purchase agreements twice on terms not relevant to this appeal. The first amendment increased each credit line to $200 billion; the second amendment made the maximum credit amount unlimited through 2012. Appx116¶¶74-75.

the Third Amendment. Appx21, 25 n.10. The plaintiffs in the Related Actions have discussed at length the impact of the Third Amendment and, in particular, the Net Worth Sweep. *See* Joint Opening Brief of the Plaintiff-Appellant Private Shareholders ("Joint Brief") at 15-18, Doc. 35, No. 20-1912 (Fed. Cir. Oct. 23, 2020). To avoid duplication, the Washington Federal Plaintiffs adopt that discussion. *See* Fed. R. App. P. 28(i); Cir. R. 28(i)-(j).[6]

Briefly, by mid-2012, with the housing and mortgage markets starting to rebound, Fannie and Freddie had once again achieved positive net worth and began generating positive net income despite the onerous terms of the conservatorships. Appx147¶¶168-171. Taking notice, however, the Government acted again to further prevent any possibility of the Companies' growing profits from benefitting shareholders by amending the stock purchase agreements for a third time in August 2012. Appx147¶172. Under the Third Amendment, ensuring the Companies would never return to profitability, the Companies started paying the *entirety* of their positive earnings to Treasury on a quarterly basis. Appx147-148¶172-174.

[6] Three days before this brief was due, the Court ordered the shareholders in the Related Actions to file a corrected Joint Brief. *See* Order, Doc. No. 46, No. 20-1912 (Fed. Cir. Nov. 16, 2020). In their reply brief later in this appeal, the Washington Federal Plaintiffs will supply updated citations.

This distinction, although significant in form, was in substance merely a continuation of the Government's primary objective from the beginning of the conservatorships—to supplant shareholder rights and control with Government control so that it could use the Companies for purposes unrelated to maintaining shareholder value. As the *Wall Street Journal* summarized, "Fannie and Freddie are simply making interest payments on a loan that can't ever be paid off." Appx149-150¶177.

Cumulatively, as a result, the Companies' shareholders were left with virtually nothing of any value and without any compensation for what the Government took from them. This occurred by way of *all* the stock purchase agreements beginning in September 2008. Appx151-153¶¶182-184. The credit lines that the Government forced on Fannie and Freddie at that time were not a rescue, but an anchor pulling the Companies down a financial sinkhole from which neither could emerge as profitable for shareholders.

D. The Court of Federal Claims granted dismissal for lack of standing to assert direct claims.

1. After preliminary proceedings, the Government moved to dismiss.

In June 2013, the Washington Federal Plaintiffs filed the first case in the CFC followed by the Related Actions. Appx36, 47. Reflecting the type of "mom and pop" investors who routinely purchased Fannie and Freddie

stock before the conservatorships—for the long term, not speculatively after the stock plummeted—the three shareholders seeking classwide relief are:

- a regional financial institution holding preferred shares in both Fannie and Freddie (Washington Federal);
- an individual holding the same (Michael McCredy Baker); and
- a municipal retirement fund holding common stock in both Fannie and Freddie (City of Austin Police Retirement System)

Appx94-95¶¶15, 17-19.

The CFC coordinated this case and others with *Fairholme* "for discovery, motion practice, case management and scheduling, and other pretrial proceedings." Appx80. The CFC then permitted narrow jurisdictional discovery, subject to a protective order, of governmental deliberations concerning the conservatorships.[7]

After this discovery, the Washington Federal Plaintiffs filed their FAC, the operative pleading. Appx39, 82. In an omnibus motion, the Government moved to dismiss all the cases. Appx40. Focusing almost entirely on the Third Amendment, however, the motion did not address the

[7] *See* Opinion & Order, No. 13-465C, ECF No. 72 (Ct. Cl. July 16, 2014). With the passage of time, much of the information gleaned through the preliminary discovery has become less sensitive or has gradually entered the public domain. In both this action and *Fairholme*, the CFC initially sealed its dismissal orders but then reissued them for publication after the parties advised that "no redactions were necessary." Appx17 n.*; *Fairholme*, 147 Fed. Cl. at 1 fn.*.

FAC's factual allegations that FHFA exceeded its statutory powers by imposing the conservatorships by coercion in 2008.[8]

2. Holding a joint oral argument on the Government's omnibus motion, the CFC initially addressed just the *Fairholme* action.

In resolving the Government's motion, the CFC (acting informally through court staff) bifurcated jurisdictional issues and the merits. In November 2019, the CFC held a joint oral argument focused on jurisdiction and standing. The 2008 events received greater attention at this hearing. The *Fairholme* plaintiffs argued, for instance, that "FHFA forced Fannie and Freddie into conservatorship" as both "were never in danger of insolvency" and had "at all relevant times ample cash to easily pay all of their debts. . . . [F]or purposes of today, it must be accepted that this was an ambush, not a rescue." Appx179.

The coercive nature of the conservatorships piqued the CFC's interest. As the CFC described the facts alleged, FHFA and Treasury told the "board of directors of the enterprises" that "you either agree to the conservatorship

[8] For example, the Government's motion proclaimed that after jurisdictional discovery, the "core allegation" of each complaint "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." Defendant's Amended Omnibus Motion to Dismiss ("MTD"), No. 13-385C, ECF No. 64 at 13 (Ct. Cl. Oct. 1, 2018).

or you're out," which "sounds like undue influence, if not a death grip." Appx200. Calling the inception of the conservatorships in 2008 "the critical time period," the CFC added that the Companies' directors faced a "Hobson's choice" of "you either play ball with Treasury or you're out." Appx201. As the CFC stated, "the conservatorship was no[] great favor to the enterprises." *Id*. *see also* Appx237 (comparing Net Worth Sweep to "the mob" because, with all money "being diverted to Treasury," the Companies "will never make a profit").

In December 2019, one month after the omnibus oral argument, the CFC issued a lengthy order resolving only the *Fairholme* action. As germane here, it held that the *Fairholme* plaintiffs "lack standing to pursue any of their direct claims." 147 Fed. Cl. at 53. At a hearing in March 2020, the CFC addressed, in light of its *Fairholme* order, how most efficiently to resolve the Government's motion to dismiss the other cases. The Government agreed that due to distinct factual allegations, the Washington Federal Plaintiffs' action is "to some extent, a different creature than the others." Appx282; *see also* Joint Status Report, No. 13-385C, ECF No. 85 at 2 (Ct. Cl. Feb. 25, 2020) (Government acknowledging this case as the "one exception"). Although the CFC eventually issued separate orders resolving each Related Action, the CFC deemed *Fairholme* the presumptive

legal framework for standing unless the parties established otherwise for their individual cases.[9]

3. The CFC relied heavily on its *Fairholme* order to dismiss this case.

In reciting the relevant facts usually taken from the complaint before the court, the dismissal order here cites the *Fairholme* order, involving a very different complaint, over 20 times. Appx18-21. The CFC described its factual overview as "a less comprehensive version of the court's recitation of facts" in *Fairholme*. Appx18 n.1. Due to the unique factual focus of *this* case, however, drawing extensively on *Fairholme* to determine the viability of the Washington Federal Plaintiffs' claims led the CFC astray.

Again, the Washington Federal Plaintiffs were the only shareholders challenging the impact of property rights taken at the inception of the conservatorships in 2008. Yet the CFC acknowledged the allegations regarding the coercive nature of the conservatorships—the heart of this

[9] In each related case, the CFC issued orders stating, apart from factual differences, that "[t]he instant complaint and the *Fairholme* complaint share significant commonalities in terms of allegations and claims." Order, No. 13-385C, ECF No. 83 n.1 (Ct. Cl. Feb. 20, 2020). In directing supplemental briefing, the CFC was explicit that *Fairholme* would be its analytical guide: "If plaintiffs are contending that the court should *not* dismiss the same type of claim (*e.g.*, taking, illegal exaction, and breach of contract) that it dismissed in the *Fairholme* Opinion, plaintiffs should explain why a different result is warranted for its case ...." Order, No. 13-385C, ECF No. 90 at 1-2 (Ct. Cl. Mar. 19, 2020).

action—in just one sentence: "According to plaintiffs, the consent obtained was invalid due to intimidation and coercion by the FHFA." Appx20. As distilled above, the coercion allegations, bearing directly on whether FHFA exceeded its statutory powers under HERA, were much broader and deeper than portrayed in the dismissal order. Notably, every subsequent action taken by the Government pursuant to the conservatorships has flowed from this original coercive and harmful imposition of Government power.

The CFC ruled that the Washington Federal Plaintiffs' constitutional claims did not sound in tort and had been timely filed. Appx23-26. Drawing heavily on *Fairholme*, the CFC concluded that the Washington Federal Plaintiffs did not allege direct claims but, instead, derivative claims belonging to the Companies. Appx26-31. The CFC's rationale is discussed further below as relevant to this appeal.

In opposing dismissal, the Washington Federal Plaintiffs included a section requesting, if necessary to state a claim, leave to amend. *See* Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss ("MTD Opp."), No. 13-385C, ECF No. 69 at 48 (Ct. Cl. Nov. 2, 2018). As the CFC recognized, they also sought, if their claims were classified as derivative, to proceed by way of a derivative action. Appx31-32. The Government did not oppose leave to amend or seek dismissal with prejudice. *See* MTD, ECF No.

64 at 81. Effectively dismissing with prejudice, however, the CFC did not address the possibility of leave to amend and entered judgment for the United States. Appx32, 34.

V. SUMMARY OF ARGUMENT

In this factually unusual case (along with the Related Actions) where the Government, not a corporation or its officials, is alleged to have unlawfully taken shareholders' property without just compensation, the binary direct/derivative distinction for standing, familiar to corporate law in private disputes, has proved to be an awkward fit at best. This legal framework has generated granular analysis in many judicial opinions parsing whether Fannie or Freddie shareholders have standing to challenge particular injuries alleged, such as loss of dividends, but perhaps no ability to challenge other harms arising out of the same sequence of extraordinary and unprecedented events. In the CFC, the unacceptable result was largely to deny a remedy to shareholders not claiming any injury to Fannie or Freddie, but only to themselves. Rather than applying the direct/derivative analysis to an exceptional case where it does not fit, the question for standing should simply be whether the Washington Federal Plaintiffs suffered harms, individual to them, that should be heard on the merits.

The answer is yes for several reasons. The shareholder derivative action is not a vehicle for vindicating individual claims grounded on individual injuries (in other words, direct harm supporting direct claims). To the limited extent existing jurisprudence on the direct/derivative distinction can reasonably be extrapolated to the circumstances here, the Washington Federal Plaintiffs' claims are more accurately and fairly classified as direct. Relief is sought for the harm to their ownership interests directly suffered *by them* that was directly caused by the Government's unlawful conduct, not for harm to the Companies they suffered indirectly merely by virtue of holding Fannie or Freddie shares.

The CFC's conclusion that nothing more than a derivative "overpayment" claim was alleged, thereby depriving the Washington Federal Plaintiffs of any remedy, rests on an unwarranted extension of off-point case law. And, it overlooks the bigger picture of what this action, unlike all the others, has always been about. In violation of HERA, the Government seized Fannie and Freddie in 2008 to stabilize the national mortgage market, not rescue the Companies, and it did so on the backs of the Companies' shareholders without providing them just compensation. Coerced consent is no more legally valid than a coerced confession. By leaning excessively on its *Fairholme* order, the CFC did not fully grapple

with detailed facts, taken as true, that strongly indicate the purported consent was coerced.

Having placed a death grip on the Companies when it coerced the conservatorships in 2008, the Government further exceeded its statutory powers by imposing the Third Amendment in 2012, effectively continuing to deny shareholders any benefits of ownership by syphoning all profits to Treasury. As comprehensively explained by the plaintiffs in the Related Actions, standing also exists for claims for taking or illegal exaction stemming from the devastating impact of the Third Amendment on what little remained of shareholder value at that time.

The Fannie and Freddie conservatorships have generated their own body of case law, both in the Court of Claims and federal courts nationally, including two consolidated cases currently pending at the Supreme Court. *Collins v. Mnuchin* (S. Ct. Nos. 19-422 & 19-563, *certiorari* granted July 9, 2020). Although the facts alleged by the various shareholders have been known for years, the legal theories that state a claim for relief have not yet come to rest. As such, after this Court and the Supreme Court have spoken, remand of this case, possibly with leave to amend, may be appropriate to give a fair opportunity to state a claim for relief. At a minimum, the CFC abused its discretion by ignoring the Washington Federal Plaintiffs'

alternative request to amend to allege, as the CFC upheld in *Fairholme*, shareholder derivative claims.

VI. ARGUMENT

Dismissal for failure to state a claim, and lack of standing in particular, are reviewed *de novo*. *Rack Room Shoes v. United States*, 718 F.3d 1370, 1374 (Fed. Cir. 2013). Irrespective of the facts alleged in *Fairholme* and other Related Actions, the CFC was required to "take all of the factual allegations in the complaint as true." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The CFC was further obligated to "draw all reasonable inferences in favor" of the Washington Federal Plaintiffs, *Call Henry, Inc. v. United States*, 855 F.3d 1348, 1354 (Fed. Cir. 2017), and view their allegations "in the light most favorable" to them. *Rack Room Shoes*, 718 F.3d at 1376.

With the CFC straying from these tenets, *de novo* review is especially appropriate but, more fundamentally, this Court is tasked with determining shareholder standing in highly atypical circumstances. As the record reflects, both the CFC and the parties anticipated appellate review in these cases to clarify the law of standing that will govern unique but viable claims against the United States. For the reasons elaborated below, the CFC erred by dismissing the Washington Federal Plaintiffs' causes of action.

A. As to the coerced imposition of the conservatorships in 2008, the Washington Federal Plaintiffs have standing to assert claims for unconstitutional taking or illegal exaction.

1. A shareholder derivative action would not remedy the injuries claimed by the Washington Federal Plaintiffs.

As a matter of first principles, the Washington Federal Plaintiffs sue for injury to their property rights, individual and personal to them, *by the Government*. *See, e.g.*, Appx98-99¶¶30-33. Duty in corporate law is context-specific but the Government, to paraphrase Oliver Wendell Holmes, must always turn square corners by complying with the Constitution. Thus, after identifying the property interest allegedly infringed, the takings analysis turns not on whether the particular constitutional takings claim may be heard, but whether the Government has taken the property without just compensation. *See, e.g., A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152 (Fed. Cir. 2014).

Most problematic about the CFC's conclusion, the Washington Federal Plaintiffs do not and could not invoke the only standing the CFC believed they had to proffer. The Washington Federal Plaintiffs do not sue to redress harm to Fannie and Freddie, as in a derivative action, caused by their corporate managers (although the Companies, fully consistent with direct claims here, were also injured by FHFA imposing conservatorships outside the bounds of HERA).

In a derivative suit, individual shareholders step into the board's shoes and invoke the courts on the corporation's behalf if they can plead, with specificity, that making a demand on the board to take action would be futile. A shareholder establishing the futility of demand requirement may bring, on the corporation's behalf, "suit to enforce a *corporate* cause of action against officers, directors, and third parties" to redress *their* injury to the corporation. *Ross v. Bernhard*, 396 U.S. 531, 534 (1970) (emphasis added). The derivative suit thus serves "to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers.'" *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991) (quoting *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 548 (1949)); *see also Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 528-534 (1984).[10]

The extreme circumstances warranting a derivative action are not present here. The Washington Federal Plaintiffs do not impugn the

[10] A derivative action is an exceptional form of litigation even in its only domain, corporate law. The business judgment rule recognizes a strong presumption that a corporation's board of directors controls the decision whether to sue. Put plainly, directors are displaced only when so conflicted they cannot fairly be charged with making this decision, most commonly if *they* are alleged, with particularity, to have injured the corporation. *See Kamen*, 500 U.S. at 96; *Aronson v. Lewis*, 473 A.2d 805, 811-12 (Del. 1984) (seminal Delaware decision on demand futility).

Company Boards' conduct in any way that a derivative claim might challenge. The CFC recognized this as well. Calling the directors' predicament whether to consent to conservatorship a "Hobson's choice," the CFC noted the reasonable inference that the directors, far from harming Fannie and Freddie, did their best to protect the Companies: "I can't speak for those directors, but one could imagine that they—they cared about the institution that they served and they would rather stay on board to see that they could help direct it and protect it from these outsiders that were going to come in, even though those outsiders are Treasury and FHFA, and they're concerned that their organization is going to be raided." Appx201. As the CFC further stated at the hearing, the conservatorships were imposed through Government "undue influence" on the directors—"if not a death grip." Appx200; *see also* Appx109-112¶¶58-67; Appx120-126¶¶84-101.

2. Familiar principles underlying the direct/derivative distinction, to the extent adaptable to alleged Government wrongdoing, support standing here.

Under federal law, shareholders "'with a direct personal interest in a cause of action' . . . can bring actions directly." *Starr Int'l Co., Inc. v. United States*, 856 F.3d 953, 966 (Fed. Cir. 2017) (quoting *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990)). Delaware's

two-part inquiry for determining whether a claim is direct or derivative, although not applied in every case, leads to the same conclusion.

Under Delaware's 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.*

As a result of the Government's actions, the Washington Federal Plaintiffs were directly harmed. The Government's abrupt move was designed to help rescue the economy, not the Companies or, much less, to protect Fannie and Freddie shareholders. Appx91-92¶9; Appx112-113¶68; Appx124¶94. In the CFC's words, stock in a publicly traded company is a "certificate of ownership"—property necessarily personal to the investor—not, as the Government called it at oral argument, a "lottery ticket." Appx201. In violation of the Fifth Amendment, the conservatorships eviscerated Plaintiffs' bundle of property rights in the Companies overnight. Appx98-99¶¶30-33; Appx112¶66; Appx114-116¶73; Appx116-

118¶¶77-81; Appx153-156¶¶185-189; Appx165-168¶¶217-225. These adverse and tangible consequences do not hinge on the abstract determination whether, under jurisprudence crafted predominantly for private corporate disputes, the claims fall neatly into the direct or derivative bucket.

The rights of Fannie and Freddie shareholders were typical of those usually associated with the private property interest represented by common stock. Appx98¶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. Appx99¶¶32-33. These diverse shareholder protections were taken away without just compensation when the Government, acting to rescue the national economy rather than Fannie or Freddie, imposed the conservatorships on both Companies. As directly harmed parties, the Washington Federal Plaintiffs have direct claims—meaning ones that should be cognizable on the merits without closing the courthouse doors at the pleading stage.

Is the fit perfect or the line crystal clear? Admittedly, no, especially since these cases involve "a one-of-a-kind expropriation of equity" by the federal government that does not fit neatly into existing legal pigeonholes. Joint Brief at 24. The direct/derivative distinction is binary in the abstract but defies simplicity in application. In this federal action asserting violation of federal rights, moreover, it cannot be dispositive.

The Washington Federal Plaintiffs' standing presents a question of federal law with Delaware corporate law "also play[ing] a role." *Starr*, 856 F.3d at 965-66. Even if viewed as prudential standing asserted on behalf of third parties, here Fannie and Freddie, this form of standing "limit[s] access to the federal courts to those litigants best suited to assert a particular claim." *Starr*, 856 F.3d at 965 (citation omitted). The Washington Federal Plaintiffs' claims fall much more comfortably in the category of direct claims—rather than the Procrustean bed of the derivative suit mechanism—and the shareholders are best positioned to seek redress for the Government's nullification of their rights in the Companies.

The alleged harm suffered by the shareholders is not dependent on the Companies being harmed. On the contrary, the Companies could have thrived under Government control, but their shareholders still would not have received any benefit. "An action in which the holder can prevail

without showing an injury or breach of duty to the corporation," as here, "should be treated as a direct action that may be maintained by the holder in an individual capacity." American Law Institute: Principles of Corporate Governance § 7.01(b). In particular, "a wrongful act that is separate and distinct from any corporate injury, such as one that denies or interferes with the rightful incidents of share ownership, gives rise to a direct action." *Id.*, cmt. c.

Likewise, any remedy for this unprecedented expropriation of equity that does not directly benefit the shareholders who held their shares in 2008 and, were harmed when the conservatorships were first imposed, would make a mockery of justice. Denying the Washington Federal Plaintiffs any standing would, in net result, unconstitutionally deny them a forum for redress: "[T]here would be a clear violation of due process if Congress did in fact preclude any opportunity for an aggrieved claimant to obtain judicial review of one of its enactments." *Bartlett v. Bowen*, 816 F.2d 695, 697 (D.C. Cir. 1987).

3. The most analogous appellate decision bolsters the conclusion that the Washington Federal Plaintiffs' claims are direct.

If there is one case closest to this one, as also argued in the Joint Brief, it is *Perry Capital LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017).

There, the D.C. Circuit held that HERA permitted certain direct shareholder claims for damages challenging the Third Amendment. Those direct claims are analogous to Washington Federal Plaintiffs' constitutional takings claim. By logical extension, this Court should follow *Perry*'s reasoning.

In *Perry*, Fannie and Freddie stockholders brought various causes of action, including contract-based theories, challenging the Third Amendment. *Id.* at 602-03. HERA's Succession Clause, emphasized by the Government in its motion to dismiss, 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 the Washington Federal Plaintiffs' regulatory taking claim that the conservatorships—imposed ostensibly, although inappropriately, under the purview of HERA—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' Boards and management. As in *Perry*, the United States is accountable by law for eviscerating shareholders' rights and the consequent destruction of value that this caused to their interests in the Companies.

4. Contrary to the CFC's conclusion, the Washington Federal Plaintiffs do not assert a routine overpayment or diminution claim classified as derivative.

In holding that direct standing did not exist, the CFC drew on various corporate-law decisions not involving anything akin to imposition of a

conservatorship, let alone one imposed pursuant to an invalid statutory basis. Boiled down, the CFC reasoned that "'claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow.'" Appx29 (quoting *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006)). But this view ignores the alleged direct harms to shareholders, stemming from the loss of their ownership rights as a result of the conservatorships being improperly imposed on the Companies so the Government could use them for purposes, however beneficial to the public at large, that had nothing to do with the inherent (or statutory) purpose of a conservatorship. It also neglects to recognize the impracticality of restoring anything to the Companies that might (in theory) indirectly benefit shareholders more than twelve years (and still counting) after the Government wrongfully imposed the conservatorships that caused the shareholders' losses.

This is especially true given that any potential future restoration of value to the Companies at this point would not flow indirectly to all those shareholders who were originally harmed, and were never compensated for the loss of property rights they suffered. Voting rights wrongfully taken

from shareholders in 2008, for example, cannot be restored to Fannie or Freddie in lieu of making those shareholders whole for the value of property unlawfully taken from them by the Government.

Two additional decisions cited by the CFC also do not support its ruling on standing. In one case preceding *Tooley*, the claim of shareholder injury was that the "corporation's funds [had] been wrongfully depleted" as a result of "overpayment" for a specific asset, preferred shares. *Protas v. Cavanagh*, No. CIV.A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012). In *Hometown Fin. Inc. v. United States*, 56 Fed. Cl. 477 (2003), the court recognized that shareholders suing for "diminution in the value of their stock" brought derivative claims. *Id.* at 486. But the concern animating the holding there—"the possibility of double recovery on the part of shareholder-plaintiffs"—is not present on the *sui generis* fact pattern alleged here. *Id.* Treating the taking and illegal exaction claims as nothing more than overpayment or diminution in value greatly oversimplifies the case the Washington Federal Plaintiffs brought. To the extent the CFC assumed that permitting a shareholder derivative action foreclosed direct claims, this is also incorrect: "Courts have long recognized that the same set of facts can give rise both to a direct claim and a derivative claim." *Grimes v. Donald*, 673 A.2d 1207, 1212 (Del. 1996).

The CFC's order also reflects an understandable effort to reach a conclusion under existing precedent, but trial courts do not make the governing law. As stated in the dismissal order, "plaintiffs suggest that the standing inquiry here is a matter of first impression" and thus not one the CFC was institutionally situated to resolve. Appx28. This case and the Related Actions require clarification of the legal principles governing standing not just for these cases but others like them involving conservator-related legal challenges, as rare as they may be.

B. As to the Third Amendment in 2012, the Washington Federal Plaintiffs have standing to assert claims for unconstitutional taking or illegal exaction.

The shareholders in the Related Actions have thoroughly and convincingly explained why direct claims may be asserted based on FHFA's imposition, as conservator, of the Third Amendment and the Net Worth Sweep in August 2012. *See* Joint Brief at 30-60. To avoid duplication, and because it is not the main focus of their case, the Washington Federal Plaintiffs adopt that discussion. *See* Fed. R. App. P. 28(i); Cir. R. 28(i)-(j).

C. With the governing law in flux, the Washington Federal Plaintiffs should have the opportunity to amend or pursue other proceedings on remand to plead a legally viable claim.

Perhaps due to the six years between the filing of suit and the CFC's rulings on the motion to dismiss, the possibility of leave to amend went by the wayside. As noted, however, the Washington Federal Plaintiffs

preserved their request for leave to amend. MTD Opp. at 48. If they do not state direct claims under their current complaint, remand with directions to grant leave to amend, or to conduct other proceedings on remand, is appropriate. Denial of leave to amend is reviewed for abuse of discretion. *Renda Marine, Inc. v. United States*, 509 F.3d 1372, 1379 (Fed. Cir. 2007).

The guiding precedent instructs that "[i]f 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." *Foman v. Davis*, 371 U.S. 178, 182 (1962) (emphasis added). While this case has been pending, the "underlying facts" have not changed but whether they may be a "proper subject of relief" has been murky because the governing law *itself* has developed as these cases have been litigated.

In *Fairholme*, for instance, although currently on appeal, the CFC upheld a shareholder derivative claim. 147 Fed.Cl. at 49-51. In addition to preserving leave to amend, the Washington Federal Plaintiffs argued that although they believe their claims are direct, *if* their claims were found to be derivative, they should be permitted to pursue shareholder derivative claims. This alternative argument was clearly and concisely stated including citation to the authority relied upon to uphold the derivative claim in *Fairholme*: "[T]he 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 [derivative] claims under the Succession Clause." MTD Opp. at 22 n.7 (citing *Delta Sav. Bank v. United States*, 265 F.3d 1017 (9th Cir. 2001), and *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999)).

Yet the CFC faulted the Washington Federal Plaintiffs for not pleading their claims as derivative before the guidance of a judicial opinion. "If plaintiffs had asserted derivative claims in their amended complaint," the CFC reasoned, "the 'conflict of interest' holding in *First Hartford* would have aided plaintiffs in their quest to establish standing. But they did not do so. Thus, their reliance on this holding in *First Hartford* is misplaced." Appx32. Respectfully, this explanation does not justify thwarting an amendment that "would have done no more than state an alternative theory for recovery." *Foman*, 371 U.S. at 182. The Supreme Court has long held: "'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" *Id.* at 181-82 (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

Appellate courts widely recognize that a "definitive ruling" is "critical" to curing pleading flaws. *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015). "Without the benefit of a ruling, many a plaintiff will not see the necessity of amendment or be in a position to weigh the practicality and possible means of curing specific deficiencies." *Id.* As another illustrative decision stated: "[I]n the context of a typical Rule 12(b)(6) motion, a plaintiff is unlikely to know whether his complaint is actually deficient—and in need of revision—until after the District Court has ruled." *U.S. ex rel. Customs Fraud Investigations, LLC. v. Victaulic Co.*, 839 F.3d 242, 250 (3d Cir. 2016).

This tenet is even more forceful when the law governing the causes of action, applied to an uncommon factual scenario, is less than fully clear. Indeed, the various legal theories asserted—from constitutional claims to breach of contract to breach of fiduciary duty, coupled with doubt over whether to frame each as direct or derivative—only underscore the legitimate need for judicial guidance before terminating the matter on the pleadings. When some of the top lawyers litigating corporate disputes diverge widely on how to frame claims arising out of the same sequence of events, this Court should clarify the legal standards followed by, if necessary, a fair opportunity to plead to them.

Especially on the first *litigated* motion to dismiss, the factors supporting the denial of amendment are rarely established—and they were not in this case. The CFC did not find, and nothing in the record shows, "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed" or, ordinarily the most important factor, "undue prejudice to the opposing party." *Foman*, 371 U.S. at 182. With the Government neither opposing leave to amend nor seeking dismissal with prejudice, *see* MTD at 81, the CFC abused its discretion by foreclosing an opportunity to amend.

More broadly, the law governing the various shareholder claims remains in flux. In *Collins v. Mnuchin*, the Supreme Court will soon grapple with various issues related to HERA, the conservatorships imposed under the statute, and the Third Amendment. Although the scope of the opinion is unknowable, the merits and *amicus* briefing have covered the direct/derivative distinction; the conflict-of-interest exception recognized in *First Hartford*; whether FHFA, by imposing the Net Worth Sweep, exceeded its statutory power; and whether shareholder plaintiffs

challenging the same FHFA conservator action as here have a direct statutory claim under the Administrative Procedure Act.[11]

Hence, the eventual *Collins* decision may shed light on viable legal theories supporting a claim for relief here with this case, again, just at the pleading phase. At the March 2020 hearing on how to proceed after its *Fairholme* order, the CFC remarked that *Collins* "would provide a roadmap for me"—or, at a minimum, some guidance on plausible causes of action. Appx272.

Depending on the outcome of this Court's opinion and in the Related Actions, as well as *Collins*, remand for further proceedings at the pleading stage may be appropriate. The Supreme Court has long instructed: "In disposing of cases before us it is our responsibility to make such disposition as justice may require. And in determining what justice does require, the Court is bound to consider any change, either in fact or *in law*, which has supervened since the judgment was entered." *Ashcraft v. State of Tenn.*, 322 U.S. 143, 156 (1944) (citation omitted and emphasis added).

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[11] *See, e.g.*, Brief of Patrick J. Collins, *et al.*, 2020 WL 5731206, at 16-30 (U.S. Sept. 16, 2020); Brief for *Amici Curiae*, Institutional Investors in Fannie Mae and Freddie Mac, in Support of Patrick J. Collins, *et al.*, 2020 WL 5801003, at 17-31 (U.S. Sept. 23, 2020); Brief of *Amici Curiae* Bryndon Fisher, Bruce Reid, and Erick Shipmon in Support of Neither Party, 2020 WL 5898901, at 12-16 (U.S. Sept. 23, 2020).

VII. CONCLUSION AND STATEMENT OF RELIEF SOUGHT

The Washington Federal Plaintiffs respectfully ask this Court to reverse or vacate the dismissal, 28 U.S.C. § 2106, and hold they have standing to pursue causes of action to be adjudicated on the merits. Alternatively, if appropriate in light of the disposition, the case should be remanded for leave to amend or other proceedings giving a fair opportunity to state a claim for relief under the controlling legal standards. *Id.*

DATED: November 19, 2020

Respectfully submitted,

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Addendum

In the United States Court of Federal Claims

No. 13-385C
(Filed Under Seal: July 9, 2020)
(Reissued for Publication: July 16, 2020)*

WASHINGTON FEDERAL et al.,	*	
	*	
Plaintiffs,	*	Motion to Dismiss; RCFC 12(b)(1); RCFC 12(b)(6); Jurisdiction; Standing; Direct Claims; Conservators; Shareholders; Fannie; Freddie; FHFA
	*	
v.	*	
	*	
THE UNITED STATES,	*	
	*	
Defendant.	*	

Steve W. Berman, Seattle, WA, for plaintiffs.

Kenneth M. Dintzer, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiffs in this case challenge the imposition by the United States of conservatorships on the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie"). Plaintiffs also take issue with the conditions of the conservatorships for Fannie and Freddie (collectively, the "Enterprises"), such as the initial and amended funding agreements between the Enterprises and the United States Department of the Treasury ("Treasury"). Plaintiffs seek the return of money illegally exacted and just compensation for their takings claim pursuant to the Fifth Amendment to the United States Constitution ("Constitution"). Defendant moves to dismiss plaintiffs' complaint, arguing that the court lacks subject-matter jurisdiction over plaintiffs' claims, plaintiffs lack standing to pursue their claims, and plaintiffs fail to state a claim upon which relief may be granted. For the reasons stated below, the court grants defendant's motion to dismiss.

* The court initially issued this Opinion and Order under seal with instructions for the parties to propose any redactions. The parties informed the court that no redactions were necessary to the Opinion and Order.

I. BACKGROUND

A. The Enterprises are private companies that are under the control of a conservator.

1. The Enterprises operated independently before the financial crisis.

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities that are sold to investors.[1] 1st Am. Compl. ¶¶ 25, 27, 29. Congress chartered Fannie in 1938 and established Freddie in 1970. Id. ¶¶ 25, 27. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. Id. Freddie is organized under Virginia law, and Fannie is organized under Delaware law. Fairholme II, 147 Fed. Cl. at 15. The Enterprises, consistent with the applicable state laws, issued their own common and preferred stock. Id.; 1st Am. Compl. ¶¶ 26, 28. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. Fairholme II, 147 Fed. Cl. at 15; 1st Am. Compl. ¶ 31. Those owning preferred stock acquired the right to receive dividends and a liquidation preference. Fairholme II, 147 Fed. Cl. at 15; 1st Am. Compl. ¶¶ 32-33.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. Fairholme II, 147 Fed. Cl. at 15; 1st Am. Compl. ¶¶ 1-2. Although the Enterprises recorded losses in 2007 and the first two quarters of 2008, the Enterprises continued to generate sufficient cash to pay their debts and retained sufficient capital to operate. Fairholme II, 147 Fed. Cl. at 15; 1st Am. Compl. ¶¶ 104-105, 121-122. Otherwise stated, the Enterprises were not in any apparent financial distress or otherwise at risk of insolvency. 1st Am. Compl. ¶¶ 115, 130.

2. Congress created the Federal Housing Finance Agency to regulate the Enterprises and authorized the agency to serve as a conservator for each Enterprise.

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency ("FHFA") and provided it with supervisory and regulatory authority over the Enterprises. See 12 U.S.C. § 4511(a)-(b) (2018).[2] Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator

[1] This background section is a less comprehensive version of the court's recitation of facts in a related case, Fairholme Funds, Inc. v. United States, 147 Fed. Cl. 1 (2019) ("Fairholme II"), interlocutory appeals docketed, Nos. 20-121, 20-122 (Fed. Cir. June 18, 2020).

[2] Congress has not amended the relevant portions of HERA since enacting the law in 2008. The court, therefore, refers to the most recent version of the United States Code.

("FHFA-C") for each Enterprise to reorganize, rehabilitate, or wind up its affairs.[3] Id. § 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its obligations. Id. § 4617(a)(3).[4] The conservator, once appointed, functions independently; it is not "subject to the direction or supervision of any other agency of the United States or any State in the exercise of [its] rights, powers, and privileges . . . ." Id. § 4617(a)(7).

Congress also delineated the scope of the FHFA-C's powers in HERA. See generally id. § 4617. As soon as it is appointed, the FHFA-C "immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . . ." Id. § 4617(b)(2)(A). Congress also conferred the conservator with the power to "[o]perate the [Enterprise]." Id. § 4617(b)(2)(B). Pursuant to that power, the conservator "may," among other things, "perform all functions of the [Enterprise]," "preserve and conserve the assets and property of the [Enterprise]," and "provide by contract for assistance in fulfilling any function . . . of the [conservator]." Id. The conservator "may" also "take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise]." Id. § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator "may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]" and "take any action authorized by [12 U.S.C. § 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA]." Id. § 4617(b)(2)(J). By describing the FHFA-C's role primarily in terms of what powers it "may" exercise, see generally id. § 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its powers, see United States v. Rodgers, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."). Simply stated, the FHFA has "extraordinarily broad flexibility to carry out its role as conservator." Perry Capital LLC v. Mnuchin, 864 F.3d 591, 606 (D.C. Cir. 2017) ("Perry II"), cert. denied, 138 S. Ct. 978 (2018).

3. Congress authorized Treasury to purchase securities issued by the Enterprises.

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(g) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. Id. §§ 1455(*l*)(4), 1719(g)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the

[3] To avoid any ambiguity, the court reiterates that it is using "FHFA" to refer to the agency acting in its regulatory role and "FHFA-C" when discussing the agency acting as a conservator.

[4] Congress enticed the Enterprises to consent to a conservatorship by insulating their board members from any liability to shareholders or creditors for agreeing in good faith to the FHFA's appointment of a conservator. 12 U.S.C. § 4617(a)(6).

availability of mortgage finance, and protect taxpayers. Id. §§ 1455(*l*)(1)(B), 1719(g)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

> (i) The need for preferences or priorities regarding payments to the Government.
>
> (ii) Limits on maturity or disposition of obligations or securities to be purchased.
>
> (iii) The [Enterprise's] plan for the orderly resumption of private market funding or capital market access.
>
> (iv) The probability of the [Enterprise] fulfilling the terms of any such obligation or other security, including repayment.
>
> (v) The need to maintain the [Enterprise's] status as a private shareholder-owned company.
>
> (vi) Restrictions on the use of [Enterprise] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

Id. §§ 1455(*l*)(1)(C), 1719(g)(1)(C).

4. The FHFA became the conservator for each Enterprise.

On September 6, 2008, the FHFA placed each Enterprise into conservatorship. 1st Am. Compl. ¶ 7. The board of directors of each Enterprise consented to the conservatorship. Id. ¶¶ 7, 87; see also 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when "[t]he [Enterprise], by resolution of its board of directors or its shareholders or members, consents to the appointment"). According to plaintiffs, the consent obtained was invalid due to intimidation and coercion by the FHFA. 1st Am. Compl. ¶¶ 7, 67, 87-101.

5. The FHFA-C contracted with Treasury to obtain funding for the Enterprises.

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement ("PSPA") with Treasury for each Enterprise. Id. ¶ 68. Treasury entered into the agreements pursuant to its authority under HERA to buy the Enterprises' securities. Fairholme II, 147 Fed. Cl. at 17. The PSPA for each Enterprise is materially identical. Id. Under the PSPAs, Treasury committed to provide up to $100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. Id.; 1st Am. Compl. ¶ 69. If an Enterprise's liabilities exceeded its assets, then the Enterprise could draw on Treasury's funding commitment in an amount equal to the difference between the Enterprise's liabilities and assets. Fairholme II, 147 Fed. Cl. at 17.

In return for Treasury's funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their

respective common stock at a nominal price. Id. Treasury's preferred stock had an initial liquidation preference of $1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury's funding commitment. Id. In the event of a liquidation, Treasury was entitled to recover the full liquidation value of its shares before any other shareholder would receive compensation. Id. Second, Treasury bargained for the right to a quarterly cash dividend equal to 10% of its liquidation preference. Id. An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. Id. Those in-kind payments, however, did not count as a draw from Treasury's funding commitment. Id. at 18. Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. Id. If Treasury did not waive the fee, the Enterprise could elect to pay the amount in cash or make an in-kind payment by increasing the liquidation preference. Id. Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. Id.

The FHFA-C and Treasury amended each Enterprise's PSPA in May 2009, to increase Treasury's funding commitment to each Enterprise from $100 billion to $200 billion. 1st Am. Compl. ¶ 74. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed $200 billion. Id. ¶ 75; Fairholme II, 147 Fed. Cl. at 18.

On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA ("PSPA Amendment"). 1st Am. Compl. ¶ 76; Fairholme II, 147 Fed. Cl. at 19. A key component of the amended PSPAs is the requirement—referred to as the "Net Worth Sweep"—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise's net worth (except for a small capital reserve amount) rather than a dividend based on a set percentage of the liquidation preference.[5] 1st Am. Compl. ¶ 204; Fairholme II, 147 Fed. Cl. at 19. Additionally, under the amended PSPAs, the Enterprises are not obligated to pay a periodic commitment fee. Fairholme II, 147 Fed. Cl. at 19. Through the conservatorships and the PSPAs, plaintiffs allege that the United States has expropriated all of their economic interests in Fannie and Freddie stock, along with any other property rights they had in their stock. See 1st Am. Compl. ¶¶ 15, 172, 177, 182-186, 192, 201, 203-205, 220, 222, 225.

B. Plaintiffs own Fannie and/or Freddie stock.

There are three named plaintiffs in this putative class action. "Washington Federal is a subsidiary of Washington Federal, Inc., and is headquartered in Seattle, Washington." Id. ¶ 17. Washington Federal and Michael McCredy Baker, another named plaintiff, owned preferred

[5] The capital reserve for each Enterprise started at $3 billion and was set to decrease to $0 by January 2018, but the Enterprises and Treasury agreed in December 2017 to reset the capital reserve amount to $3 billion in the first quarter of 2018. Fairholme II, 147 Fed. Cl. at 19 n.5.

stock in Fannie and Freddie at the time of the alleged taking/illegal exaction. Id. ¶¶ 17-18. The third named plaintiff is the City of Austin Police Retirement System, which owned common stock in Fannie and Freddie at the time of the alleged taking/illegal exaction. Id. ¶ 19.

Plaintiffs assert that there are four categories of class action plaintiffs encompassed in this suit. The four classes are holders of (1) Fannie common stock, (2) Freddie common stock, (3) Fannie preferred stock, and (4) Freddie preferred stock, who owned their stock on or before September 5, 2008. Id. ¶ 209. The United States is excluded from each class. Id.

II. PROCEDURAL HISTORY

Plaintiffs filed their class action complaint on June 10, 2013. After jurisdictional discovery proceeded in Fairholme, a related case, see supra note 1, plaintiffs filed their first amended complaint on March 8, 2018.[6] In their amended complaint, plaintiffs plead two direct claims brought in their individual capacities as shareholders.

Plaintiffs first assert that the imposition of the conservatorships on the Enterprises constitutes a Fifth Amendment taking (count I) of their property rights in their stock. Plaintiffs further assert, in the alternative, that the imposition of the conservatorships constitutes an illegal exaction of their economic interests in their stock (also in count I). Although plaintiffs' decision to combine two alternative legal claims in the sole count of their amended complaint effectively obscures the delineation of these claims, the amended complaint supplies sufficient clarity for the resolution of the motion pending before the court.

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case and eleven related cases before the undersigned.[7] The plaintiffs in each of the twelve cases filed a response brief on their respective dockets; although some of the plaintiffs relied on a joint brief, plaintiffs here filed a brief that stood alone. Defendant filed its omnibus reply brief in each of the cases on May 6, 2019. The parties have fully briefed defendant's motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiffs in this case have adopted the favorable arguments made by the plaintiffs in the

[6] A fuller recitation of the procedural history of this case and related cases is provided in Fairholme II, 147 Fed. Cl. at 21-23.

[7] The eleven related cases are Fairholme Funds, Inc. v. United States, No. 13-465C; Cacciapalle v. United States, No. 13-466C; Fisher v. United States, No. 13-608C; Arrowood Indemnity Company v. United States, No. 13-698C; Reid v. United States, No. 14-152C; Rafter v. United States, No. 14-740C; Owl Creek Asia I, L.P. v. United States, No. 18-281C; Akanthos Opportunity Master Fund, L.P. v. United States, No. 18-369C; Appaloosa Investment Limited Partnership I v. United States, No. 18-370C; CSS, LLC v. United States, No. 18-371C; and Mason Capital L.P. v. United States, No. 18-529C.

related cases to the extent that such arguments are relevant.[8] Defendant's motion to dismiss is now ripe for adjudication.

III. STANDARD OF REVIEW

In ruling on a motion to dismiss a complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), the court generally assumes that the allegations in the complaint are true and construes those allegations in the plaintiff's favor. Trusted Integration, Inc. v. United States, 659 F.3d 1159, 1163 (Fed. Cir. 2011). With respect to RCFC 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of the evidence, that the court possesses subject-matter jurisdiction. Id. The allegations in the complaint must include "the facts essential to show jurisdiction." McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936). And, if such jurisdictional facts are challenged in a motion to dismiss, the plaintiff "must support them by competent proof." Id.; accord Land v. Dollar, 330 U.S. 731, 735 & n.4 (1947) ("[W]hen a question of the District Court's jurisdiction is raised, . . . the court may inquire by affidavits or otherwise, into the facts as they exist." (citations omitted)). If the court finds that it lacks subject-matter jurisdiction, it must, pursuant to RCFC 12(h)(3), dismiss the complaint.

A claim that survives a jurisdictional challenge remains subject to dismissal under RCFC 12(b)(6) if it does not provide a basis for the court to grant relief. Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002) ("A motion to dismiss . . . for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy."). To survive a motion to dismiss under RCFC 12(b)(6), a plaintiff must include in the complaint "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Indeed, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 814-19 (1982).

IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a "threshold matter." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998). Subject-matter jurisdiction cannot be waived or forfeited because it "involves a court's power to hear a case." Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it is "an inflexible matter that must be considered before proceeding to evaluate the merits of a

[8] The court addresses in this opinion some arguments that were made primarily by the plaintiffs in the related cases to provide context for the resolution of defendant's motion to dismiss. In addition, to the extent that any of plaintiffs' less-developed arguments are not discussed in this opinion, the court found such arguments to be unpersuasive.

case." Matthews v. United States, 72 Fed. Cl. 274, 278 (2006); accord K-Con Bldg. Sys., Inc. v. United States, 778 F.3d 1000, 1004-05 (Fed. Cir. 2015). Either party, or the court sua sponte, may challenge the court's subject-matter jurisdiction at any time. Arbaugh, 546 U.S. at 506; see also Jeun v. United States, 128 Fed. Cl. 203, 209-10 (2016) (collecting cases).

The ability of the United States Court of Federal Claims ("Court of Federal Claims") to entertain suits against the United States is limited. "The United States, as sovereign, is immune from suit save as it consents to be sued." United States v. Sherwood, 312 U.S. 584, 586 (1941). The waiver of immunity "may not be inferred, but must be unequivocally expressed." United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003). Any such waiver must be narrowly construed. Smith v. Orr, 855 F.2d 1544, 1552 (Fed. Cir. 1988). The Tucker Act, the principal statute governing the jurisdiction of this court, waives sovereign immunity for claims against the United States, not sounding in tort, that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (2018); White Mountain, 537 U.S. at 472. However, the Tucker Act is merely a jurisdictional statute and "does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 298 (1976). Instead, the substantive right must appear in another source of law, such as a "money-mandating constitutional provision, statute or regulation that has been violated, or an express or implied contract with the United States." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc).

Defendant raises two challenges to the court's jurisdiction to entertain plaintiffs' claims. Specifically, defendant argues that 28 U.S.C. § 1491 bars plaintiffs' claims because they sound in tort. Defendant also contends that plaintiffs' challenge to the conservatorships is untimely under HERA. The court addresses each of these issues in turn.[9]

A. Plaintiffs' takings and illegal-exaction claims do not sound in tort.

Defendant first argues that plaintiffs' Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the United States. Plaintiffs characterize defendant's challenge to their takings and illegal-exaction claims, as contrasted to its challenge to similar claims in the related cases, as untenable, inadequate, perfunctory, and undeveloped. Pls.' Br. in Opp'n to Def.'s Mot. to Dismiss ("Pls.' Opp'n") 17.

[9] In Fairholme II, the court addressed numerous jurisdictional concerns that were not raised or are not implicated in this case. See, e.g., 147 Fed. Cl. at 34-37 (rejecting the contention of a putative intervenor that the Court of Federal Claims lacks jurisdiction to entertain Fifth Amendment takings claims). Of note, the court disagreed with defendant's contention that the actions of the FHFA-C related to the Net Worth Sweep should not be considered to be those of the United States. Id. at 25-34. Here, however, the focus is on the imposition of the conservatorships by the FHFA; there is no dispute that the FHFA is the United States and that plaintiffs' claims are against the United States. See 12 U.S.C. § 4511(a) (establishing the FHFA as an "independent agency of the Federal Government").

The court cannot agree with plaintiffs' characterization of defendant's argument but agrees with plaintiffs that this jurisdictional challenge lacks merit.[10]

When a party pleads the predicates for a takings claim or illegal-exaction claim, the court possesses jurisdiction to entertain such claims. See Hansen v. United States, 65 Fed. Cl. 76, 80-81 (2005) ("[S]o long as there is some material evidence in the record that establishes the predicates for a [claim covered by the Tucker Act,] . . . a plaintiff succeeds in demonstrating subject matter jurisdiction in this court . . . ."). Those claims, at a basic level, are contentions that the government expropriated private property lawfully (takings) or unlawfully (illegal exaction). See Orient Overseas Container Line (UK) Ltd. v. United States, 48 Fed. Cl. 284, 289 (2000) ("Takings claims arise because of a deprivation of property that is authorized by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation." (citation omitted)). If a party alleges the necessary predicates for these claims, the court is not deprived of jurisdiction even if the complaint contains allegations that could support a tort claim. See El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1353 (Fed. Cir. 2004) ("That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims."); Rith Energy, Inc. v. United States, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that this court has jurisdiction over a takings claim "even if the government's action was subject to legal challenge on some other ground"). Here, plaintiffs plead the predicates for their takings and illegal-exaction claims by alleging, in essence, that they were forced to give their property to the government because of authorized or unlawful government conduct. Therefore, it is of no import to the court's jurisdiction whether plaintiffs have alleged facts that would also support a tort claim.

B. Plaintiffs' claims were filed within the relevant limitations period.

Defendant also argues that plaintiffs' challenge to the imposition of the conservatorships is barred by a limitations period set by HERA. This statutory provision permits Fannie or Freddie to challenge a conservatorship within thirty days of its imposition by the FHFA:

[10] Plaintiffs argue that defendant, in its omnibus motion to dismiss which focused primarily on the Net Worth Sweep and not on the imposition of the conservatorships, waived, in large part, arguments that would more specifically address the claims in this suit. Pls.' Opp'n 15-18 & n.5. The court disagrees. Plaintiffs' amended complaint contained no statement that the Net Worth Sweep was not a constituent part of the government actions that harmed plaintiffs—indeed, the document gives the opposite impression. See 1st Am. Compl. ¶¶ 15, 172-186, 204-205, 220, 222, 225. Even plaintiffs' opposition brief, while announcing that the only government action challenged in this suit is the imposition of the conservatorships in 2008, Pls.' Opp'n 3, continues to reference the deleterious effects of the Net Worth Sweep as support for plaintiffs' claims, id. at 13-14. Because plaintiffs continued to clarify, in their briefs and at oral argument, their focus on the imposition of the conservatorships as the basis of their claims, defendant did not waive any arguments against plaintiffs' claims by concentrating on the Net Worth Sweep.

> If the [FHFA] 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 [FHFA] to remove itself as conservator or receiver.

12 U.S.C. § 4617(a)(5)(A). Plaintiffs argue that HERA does not deprive this court of jurisdiction over their takings and illegal-exaction claims. The court agrees with plaintiffs.

The court observes, first, that recent precedent from the United States Supreme Court employs a "more stringent test for determining when statutory time limits are jurisdictional." Ford Motor Co. v. United States, 811 F.3d 1371, 1376 (Fed. Cir. 2016) (citing United States v. Wong, 575 U.S. 402, 409-12 (2015)). Not only has defendant failed to muster any case law showing that this HERA limitations provision applies to plaintiffs' takings and illegal-exaction claims, defendant has not provided any authority to support the proposition that this HERA provision is a jurisdictional bar, rather than a procedural rule.[11] See Wong, 575 U.S. at 410 (noting that most limitations periods should be presumed to be procedural, not jurisdictional, absent clear indicia to the contrary). The court finds no jurisdictional bar in HERA that deprives this court of jurisdiction over plaintiffs' claims.

This suit was filed on June 10, 2013. Plaintiffs' claims focus on the imposition of the conservatorships on September 6, 2008. The applicable statute of limitations is six years. 28 U.S.C. § 2501. As a question of jurisdiction, the court finds that plaintiffs' claims are timely.

V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiffs' claims, defendant challenges plaintiffs' standing to pursue their claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. Starr Int'l Co. v. United States, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is "assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal

[11] Defendant's reference to a discussion of HERA's limitations provision in Perry II, 864 F.3d at 614, is unpersuasive. In the court's view, those comments are dicta that expressly do not address "constitutional claims" and, in any case, do not clearly state that HERA's thirty-day limitations provision is jurisdictional. Id. The other passages in the decisions relied upon by defendant also do not address the timeliness of a shareholder's takings or illegal-exaction claim founded on the imposition of a conservatorship. See Gibson v. Resolution Tr. Corp., 51 F.3d 1016, 1020, 1026-27 (11th Cir. 1995) (affirming the dismissal of claims for declaratory and injunctive relief against the conservator of a bank, holding that the plaintiffs could not challenge the validity of the conservatorship pursuant to a provision similar to HERA's thirty-day limitations period); Resolution Tr. Corp. ex rel. First La. Fed. Sav. Bank v. Commerce Partners, 132 F.R.D. 443, 445-47 (W.D. La. 1990) (resolving a discovery dispute, holding that the parties defending against a suit by the conservator of a bank could not challenge the validity of the conservatorship pursuant to a provision similar to HERA's thirty-day limitations period).

rights or interests of third parties." Kowalski v. Tesmer, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that controls. See Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted."), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014). Thus, in a suit brought by shareholders, it is the substance of the allegations and not the label assigned to the allegations—i.e., direct or derivative—that matters. See Starr, 856 F.3d at 966-67; see also In re Sunrise Sec. Litig., 916 F.2d 874, 882 (3d Cir. 1990) ("Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties."). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based on the rights of the company. See Starr, 856 F.3d at 966-67; see also Weir v. Stagg, No. 09-21745-CIV, 2011 WL 13174531, at *9 (S.D. Fla. Feb. 7, 2011) ("Shareholders do not have standing to bring a direct action for injuries suffered by a corporation, but rather, must bring a derivative action."). A shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the corporation's injuries—to have standing to litigate those claims. See Starr, 856 F.3d at 966-67.

Defendant argues that plaintiffs lack standing because their claims, pled as direct claims, actually belong to the Enterprises and are therefore derivative in nature. The parties in this case and the related cases fully briefed and argued this issue prior to the court issuing the Fairholme II decision. The court concluded in Fairholme II that Fannie and Freddie shareholders lack standing to pursue direct claims that are derivative in nature.

Thereafter, the court solicited short supplemental briefs from plaintiffs and defendant regarding the applicability of the holdings in Fairholme II to this case. In their supplemental brief, plaintiffs suggest that their allegations in support of the claims in the amended complaint, for purposes of establishing standing, are materially different from the allegations regarding the direct takings and illegal-exaction claims asserted in Fairholme. Defendant contends, however, that the differences in the government actions referenced in the two suits does not change the fact that the nature of plaintiffs' alleged injuries is derivative, not direct, as was the case in Fairholme.

A. Plaintiffs' allegations of injury are not materially different from the allegations in Fairholme.

Plaintiffs generally contend that their allegations are materially different from those advanced in Fairholme, as regards standing. Plaintiffs point first to the fact that their suit is founded on the imposition of the conservatorships by the FHFA, as contrasted with the Fairholme allegations regarding the Net Worth Sweep effected by the amended PSPAs agreed to by Treasury and the FHFA-C. Pls.' Suppl. Br. on Mot. to Dismiss ("Pls.' Suppl. Br.") 1-2. This suit, therefore, focuses largely on what occurred in September 2008, whereas the related cases, including Fairholme, are focused primarily on what occurred in August 2012. Plaintiffs argue that "[w]hether the Government's unjustified imposition of the conservatorships under HERA harmed shareholders, in the first place, is entirely distinct from [the] FHFA's actions as

conservator related to the [PSPA] Amendment—conduct that was central to finding the claims derivative in Fairholme." Pls.' Suppl. Br. 4. Indeed, plaintiffs suggest that the standing inquiry here is a matter of first impression.

While defendant concedes that the "statutory powers" at issue in Fairholme and this case are different, it asserts that the type of injuries and the claims in the two cases are "virtually identical." Def.'s Resp. to Pls.' Suppl. Br. ("Def.'s Resp.") 1. The court agrees with defendant's statement, at least to the extent that the focus is properly placed on the claims alleged in this suit and in Fairholme, rather than on the fact that plaintiffs here frame their injury as one caused by the imposition of the conservatorships. The standing inquiry is governed more by the true nature of the claim than by distinctions between the relative amount of emphasis that plaintiffs place on certain events occurring in 2008 and the emphasis placed on the Net Worth Sweep in Fairholme.[12] Cf. Katz v. Cisneros, 16 F.3d 1204, 1207 (Fed. Cir. 1994) ("Regardless of the characterization of the case ascribed by [the plaintiff] in its complaint, we look to the true nature of the action in determining the existence or not of jurisdiction." (citing Livingston v. Derwinski, 959 F.2d 224, 225 (Fed. Cir. 1992))). Defendant persuasively argues that the standing inquiry must focus on the nature of plaintiffs' claims, not on the timing of the alleged injury.

It is true, as plaintiffs point out, that some of the facts discussed in Fairholme II are not alleged here. That is because the Net Worth Sweep, as opposed to the imposition of the conservatorships, gives rise to differently articulated claims in the related cases. But these are distinctions without a difference. In all of the related cases presenting direct claims, the takings and illegal-exaction claims have been premised on the expropriation of the plaintiffs' economic interests and property rights as shareholders. Thus, whether the primary focus is on the imposition of the conservatorships or the Net Worth Sweep, the direct takings and illegal-exaction claims are virtually indistinguishable for standing purposes.

Plaintiffs suggest that their injuries are different from those alleged in Fairholme. They state, for example, that "the conservatorships eviscerated Plaintiffs' bundle of property rights in the [Enterprises] overnight." Pls.' Suppl. Br. 3. Plaintiffs also assert that the class members in this suit "sustained billions of dollars in losses." Id. Finally, plaintiffs argue that their situation is not at all like those of the Fairholme plaintiffs, who alleged that their injuries were caused by the overpayments made to Treasury as a consequence of the Net Worth Sweep, because here plaintiffs "focus exclusively on the initial, wrongful government actions, and the direct harm to investors holding shares at that time, from which all subsequent events flowed." Id. at 4.

The court finds no significant distinction, for the standing inquiry, between the alleged injuries here and those in Fairholme. First, although the Net Worth Sweep is less emphasized by plaintiffs, that change to the PSPAs is clearly implicated, as it is in Fairholme, in plaintiffs' claims. See supra note 10. Second, the allegedly "direct" harm to plaintiffs' property interests in their Fannie and Freddie stock is mirrored in the allegations in the Fairholme complaint. See 2d Am. Compl. ¶¶ 169-174, 194-196, 202, Fairholme II, 147 Fed. Cl. at 1 (No. 13-465C). Finally,

[12] In addition, plaintiffs' amended complaint relies to a great extent on the Net Worth Sweep to measure the extent of the injuries suffered by the class members. See supra note 10.

for the reasons set forth below, when the test applied in Fairholme II is applied to the amended complaint here, "plaintiffs do not identify an injury unique to them that is independent from any Enterprise injury." Def.'s Resp. 3. Thus, the standing analysis of Fairholme II applies to the claims presented here in the amended complaint.[13]

B. Plaintiffs' claims actually belong to the Enterprises.

Having determined that plaintiffs' allegations, for the purposes of the standing inquiry, do not materially differ from those advanced in support of the direct takings and illegal-exaction claims in Fairholme, the court turns to defendant's contention that plaintiffs lack standing to litigate these claims. Defendant's standing argument is premised on its assertion that plaintiffs' claims actually belong to the Enterprises—and are therefore derivative in nature—because, to prevail, plaintiffs would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises. Plaintiffs counter that they assert direct claims and rely on two principal authorities for this proposition: Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004) (en banc), and Perry II.

The court observes, first, that federal law governs whether plaintiffs' claims are direct or derivative. See Starr, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. Id.; see also Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 97 (1991) (noting the "presumption that state law should be incorporated into federal common law"). Under Delaware law, the test for whether a shareholder's claim is derivative or direct depends on the answers to two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Tooley, 845 A.2d at 1033.

"Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow." Gentile v. Rossette, 906 A.2d 91, 99 (Del. 2006), discussed in Starr, 856 F.3d at 965. Such claims are derivative even "though the overpayment may diminish the value of the corporation's stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend." Protas v. Cavanagh, No. CIV.A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012); see also Hometown Fin. Inc. v. United States, 56

[13] Section V.B, infra, is a version of the standing analysis in Section V.B of Fairholme II, 147 Fed. Cl. at 45-47, which has been modified to take into account plaintiffs' arguments that were timely raised. Any new arguments raised in plaintiffs' supplemental brief are untimely and waived. See United States v. Ford Motor Co., 463 F.3d 1267, 1276-77 (Fed. Cir. 2006) (explaining that "[a]rguments raised for the first time in a reply brief are not properly before this court" (citing Novosteel SA v. United States, 284 F.3d 1261, 1274 (Fed. Cir. 2002); United States v. Nealy, 232 F.3d 825, 830-31 (11th Cir. 2000))); Ironclad/EEI v. United States, 78 Fed. Cl. 351, 358 (2007) (noting that "under the law of this circuit, arguments not presented in a party's principal brief to the court are typically deemed to have been waived"). The court did not invite plaintiffs, after the status conference held March 5, 2020, to challenge the standing analysis presented in Fairholme II. See Order of March 19, 2020, at 2 n.2.

Fed. Cl. 477, 486 (2003) ("[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to nothing more than a diminution in stock value or a loss of dividends."). Plaintiffs argue that their claims differ from corporate overpayment claims because, in their terms, "the jarring decline in the [Enterprises'] 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 [Enterprises']." Pls.' Opp'n 22. According to plaintiffs, their "stock lost value because it ceased to represent a significant ownership or economic right in the [Enterprises]." Id.

Despite framing their loss as the loss of ownership rights, plaintiffs also recount in their amended complaint the expropriation of the Enterprises' assets by the FHFA through the conservatorships. See 1st Am. Compl. ¶¶ 7-8, 12, 165, 172, 174-175, 177, 182-185. In the amended complaint, plaintiffs' injuries are attributed to both the imposition of the conservatorships and the Net Worth Sweep. Id. Defendant accurately characterizes these injuries as derivative: "Substantively, plaintiffs' claims are derivative because plaintiffs' alleged injuries exist solely as a result of the Enterprises' alleged injuries: first, from the Enterprises' placement in conservatorship; and second, from the Enterprises' payment of dividends pursuant to the [PSPA Amendments]." Def.'s Reply in Support of its Omnibus Mot. to Dismiss 2.

The gravamen of plaintiffs' takings and the illegal-exaction claims is indistinguishable from an overpayment claim: The FHFA, through the imposition of the conservatorships and subsequent manipulations of the Enterprises, gutted Fannie and Freddie and left nothing for the shareholders. See 1st Am. Compl. ¶ 186. Plaintiffs' claims are substantively derivative in nature because they are premised on allegations that the Enterprises themselves were harmed by the conservatorships.[14] See id. ¶¶ 8-10, 12, 68, 73, 77, 145, 147, 157, 164, 174-177, 182-186, 194-195, 198-201, 204, 222; see also id. ¶ 200 (describing the damage from the imposition of the conservatorships as the "damage to Fannie Mae and Freddie Mac, and, in turn, to their shareholders' interests"). Plaintiffs cannot transform their substantively derivative claims into direct claims by merely alleging that, as a result of the conservatorships, they were deprived of their stockholder rights, such as the rights to receive dividends or liquidation payments, or the right to vote on the management of the Enterprises. The claims remain derivative because plaintiffs' purported "harms are 'merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.'" Protas, 2012 WL 1580969, at *6 (quoting Gentile, 906 A.2d at

[14] Plaintiffs would remain unsuccessful if their allegations of improper government conduct were construed to be indicative of some action other than simply a depletion of the Enterprises' assets. Any claims premised on waste and mismanagement are derivative in nature. Kramer v. W. Pac. Indus., Inc., 546 A.2d 348, 353 (Del. 1988) (noting that "mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature"). Plaintiffs' claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. See Hometown, 56 Fed. Cl. at 486 (stock prices); In re Straight Path Commc'ns Inc. Consol. S'holder Litig., No. CV 2017-0486-SG, 2017 WL 5565264, at *4 (Del. Ch. Nov. 20, 2017) ("Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . . .").

99); see also Agostino v. Hicks, 845 A.2d 1110, 1122 (Del. Ch. 2004) ("[T]he inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation."). Because plaintiffs' claims are derivative in nature, under Tooley and Starr, plaintiffs lack standing to pursue those claims on their own behalf.

Turning to plaintiffs' reliance on Perry II, the court considers whether this decision by the United States Court of Appeals for the District of Columbia Circuit supports plaintiffs' standing to assert their claims. The parties acknowledge that Perry II did not address takings and illegal-exaction claims, but plaintiffs attempt to find a parallel between their constitutional claims and the direct contract claims discussed in Perry II. According to defendant, however, the nature of the claims in Perry II is not analogous to the nature of the claims in this case because the contract claims considered to be direct in Perry II were asserted by the shareholders against their contracting partners, the Enterprises. The court agrees with defendant that the standing analysis in Perry II is not sufficiently analogous to the standing inquiry required here—those contract claims could not have been derivative in nature because they were brought against the Enterprises, now under a conservator, not on behalf of the Enterprises. See 864 F.3d at 628 ("These [contract claims] are 'not claims that could plausibly belong to' the [Enterprises] because they assert that the [Enterprises] breached contractual duties owed to the class plaintiffs by virtue of their stock certificates." (quoting Citigroup Inc. v. AHW Inv. P'ship, 140 A.3d 1125, 1138 (Del. 2016) (en banc))). Perry II does not assist plaintiffs in establishing standing for their claims.

In sum, plaintiffs have not shown that they have standing to litigate their claims because they do not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court dismisses plaintiffs' nominally direct claims on standing grounds.[15]

C. Plaintiffs' claims are direct claims, as pled, and cannot be deemed to be derivative claims.

Plaintiffs, while acknowledging that they assert only direct claims,[16] attempt to avoid dismissal of those claims for lack of standing by requesting, in a footnote, that the court permit them to pursue their claims as derivative claims. The entirety of the argument is as follows:

> 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

[15] Because plaintiffs' claims must be dismissed for lack of standing, the court need not reach defendant's remaining arguments that these claims should be dismissed for failure to state a claim upon which relief can be granted.

[16] There is no dispute that the claims plaintiffs assert in their amended complaint are framed as direct claims. For their takings and illegal-exaction claims, plaintiffs emphasize that the harm to plaintiffs is direct. 1st Am. Compl. ¶¶ 224-225; see also Pls.' Opp'n 20-22 & n.7 (arguing that plaintiffs' claims are direct, not derivative). In addition, the relief requested by plaintiffs is for monetary relief payable to them, not to the Enterprises. 1st Am. Compl. 82.

> prevents the FHFA from pursuing these claims under the Succession Clause [in HERA]. As such, shareholders should be permitted to pursue these claims even if the Court deems them to be derivative.

Pls.' Opp'n 22 n.7 (citing Delta Sav. Bank v. United States, 265 F.3d 1017 (9th Cir. 2001); First Hartford Corp. Pension Plan & Tr. v. United States, 194 F.3d 1279, 1295 (Fed. Cir. 1999)). Because the First Hartford decision is binding precedent from the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), and the holding in First Hartford was followed by the United States Court of Appeals for the Ninth Circuit in Delta Savings Bank, 265 F.3d at 1022-24, the court focuses on First Hartford.

In First Hartford, the Federal Circuit held that a shareholder of a company could bring a derivative claim, notwithstanding a succession clause, if the company was controlled by an entity with a conflict of interest. 194 F.3d at 1283; accord id. at 1295 (remarking that the purpose of derivative suits was to "permit shareholders to file suit on behalf of a corporation when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation"). The court in Fairholme II concluded that, pursuant to First Hartford, the plaintiff who asserted derivative claims in Fairholme had standing to litigate those claims due to the FHFA-C's conflict of interest. 147 Fed. Cl. at 49-51.

If plaintiffs had asserted derivative claims in their amended complaint, the "conflict of interest" holding in First Hartford would have aided plaintiffs in their quest to establish standing. But they did not do so. Thus, their reliance on this holding in First Hartford is misplaced.

As for plaintiffs' suggestion that their direct claims could be deemed derivative, they identify no authority for that recharacterization of their claims, even though they had the opportunity to do so in their opposition brief. The court finds plaintiffs' request to be unsupported by authority and unpersuasive for the purpose of establishing plaintiffs' standing to bring the claims in their amended complaint.[17]

VI. CONCLUSION

The court must dismiss plaintiffs' claims for lack of standing. It therefore **GRANTS** defendant's motion to dismiss. The clerk is directed to enter judgment accordingly. No costs.

The court has filed this ruling under seal. The parties shall confer to determine proposed redactions to which the parties agree. Then, **by no later than Friday, July 17, 2020**, the parties shall file a joint status report indicating either that no redactions are necessary, or their

[17] Derivative takings and illegal-exaction claims brought on behalf of the Enterprises are asserted in some of the related cases, including Fairholme.

agreement with the proposed redactions, **attaching a copy of those pages of the court's ruling containing proposed redactions, with all proposed redactions clearly indicated**.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 2020-2190

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Date: 11/19/2020

Signature: /s/ Steve W. Berman

Name: Steve W. Berman