No. 13-385C
(Judge Sweeney)

UNITED STATES COURT OF FEDERAL CLAIMS

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

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

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

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I. INTRODUCTION

On September 6, 2008, the Government imposed conservatorships on Fannie Mae and Freddie Mac (collectively "the Companies," and sometimes individually, "Company"). However, the "conservatorships" defied the very nature of conservatorship itself. Unlike when the Government acts as conservator of a bank in order to preserve the bank's assets and protect its creditors, the Government used the conservatorships to stabilize the economy by warehousing on the Companies' books bad mortgage debt from financial institutions the Government deemed "too big to fail." In addition, via Stock Agreements forced on the Companies, the Government funneled billions of dollars to Treasury as "dividend payments" in exchange for capital infusions that the Companies never requested or needed. Eventually, the Government used the so-called conservatorships to deny the Companies their own profits, instead siphoning them directly to the federal treasury. While the Government called the Federal Housing Finance Agency ("FHFA") "conservator," it was such in name only. In reality, it has been a shill for using the Companies to accomplish whatever the Government wanted.

The Government's unprecedented seizure of the Companies to further its own ends resulted in near total destruction of shareholder value. Almost immediately after the conservatorships were imposed, the value of the Companies' shares plummeted, causing preferred and common shareholders of the two Companies to lose more than *$41 billion.* FHFA agreed, purportedly as conservator of the Companies, to accept from Treasury $100 billion in capital infusions for each Company, but in exchange granted from each Company $1 billion in preferred stock with preferential rights that placed the Government ahead of all other stockholders. FHFA further gave the Government warrants for 79.9% of the Companies' common shares at a bargain-basement price of one-thousandth of one cent per share. The Government's actions virtually handed majority control in the Companies to the Government for a miniscule fraction of their value. Once the conservatorships were imposed, shareholders also lost the right to vote their shares. And though shareholders have the right to receive a portion of the Companies' assets in the event of dissolution, the Government's newly-acquired preferred stock ensured that, if the Companies are dissolved, the Government will receive $189.5 billion from liquidation preferences while shareholders will get nothing. Even though conservatorships are by definition temporary, the Government's seizure of the Companies has lasted over five years and there is no plan in sight for them to be returned to the shareholders who own them, and thus no avenue by which shareholders will be able to recover the loss of the value in their shares.

Under the Fifth Amendment to the United States Constitution, the Government cannot take private property without just compensation. Despite the extraordinary facts alleged in the Complaint, there is no doubt that the Government's actions in imposing the conservatorships constituted a taking. In the alternative, they constituted an illegal exaction in violation of the Due Process Clause of the Constitution. Under either theory, whether done in the guise of "conservatorships" or otherwise, the Government cannot seize control of privately-held corporations, force them to serve the whim of the Government's objectives and, in the process, wipe out the interests of millions of shareholders. And if the Government does so, it must compensate the shareholders for what it has taken.

Thus, while the Government's Motion[1] asks this Court to immunize the Government from its own conduct, nearly every one of the Government's legal arguments ignores the facts of the Complaint and misrepresents the actions that led to and have constituted the alleged "conservatorships." First, even though the Companies were subjected to conservatorship to serve the Government's objectives, the Government argues that FHFA was not, in fact, the Government. Not only is this argument premised on the fiction that FHFA acted as a

[1] All references to the Government's Motion to Dismiss, [Dkt. No. 31] will appear as "Mot. at __."

"conservator" but, even assuming the existence of true conservatorships, it improperly asks this Court to find, as a matter of law, that FHFA ceased acting as a regulator once it became the Companies' conservator. It likewise ignores the Complaint's allegations, which the Court must accept as true, that FHFA conspired with Treasury in imposing the conservatorships. Indeed, during the conservatorships there has been no meaningful distinction between the roles of Treasury and FHFA, as the conservatorships were designed *not* to preserve the Companies' assets, but rather to further Treasury's directives and goals.

The Government also claims that Plaintiffs are precluded from pursuing this action by virtue of a purportedly exclusive remedy in the Housing and Economic Recovery Act of 2008 ("HERA"). However, the provision cited by the Government (12 U.S.C. § 4617(a)(5)) only addresses claims for declaratory and injunctive relief, not the claims for damages Plaintiffs make here. When Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear, and the Government has pointed to no such legislative declaration in HERA.

The Government next claims Plaintiffs lack "standing" to bring this action because, under HERA, it suggests, FHFA assumed all rights of the Companies' shareholders, including the ability to bring suit. But this argument ignores a well-recognized exception applicable when a conservator has a conflict of interest because of its entanglement with "closely related" government entities. As described above, the Complaint alleges the existence of such an entanglement here. The Government further claims that Plaintiffs lack standing to recover the Companies' lost profits. But Plaintiffs are not seeking to recover profits that belong to the Companies themselves: they are seeking to recover for the destruction of the value of their shares. Moreover, Plaintiffs can directly recover based on the Companies' overpayment to the Government for access to Treasury funds, which caused Plaintiffs to lose the economic value and voting power of their shares.

Plaintiffs have sufficiently alleged that the conservatorships constituted an unconstitutional taking. As an initial matter, Plaintiffs' claims are ripe for review. Indeed, the Government would force Plaintiffs to wait until their claims were barred by the statute of limitations before this Court could find them sufficiently "ripe." More substantively, this Court has recently reiterated in *Starr International Co. v. United States* that Plaintiffs have a cognizable property interest in their shares. The Government's actions clearly affected the value of those shares and Plaintiffs' other ownership interests. Plaintiffs had reasonable-investment backed expectations that the Government would not take over the Companies for its own purposes, thereby destroying the value of their shares and their rights as shareholders. As much as the Government would like the Court to believe otherwise, the Companies were not engaged in banking and thus were not part of the "highly regulated" banking industry, where regulatory takeovers are more common. Thus, there is no basis for suggesting that Plaintiffs should have reasonably anticipated the Government's actions here, particularly where, just months before the conservatorships were imposed, the Government repeatedly represented that there was no need to impose them because the Companies were financially sound. The Government was not "rescuing" the Companies as would be done in a traditional conservatorship. At best, it was cleaning up its own mess after directing the Companies to make high-risk investments.

Finally, Plaintiffs have stated an exaction claim. The Government's actions were not lawful under HERA. If the Government's argument is true, the Government could have imposed the conservatorships to do whatever it wished with the Companies. Instead, HERA established FHFA's duty to preserve the Companies' assets, and that duty creates a money mandating obligation. FHFA has done precisely the opposite by giving away the Companies' assets virtually for free to Treasury. Finally, Plaintiffs' claims are not "indirect," because there is no intervening party more injured by the Government's actions.

The Government's Motion ignores defining facts of the takeover and instead simply characterizes its actions as ordinary. But the Government's attempt to reinvent history shows the very reason this Court should not grant its Motion. Accepting Plaintiffs' account as true, as the Court must, and considering the novel application of constitutional principles implicated by this case, dismissal is inappropriate at this stage. The Motion should be denied and Plaintiffs' claims decided on their merits after discovery.

II. STATEMENT OF FACTS[2]

A. The Creation of Fannie Mae and Freddie Mac

Congress established Fannie Mae in 1938 to provide increased liquidity to the nation's home mortgage market. Compl. ¶ 29.[3] While the Company was originally operated by the Government, in 1968 Congress reorganized it as a government-sponsored enterprise ("GSE"), a federally-chartered private corporation charged with serving the self-supporting mortgage market. *Id.* In so doing, Congress transferred the ownership of Fannie Mae to its new shareholders and enabled the Company to raise capital from the private capital markets. *Id.* Beginning in 1968 and continuing until June 2010, Fannie Mae was publicly traded on the New York Stock Exchange. *Id.* ¶ 30.

Congress established Freddie Mac in 1970 to create a secondary market for conventional mortgages. Compl. ¶ 31. In 1989, the Company was reorganized as a for-profit corporation owned by private shareholders. *Id.* Beginning in 1984 and continuing until June 2010, Freddie Mac was publicly traded on the New York Stock Exchange. *Id.* ¶ 32.

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[2] In its Statement of Facts, the Government omits large swaths of facts, the inclusion of which would plainly defeat the Government's Motion. In addition, throughout its Statement, the Government makes statements of "fact" unsupported by citations that should not be considered in deciding its Motion. Plaintiffs attempt to point out the Government's sleights of hand throughout.

[3] All references to "Compl. ¶ __" are to Plaintiffs' June 10, 2003 Complaint, [Dkt. No. 1].

Although the Companies were charged with a public mission, for decades they raised capital from investors through the private capital markets, generating profits and increasing shareholder value, and generally operated much like any other publicly traded, shareholder-owned company. Compl. ¶ 33. As with any publicly traded company, the bylaws and offering documents for the Companies' common stock enumerated specific rights held by each Company's common shareholders, including the right to transfer their shares and vote for candidates for those Companies' boards of directors and shareholder proposals. *Id.* ¶¶ 34-335. The owners of the Companies' common stock also had the right to receive a portion of the Companies' assets in the event of dissolution or liquidation. *Id.* ¶ 35. The offering documents for the Companies' preferred stock also enumerated specific rights held by their preferred shareholders typical of those rights often held by preferred stockholders in a shareholder-owned company, such as the right to transfer their shares, to receive a portion of the Company's assets in the event of dissolution or liquidation, and to vote on amendments to their series' certificate of designation. *Id.* ¶¶ 36-37. Indeed, private investors long considered Fannie Mae and Freddie Mac securities to be popular, sound, conservative investments. *Id.* ¶¶ 38-41. In fact, the Government created strong incentives for banks and other institutions to buy Fannie's and Freddie's preferred stock, including beneficial capital treatment and tax treatment. *Id.* ¶ 19.

B. The Government's Actions Weakened the Companies' Financial Strength by Requiring Them to Increase Their Holdings in Riskier Mortgages and Mortgage-Backed Investments

Throughout their existence as public companies, the Companies were charged, to varying degrees, with attempting to increase home ownership in the United States. Compl. ¶ 49. However, by 2006, HUD's quotas resulted in low- and moderate-income mortgages accounting for nearly 57% of each Company's mortgage portfolio. *Id.* And in the years leading up to the financial crisis, both Congress and the Office of Federal Housing Enterprise Oversight

("OFHEO"), which had oversight responsibility for the Companies, repeatedly exerted pressure on Fannie and Freddie to delve deeper into the subprime and Alt-A mortgage market. *Id.* ¶¶ 50-54. Despite the Government's ill-advised policies, the Companies had less exposure to toxic mortgages than many other financial institutions, and they did not have significant amounts of risky mortgage debt on their books until 2006. *Id.* ¶ 55.

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

As the financial crisis deepened, Congress enacted HERA on July 24, 2008. Compl. ¶ 56. HERA replaced OFHEO with FHFA. *Id.* Congress gave FHFA new authority to place the Companies into receivership and expanded authority to place them into conservatorship. *Id.* ¶ 57. In giving FHFA that power, then-Treasury Secretary Paulson told the Senate that regulators needed "a bazooka" at their disposal, but said "[y]ou are not likely to take it out." He added, "I just say that by having something that is unspecified, it will increase confidence. And by increasing confidence it will greatly reduce the likelihood it will ever be used." *Id.*

In addition, in supporting and enacting HERA, members of Congress repeatedly emphasized the health and viability of both Fannie and Freddie and expressly rejected the notion that a conservatorship would ever be imposed on either Company. *Id.* ¶¶ 58-61. For example, in support of the bill, Senator Isakson (R-GA) explained that:

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

Compl. ¶ 61 (emphasis added) (citing 154 Cong. Rec. S7436-01 (2008)).

Around the same time, other government officials and executives at both Companies went out of their way to reinforce the public's positive views of Fannie and Freddie. *Id.* ¶¶ 62-64. In the months before the Companies were placed into conservatorship, OFHEO and Secretary Paulson represented that both Companies were "adequately capitalized." *Id.* ¶¶ 65-66.

Notwithstanding the positive views of the Companies, in June 2008, the Government began to take steps that would lead to the imposition of the conservatorships on the Companies to serve the Government's public policy objectives. For example, on June 10, 2008, OFHEO announced a final rule that changed the loan loss severity formulas used in the Companies' regulatory risk-based capital stress test and began to formally apply that rule with the third quarter 2008 capital classification. Compl. ¶ 67. These new standards dramatically increased the risk-based capital requirement. *Id.*

1. Fannie Mae and Freddie Mac were suddenly and improperly placed into conservatorship.[4]

On September 7, 2008, less than two months after the enactment of HERA, when their regulators and Government officials said the Companies were adequately capitalized, FHFA and Treasury blindsided the Companies and their shareholders by placing them into conservatorship and taking control away from the shareholders. Compl. ¶ 68. The Government intended to keep the plan to place the Companies into conservatorship secret until the last possible minute. *Id.* ¶ 69. As explained in Secretary Paulson's memoir, *On the Brink*, the Secretary met with President George W. Bush only three days before the conservatorships were publicly announced and told

[4] The Government's Motion claims that the Government was "called upon to rescue the Enterprises when their investment strategies left them exposed to the disintegrating housing market and declining access to capital markets." Mot. at 6. The Government does not identify who or what made this "call" to the Government and, in fact, provides no citation for this assertion at all. This "fact" likewise does not appear in the Complaint, and therefore cannot be considered in deciding the Government's Motion.

him that "[w]e're going to move quickly and take them by surprise. The first sound they'll hear is their heads hitting the floor." *Id.*

In his September 7, 2008 statement announcing the conservatorships, FHFA Director Lockhart misleadingly stated that "[t]he Boards of both companies consented yesterday to the conservatorship." *Id.* ¶ 70. However, the Boards' "consent" was by no means voluntary. *Id.* Two days prior to the September 7th announcement, the senior executives at Fannie and Freddie were summoned to secret meetings where they were told that they could either accept Government control within 24 hours or the Government would impose it by force. Further, HERA immunized the Companies' directors against liability for consenting to the appointment of FHFA as conservator, Compl. ¶ 87 (citing 12 U.S.C. § 4617(a)(6)), and the Government played on this immunity to persuade the Companies' management and directors to accede to the Government's demands. *Id.* The Financial Crisis Inquiry Commission concluded that: "[e]ssentially the GSEs faced a Hobson's choice: take the horse offered or none at all." *Id.* ¶¶ 70-73; *see also id.* ¶¶ 81-90.

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

The decision to impose the conservatorships was not based on the statutory grounds set forth in HERA, but rather on the broader public policy objective of restoring confidence and liquidity in the financial markets by, among other things, providing a mechanism for other financial companies to unload their bad mortgage debts. Compl. ¶ 74. As a result of the Government's actions, the Companies became "the mortgage industry's wastebasket for toxic mortgage debt." *Id.* Whatever the validity of these goals from a public policy perspective, they did not constitute a valid legal basis for imposing conservatorships over the Companies and taking control away from their shareholders, and they had very little to do with the Companies' health. *Id.* ¶ 75.

b. The conservatorships obliterated shareholder value.

Under the terms of the conservatorships, FHFA assumed the powers of the Companies' boards of directors and management, and the Companies' CEOs were dismissed. Compl. ¶ 79. It terminated all shareholder meetings and all shareholder voting rights. *Id.* These Government actions caused the Companies' preferred and common stock values to plummet, destroying both shareholder value and the rights and property interests of the Companies' preferred and common shareholders. *Id.* ¶¶ 79-80. The Companies were ordered to cease paying dividends on their preferred and common stock. *Id.* On June 16, 2010, FHFA ordered the Companies to delist their common and preferred shares from the New York Stock Exchange. *Id.*

In total, preferred and common shareholders of the two Companies suffered a loss in value of more than $41 billion. *See* Compl. ¶¶ 189-91.

2. None of the criteria under HERA for appointing a conservator was satisfied.

HERA provides for 12 circumstances under which FHFA could place the Companies into conservatorship. 12 U.S.C. § 4617(a)(3)(A)-(L); Compl. ¶ 91. None of these statutory grounds existed with respect to either Company because: (1) the Companies' assets were greater than their obligations to their creditors and others, *see id.* ¶¶ 93-98; (2) neither of the Companies had experienced a substantial dissipation of assets or earnings due to i) any violation of any provision of federal or state law or ii) any unsafe or unsound practice, *see id.* ¶¶ 99-105; (3) neither Company was operating in an unsafe or unsound condition to transact business, *see id.* ¶¶ 106-12;[5] (4) neither Company was in violation of a cease or desist order, *see id.* ¶¶ 113-15;

[5] The Government says that FHFA had determined that "the Enterprises had severe capital deficiencies and were operating in an unsafe and unsound manner." Mot. at 7. It cites Paragraph 68 of

(5) neither Company concealed or refused to submit any books and records, *see id.* ¶¶ 116-18; (6) the Companies were able to pay their obligations and meet the demands of their creditors, *see id.* ¶¶ 119-24; (7) neither Company had incurred or was likely to incur losses that would deplete all or substantially all of their capital, *see id.* ¶¶ 125-33; (8) neither Company violated any law or regulation, or engaged in any unsafe or unsound practice or condition that would likely cause insolvency, a substantial dissipation of assets or earnings, or a weakening of its condition, *see id.* ¶¶ 134-36;[6] (9) the Companies did not consent to the appointment of a conservator, *see id.* ¶¶ 137-40;[7] (10) neither Company was undercapitalized, *see id.* ¶¶ 141-48; (11) or critically undercapitalized, *see id.* ¶¶ 149-51;[8] and (12) neither Company was found guilty of money laundering, *see id.* ¶¶ 152-53. Thus, there was no legal basis for the Government to place the Companies into receivership or conservatorship. Compl. ¶ 92.

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

1. The Original Stock Agreements

At the time the Companies were placed into conservatorship, the Director of FHFA, acting as conservator, and the Secretary of the Treasury entered into the Stock Agreements.

the Complaint for this proposition, but that Paragraph simply quotes Treasury Secretary Paulson's statement that the conservatorships were being imposed "based on . . . what we have learned about their capital requirements." There is no support – in the Complaint or otherwise – for the proposition that, at the time of the conservatorships, the Government determined the Companies were operating in an unsafe or unsound manner.

[6] The Government's Statement of Facts says that the Companies "were facing serious financial difficulty, and insolvency loomed." Mot. at 7. The citations to the Complaint purportedly offered in support of this observation do not support the Government's statement.

[7] The Government claims the Companies did consent, Mot. at 7-8, but at this stage the Court must accept Plaintiffs' allegations that the consent was coerced as true. *See Starr Int'l Co., Inc. v. United States*, 106 Fed. Cl. 50, 79 (2012) ("The Court acknowledges that the Government vigorously disputes Starr's characterization of the voluntariness of the loan agreement, . . . and the cause of those circumstances. . . . On a motion to dismiss, however, the Court must assume the truth of the plaintiffs' allegations and leave the determination as to their merit for a later stage.") (internal citations omitted).

[8] The Government's Motion claims that, at some unspecified time between 2007 and 2008, "the Enterprises faced a critical decline in their ability to raise capital." Mot. at 5. However, this "fact" is not alleged in the Complaint and the Government provides no citation for it.

Compl. ¶ 154.[9] Those Agreements provided that, in exchange for making available to each Company a $100 billion line of credit, which the Companies never sought or requested,[10] the Treasury would receive (a) $1 billion in preferred stock with a cumulative 10% dividend; (b) additional senior preferred stock equal to the amount of any credit the Treasury extended to the Companies; (c) preferential rights for the Treasury's senior preferred stock that placed it ahead of all other stockholders; and (d) warrants to acquire 79.9% of each company's common stock for one-thousandth of one cent per share, which translated to a total exercise price of approximately $8,000 for each Company. *Id.* The Stock Agreements were amended in May 2009 to increase the line of credit to $200 billion for each Company, and in December 2009 to make that maximum line of credit based on a formula designed to cover quarterly deficits in net worth from 2010 to 2012, and then for future years subject to a cap. *Id.*

2. The Third Amendment

The Treasury's purpose in entering into the Stock Agreements became even clearer in August 2012, when, after Fannie Mae and Freddie Mac had once again achieved positive net worth despite having been forced to pay tens of billions of dollars to the Treasury in dividends in exchange for capital infusions the Companies did not need, the Treasury amended the terms of the Stock Agreements. Compl. ¶ 161.[11] Under the Third Amendment to each of the Stock

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[9] The Government claims that "[t]he conservatorship decisions focused on maintaining the Enterprises as functioning market participants and avoiding the statutory trigger for receivership and liquidation." Mot. at 8. Again, the Government cites no support for it.

[10] The Government's Motion claims this funding was necessary "to avoid insolvency" and characterizes it as "capital lifelines." Mot. at 8. However, the Complaint does not allege this and, in fact, the Government made no such findings when it forced the Stock Agreements on the Companies. Instead, Treasury stated that the amount of the lines of credit was "unrelated to the Treasury's analysis of the current financial conditions of the GSEs." *See* Fact Sheet: Treasury Senior Preferred Stock Purchase Agreement (Sept. 7, 2008), Exhibit A to Declaration of Steve W. Berman ("Berman Decl.").

[11] The Government's Motion claims that "[t]he amendment was necessary because of a concern that the Enterprises, although solvent with Treasury's assistance, would fail to generate enough revenue to fund the 10 percent dividend obligation." Mot. at 8; *see also id.* at 9 ("There was concern that, under the weight of the fixed dividend, the Enterprises would run through the remaining Treasury investment

Agreements, beginning in January 2013, the entire positive net worth of Fannie Mae and Freddie Mac, to the extent that the Companies generate profits going forward, will be transferred to the Treasury on a quarterly basis, less a diminishing capital reserve requirement for the first five years following this change. *Id.* As the *Wall Street Journal* reported, "Fannie and Freddie are simply making interest payments on a loan that can't ever be paid off." *Id.* ¶ 162.[12] This is a windfall for the Government, at the direct expense of the Companies' shareholders.

The Companies are currently in strong financial health. *See id.* ¶ 163. Two primary things have contributed to their renewed profitability. *Id.* ¶ 164. First, after years of being denied the opportunity to do so, the Companies have been permitted to increase their guarantee fees. *Id.* Second, the Government recently revised the treatment of the Companies' deferred tax assets – the very same assets it previously forced the Companies to write down. *Id.* ¶¶ 165-66. While the Government is now reaping a fortune from its takeover of the Companies, the Companies' shareholders have been left with nothing. *See id.* ¶¶ 167-69.

III. STANDARD OF REVIEW

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

capacity, leading to insolvency."). The Government provides no citation for these statements and they do not appear anywhere in the Complaint.

[12] The Government claims that "[t]he amendment was designed to strengthen the Enterprises, decreasing their funding costs and avoiding draws on the limited backstop provided by Treasury in the Stock Agreements. Thus, the modification maintained market stability by preserving Treasury's ability to support the continued solvency of the Enterprises." Mot. at 9. Again, the Government provides no citation for these statements and they do not appear in the Complaint.

To defeat a motion to dismiss, a plaintiff need only state a claim to relief that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). As with a motion to dismiss for lack of subject matter jurisdiction, in deciding a motion to dismiss for failure to state a claim, the Court must also accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint can survive dismissal even if it appears on the face of the pleadings that "recovery is very remote and unlikely." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

IV. ARGUMENT

A. The Court Has Jurisdiction to Entertain Each of Plaintiffs' Claims

The facts set forth in the Complaint reflect the breadth and complexity of the Government's scheme to take over the Companies, use them to stabilize the economy, and then drain them of their assets for the Government's own benefit, all at Plaintiffs' expense. Despite these facts, and despite conceding that FHFA's placement of the Companies into conservatorship was conduct by "a Government actor," Mot. at 12, the Government argues that this Court lacks jurisdiction over Plaintiffs' claims because the Complaint purportedly does not challenge actions committed by the Government. The Government's arguments mischaracterize the facts in the Complaint and improperly assume that its characterizations of the relevant conduct control.

1. The Court has Tucker Act jurisdiction over FHFA because the Complaint challenges FHFA's conduct as a regulator, not as a conservator, and alleges that FHFA colluded with Treasury.

Whether FHFA's conduct with respect to the Companies is characterized as the conduct of a regulatory agency or a conservator, the United States is responsible for its conduct, and this Court therefore has jurisdiction over FHFA under the Tucker Act. *See* 28 U.S.C. § 1491(a). The Complaint alleges that, rather than acting as a conservator authorized to "take such action as may be . . . necessary to put the regulated entity in a sound and solvent condition . . . and . . .

appropriate to carry on the business of the regulated entity and ***preserve and conserve the assets and property of the regulated entity***," 28 U.S.C. § 4617(b)(2)(D) (emphasis added), FHFA used the conservatorships to further Government policies, including the shoring up of the housing finance market through the warehousing of other institutions' toxic debt, and enrich the Government by implementing the Stock Agreements, including the "net worth sweep" effected by the Third Amendment. Thus, FHFA's conduct was consistent with its role as a *regulator*, not a conservator[13] and is therefore subject to jurisdiction under the Tucker Act.[14]

In recasting Plaintiffs' allegations, Defendant argues that FHFA's conduct was consistent with a traditional "preserve and conserve" conservatorship, such as the type the Federal Deposit Insurance Corporation ("FDIC") has imposed upon troubled banks. The Government argues that, once it became conservator, FHFA's conduct became immunized against this Court's review because "courts have ruled that a Government regulatory agency – acting as conservator – is not the United States." Mot. at 12. Neither the facts concerning FHFA's conduct nor the cases cited support this position.[15] "FHFA cannot evade judicial scrutiny by merely labeling its

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[13] FHFA's stated mission is to "[e]nsure that the housing GSEs operate in a safe and sound manner *so that they serve as a reliable source of liquidity and funding* for housing finance and community investment," Federal Housing Finance Agency – Mission, http://www.fhfa.gov/Default.aspx?Page=38 (emphasis added), and the Agency's authorizing statute empowers the FHFA director "to exercise such incidental powers as may be necessary or appropriate to fulfill the duties and responsibilities of the Director in the supervision and regulation of such regulated entity," 12 U.S.C. § 4513(a)(2)(B), to ensure that, *inter alia*, "the operations and activities of each regulated entity foster liquid, efficient, competitive, and resilient national housing finance markets . . . ," § 4513(a)(1)(B)(ii), and that "each regulated entity carries out its statutory mission only through activities that are authorized under and consistent with this chapter and the authorizing statutes . . . ." § 4513(a)(1)(B)(iv).

[14] The Company's SEC filings even acknowledged that FHFA's mandates were out of tune with a conservator's obligation to preserve and conserve a company's assets: "Certain changes to our business objectives and strategies [under the conservatorship] are designed to provide support for the mortgage market in a manner that serves our public mission and other non-financial objectives. . . . In addition, the objectives set forth for us under our charter and by our Conservator, as well as the restrictions on our business under the [Stock] Purchase Agreement, have adversely impacted and may continue to adversely impact our financial results . . . ." Compl. ¶ 77 (citing Freddie Mac's 2011 Form 10-K).

[15] *See also id.* ("Although it may appear at first blush that many of the functions of the FHFA as regulator and as conservator overlap, we consider both the concept and function of a conservatorship and

actions with a conservator stamp." *Leon County Fla. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012).

The Government inaptly cites a litany of *Winstar*[16] cases in support of its position. In each of these cases, the courts looked at the relevant conduct by the FDIC and concluded that it acted *solely* as conservator or receiver for a banking institution. Therefore, those courts held that the Tucker Act could not provide a basis for this Court's jurisdiction over the FDIC. For instance, in *Ameristar Fin. Servicing Co., LLC v. United States*, 75 Fed. Cl. 807 (2007) – the primary case on which the Government relies – Ameristar sued the FDIC, which was acting as receiver for a failed savings bank and conservator for its newly-established successor bank. Ameristar had contracted with the successor bank to collect an outstanding loan owned by the original bank. *See id.* at 808. Before Ameristar could collect that debt, the FDIC, acting as receiver for the original bank, settled the loan with the debtors. *See id.* Ameristar then sued the FDIC for breach of contract and a taking. *See id.* at 808-09. This Court dismissed Ameristar's claims, reasoning that because the FDIC's actions were taken solely in its role as conservator/receiver, it had "'step[ped] into the shoes'" of the bank, and was therefore not acting as the United States for purposes of the Tucker Act. *Id.* at 811 (quoting *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 86 (1994)). Central to the *Ameristar* court's reasoning was the Government's argument that, as conservator/receiver, the FDIC was "[a]cting in the interests of the depositors and investors and is, therefore, more akin to a private party than the Government." *Id.* at 810 (internal quotation marks omitted). Thus, "[Ameristar's] claim is . . . actually one between two non-governmental parties . . . ." *Id.* at 812.

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the overall statutory scheme to determine whether the actions of the FHFA . . . should be deemed an act taken by the FHFA as conservator, insulated from judicial review, or an act of rulemaking within its function as a regulator.").

[16] *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

The remaining *Winstar* cases cited by the Government had similar facts.[17] The facts of this case are likewise distinguishable from *Herron v. Fannie Mae*, 857 F. Supp. 2d 87 (D.D.C. 2012), in which the district court held that an aggrieved former Fannie Mae consultant, whose position began after the Company was placed into conservatorship, could not raise constitutional claims against the Company simply because it was under FHFA's conservatorship. *See id.* at 95-97. The district court concluded that FHFA's control over Fannie Mae did not turn the private institution into a federal actor. *See id.* at 96 (citing *O'Melveny*, 512 U.S. at 86-87). Rather, Herron's dispute was with Fannie Mae, and "when FHFA took over as conservator of Fannie Mae, it stepped into Fannie Mae's private role." *Id.*

The Government's reliance on *Herron* and the *Winstar* cases is inapt because Plaintiffs here were injured by FHFA's conduct in its role as the Companies' regulator. The Government's argument rests on the untenable presumption that once an agency takes on the role of conservator, its role as a regulator ceases. Because this oversimplified view is inconsistent with both the law and the well-pleaded facts in the Complaint, the Tucker Act provides a clear basis for exercising jurisdiction over FHFA.

Even if FHFA's conduct is viewed as implicating its role as the Companies' conservator, it is still subject to jurisdiction under the Tucker Act because of its extensive collusion with Treasury. *See Frazer v. United States*, 288 F.3d at 1354. In *Frazer*, the Federal Circuit considered whether equitable tolling would be available to plaintiffs seeking to pursue *Winstar*-related derivative claims, when FDIC, acting as receiver for the failed bank in which the plaintiffs held shares, had negotiated a tolling agreement with the Department of Justice. The

[17] *See Frazer v. United States*, 288 F.3d 1347, 1350, 1353-54 (Fed. Cir. 2002) (discussed below); *Ambase Corp. v. United States*, 61 Fed. Cl. 794, 797 (2004) (claim of mismanagement by FDIC as receiver for failed bank not a claim against the government; "[t]he FDIC is not generally considered to be the government for jurisdictional purposes in *Winstar* litigation"); *AG Route Seven P'ship v. United States*, 57 Fed. Cl. 521, 534 (2003) (same).

court held that the plaintiffs were not parties to the tolling agreement; moreover, there was no government action that would have misled the plaintiffs regarding the expiration of the limitations period, a requirement for equitable tolling. The court therefore held the FDIC was not the government for *Winstar* purposes, and the Department of Justice had made no representations to the plaintiffs. *See id.* at 1353-54. Importantly, the court also held that any collusion between the FDIC and the Department of Justice that misled the plaintiffs "would make the United States responsible for the conduct of the FDIC," thus providing a basis to exercise jurisdiction. *Id.* at 1354.

Applying the collusion exception in *Frazer* to the facts of this case, the Complaint alleges numerous acts by FHFA clearly indicating that it was in collusion with Treasury, thus requiring the United States to answer for FHFA's conduct in its purported role as conservator. As detailed throughout the Complaint, FHFA's actions during the ongoing, apparently indefinite conservatorships were inextricably intertwined with Treasury's directives and goals. Both FHFA and OFHEO, its predecessor, directed that the Companies purchase and provide guarantees for subprime and other high risk securities and caused the Companies to suffer significant losses on certain portfolio holdings. Compl. ¶¶ 2, 4, 49-55. Then, after encouraging the Companies to purchase and guarantee bad mortgage debt after other financial institutions had left the market, the Government, including FHFA, ordered the Companies to warehouse additional bad debt from the books of other larger financial institutions. *Id.* ¶¶ 5, 14-16. At the same time, while purportedly being charged with the power to "take such action as may be . . . necessary to put the regulated entit[ies] in a sound and solvent condition[] and . . . appropriate to carry on the business of the regulated entit[ies] and conserve the assets and property of the regulated entit[ies]," 12 U.S.C. § 4617(b)(2)(D), the Government set strict limits on the fees the Companies could charge to guarantee more transactions. Compl. ¶¶ 16-17. It then forced the

Companies to substantially increase their loan loss reserves, thus unnecessarily reducing the value of their deferred tax assets. *Id.* ¶ 18.

Then, just a month after making repeated representations about the financial soundness of the Companies, FHFA, in consultation with Treasury, met in secret to decide to place the Companies into conservatorship and subsequently forced the Companies' Boards to "consent" to them. *Id.* ¶¶ 68-73; 81-90. And FHFA's actions as conservator have borne no relationship to the typical purpose of conservatorship: FHFA's first action as conservator was to enter into the Stock Agreements with Treasury, under which the Companies were forced to accept capital infusions they neither needed nor requested in exchange for giving the Government billions of dollars in preferred stock and warrants for 79.9% of the Companies' common stock. *Id.* ¶¶ 157-60. The Third Amendment thereafter required the Companies to "sweep" their entire positive net worth to the Treasury. *Id.* ¶¶ 161-62.

Given FHFA's conduct unrelated to its role as conservator and extensive collusion with Treasury, the Government cannot plausibly argue that the United States is not answerable for FHFA's actions. This Court should conclude that it has Tucker Act jurisdiction over FHFA.

2. HERA creates no limitation whatsoever on Plaintiffs' ability to seek damages based upon the imposition of the conservatorships.

a. HERA's 30-day challenge window applies only to requests for equitable relief.

Because Plaintiffs seek only damages for the Government's conduct, HERA does not preclude this Action. *See* Prayer for Relief, Compl. at 64. The Government mistakenly insists that Plaintiffs were required to pursue the remedy available under 12 U.S.C. § 4617(a)(5), which provides a 30-day window in which to seek to have a conservatorship set aside. This is nonsense.[18] Although no court appears to have opined on the scope of § 4617(a)(5), courts evaluating similar provisions have uniformly concluded that they are directed exclusively at limiting claims for ***declaratory and injunctive relief***, not claims for damages.

The only two cases on which the Government relies illustrate this point. In *Gibson v. Resolution Trust Corp.*, 51 F.3d 1016 (11th Cir. 1995), the plaintiff-appellants sought only declaratory and injunctive relief relating to the appointment of the Resolution Trust Corporation as conservator and receiver of a failed bank. *See id.* at 1020, 1026. The Eleventh Circuit rejected their claims, concluding that 12 U.S.C. § 1464(d)(2)(B), a provision analogous to § 4617(a)(5), precluded such a challenge to the conservatorship. *Id.* at 1026. Although *Gibson* did not expressly address whether such provisions also preclude claims for damages, the Government's second case, *Hindes v. FDIC*, 137 F.3d 148 (3d Cir. 1998), answered that question. In that case, shareholders of a bank placed into receivership sought both a declaration that the order closing the bank and placing it into receivership was unconstitutional and the rescission of the order. *See id.* at 165. Although the Third Circuit held that the requested relief was precluded by 12 U.S.C. § 1821(j),[19] *id.* at 166, it also expressly held (when evaluating a

[18] Similarly, the Government asserts that "plaintiffs identify nothing in Federal statute or precedent that would allow the Enterprises' shareholders to ignore the statutorily limited challenge window, wait years for the Enterprises to begin recovery, and then sue FHFA for a taking or illegal exaction." Mot. at 15-16. This argument is also incorrect. Simply put, neither R.C.F.C. 8 nor the Supreme Court's decisions in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), or *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), require a complaint to plead defenses to arguments that have not yet been raised. Rather, the Government bears the burden of demonstrating that the complaint does not "plausibly suggest[] a showing of entitlement to relief." *Acceptance Ins. Co., Inc. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) (internal citations and quotation marks omitted).

[19] Section 1821(j), entitled "Limitation on court action," is plainly broader than the 30-day window provision at § 1821(c)(7) (which is analogous to 12 U.S.C. §§ 1464(d)(2)(B) and 4617(a)(5)), and reads: "Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or receiver." Section 4617(f), also titled "Limitation on court action," contains virtually identical language: "Except as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a

related argument) that "[o]ur interpretation of section 1821(j) ***only denies appellants the declaratory and injunctive relief they now seek***, but does not deny them judicial review for their constitutional claims. ***Courts have uniformly held that the preclusion of section 1821(j) does not affect a damages claim***." *Id.* at 161 (canvassing circuit law) (emphasis added). This Court reached the same conclusion in *Ambase Corp. v. United States*, 61 Fed. Cl. 794 (2004), reasoning that "§ 1821(j) is not directed to the pursuit of money damages *ex post* as the result of FDIC actions. Instead, this section is intended to prevent injunctive relief against the FDIC's actions as receiver." *Id.* at 799 (footnote omitted). Because Plaintiffs do not seek declaratory or injunctive relief related to the imposition of the conservatorships, § 4617(a)(5) does not preclude their damages claims.[20]

b. HERA's 30-day window cannot be construed to preclude claims for damages based on Fifth Amendment violations.

"[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988). "We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.*; *see also Riggin v. Office of Senate Fair Emp't Practices*, 61 F.3d 1563, 1570 (Fed. Cir. 1995) ("there is a strong presumption that constitutional claims are judicially reviewable in some forum") (citing *Webster*, 486 U.S. at 603). Section 4617(a)(5) contains no language evincing such a "clear intent," and the Government cannot plausibly argue otherwise. Rather, like the equally

conservator or a receiver." Although the Government does not argue that § 4617(f) governs Plaintiffs' claims for damages, for the reasons discussed in this paragraph, § 4617(f) is also inapplicable here.

[20] This assertion is in no way undermined by the Plaintiffs' Prayer for Relief, which requests "all other relief as this Court may deem just and appropriate." Compl. at 64. Plaintiffs are aware that the Tucker Act does not provide this Court with jurisdiction to entertain claims for declaratory or injunctive relief. *See Brown v. United States*, 105 F.3d 621, 624 (Fed. Cir. 1997). Rather, Plaintiffs' Prayer merely reflects their understanding that the Court has discretion to fashion appropriate remedies.

restrictive provision at issue in *Hindes*, § 4617(a)(5) merely limits a plaintiff's ability to seek injunctive or declaratory relief related to the imposition of a conservatorship; it has no bearing on Plaintiffs' constitutional claims for damages.

B. Plaintiffs Have Standing to Bring These Claims

At all relevant times, Plaintiffs were preferred and common shareholders of the Companies. Compl. ¶¶ 21-23. When the conservatorships were imposed, shareholders collectively lost more than $41 billion (*id.* ¶ 191) and lost all their rights as shareholders (the right to vote, *id.* ¶¶ 35-37, 80, 186; subordination of the preferred shares to the Government's senior preferred stock, *id.* ¶ 154; the right to receive a portion of the Companies' assets in the event of dissolution or liquidation, *id.*; and the suspension of dividends, *id.* ¶ 80). As a result of the Government's actions, shareholders who have since sold their shares lost nearly all the value of those shares. For shareholders who have not sold, the Government's actions in imposing and conducting the conservatorships took away every indicia of ownership of Plaintiffs' shares. Whatever ultimately happens to the Companies, the interests of current shareholders have been permanently subordinated to the Government's whims.

Despite these facts, the Government suggests Plaintiffs do not have standing to bring claims to recover their losses because they are derivative in nature, indirect, or would be better pursued by the very Government agency that gave away the value of the Companies' shares to the Treasury in the first instance. Because the Government's standing arguments defy common sense and established authority, the Court should reject them.

1. HERA does not preclude Plaintiffs from suing the Government directly because FHFA is so inextricably intertwined with the Government that it cannot stand in the shoes of the Companies' shareholders.

The Government claims that Plaintiffs lack standing to bring a direct action for damages against the Government because under HERA, upon the imposition of a conservatorship, FHFA assumed the sole right to pursue this action.[21] In support of its argument, the Government relies on a series of derivative cases interpreting similar language in the Financial Institutions, Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(d)(2); 12 U.S.C. § 1787(b)(2).[22] However, even the Government's cases acknowledge that FHFA cannot stand in the shoes of shareholders when a conflict of interest prohibits it from doing so.[23]

For example, in *Delta Sav. Bank v. United States*, 265 F.3d 1017 (9th Cir. 2001), the plaintiffs alleged that Delta fell under federal scrutiny and eventually receivership because of a conspiracy between two employees at the Office of Thrift Supervision ("OTS") and an employee at Delta. The *Delta* court held that the plaintiffs had standing to pursue their claims as representatives of Delta and that the Resolution Trust Corporation ("RTC"), the receiver, was not the proper party to assert claims against OTS. The court stated the plaintiffs' position as follows:

> [P]laintiffs make a simple plea to logic: the FDIC should not have the final say on whether it is in Delta's best interests to sue the OTS. The OTS and the FDIC are interrelated agencies with overlapping personnel, structures, and responsibilities, and thus, according to plaintiffs, the FDIC faces a conflict of interests [*sic*] when it contemplates a suit against the OTS.

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[21] 12 U.S.C. § 4617(b)(2)(A)(i) (granting FHFA "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").

[22] *See Kellmer v. Raines*, 674 F.3d 848 (D.C. Cir. 2012) (action brought by shareholders against directors for accounting irregularities); *In re Federal Home Loan Mortg. Corp. Derivative Litig. ("Freddie Derivative Litig.")*, 643 F. Supp. 2d 790 (E.D. Va. 2009) (shareholder action against former board members for misrepresenting financial health of Freddie Mac); *Esther Sadowsky Testamentary Trust v. Syron*, 639 F. Supp. 2d 347 (S.D.N.Y. 2009) (shareholder action against former Freddie Mac officers and directors for misrepresentations).

[23] *Kellmer*, 674 F.3d at 850 ("all of these courts have found that, absent a manifest conflict of interest by the conservator not at issue here, the statutory language bars shareholder derivative claims") (citing cases); *Freddie Derivative Litig.*, 643 F. Supp. 2d at 797 ("There is authority for the principle that under FIRREA, if a federal receiver or conservator is subject to a manifest conflict of interest, shareholders can maintain a derivative suit despite otherwise being barred from doing so," but holding conflict of interest not relevant because the government was not being sued.).

Id. at 1021-22. The court agreed with plaintiffs' position, noting that "[t]hese are not two disengaged bodies on the opposite ends of an organizational chart; these are closely related entities." *Id.* at 1023. It observed that the director of the OTS was, by statute, a member of the Board of the FDIC and that, until the RTC ceased to exist, the Director of OTS was also a member of the Thrift Depositor Protection Oversight Board, which had oversight over the RTC. *Id.* It noted that an employee of OTS could simultaneously serve as an assistant to a member of the FDIC Board, and that the FDIC and OTS jointly issued regulations, reports, and conducted cooperative investigations. *Id.* Finally, it found that the OTS and RTC "even share a common genesis, both having been created in FIRREA" and that they played "complementary roles" in the process of bailing out failing thrifts. *Id.*[24]

The very nature of the conduct alleged in the Complaint supports that FHFA likewise has such a conflict of interest here. Namely, as described in Section IV(A)(1) above, FHFA imposed and has used the conservatorships to accomplish the Government's own objectives rather than preserving the Companies' assets with a view towards their eventual emergence from conservatorship. No understanding of conservatorship would include actions that *destroyed* the value of the Companies and siphoned their control and profits to the Government. Because FHFA has the same conflict of interest found in the *Delta Savings Bank* line of cases,[25] and because in enacting HERA Congress imported language from FIRREA that courts had uniformly

[24] While *Delta Savings Bank* was a derivative case, the Government itself says that "there is no basis for distinguishing direct or indirect suits," Mot. at 17, and "[t]he reasoning of [the Government's derivative cases] is directly applicable here, however, because HERA, in granting FHFA all shareholder rights, makes no distinction between individual and derivative rights sought be to asserted by shareholders." *Id.* at 19.

[25] *See also First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999) (holding FDIC had a conflict of interest to become plaintiff in derivative action because it "was asked to decide on behalf of the depository institution in receivership whether it should sue the federal government based upon a breach of contract, which, if proven, was caused by the FDIC itself").

interpreted as including the conflict of interest exception in that line of cases,[26] HERA does not prevent Plaintiffs from asserting direct claims.[27] At the motion to dismiss stage, Plaintiffs have sufficiently alleged that there is a conflict of interest.

2. Plaintiffs have standing to bring a direct action against the Government.

The Government next argues that Plaintiffs lack standing because "[c]ourts generally view the loss of share value as an injury to a corporation that may only be asserted by shareholders derivatively, rather than directly." Mot. at 19. While the Government's argument articulates a general rule, that rule does not apply here where there is no risk of double recovery and any recovery on behalf of the Companies would go to the Government. Moreover, the Government's rule has an exception where, as here, a shareholder seeks to recover the value of the loss of control.

a. Plaintiffs have standing because there is no risk of double recovery and any recovery by the Companies would improperly go to the Government.

In all of the cases cited by the Government, shareholders were attempting to recover lost profits that those courts held were owed to the corporation.[28] The reasoning behind those cases,

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[26] *See Lorilland v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of . . . a[] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change[.]").

[27] The more superficial facts of *Delta* are likewise present here. The Director of FHFA receives advice from the Federal Housing Finance Oversight Board, whose 4-member Board includes the Secretary of the Treasury. 12 U.S.C. §§ 4513a(a) and (c). FHFA and Treasury regularly create initiatives and author publications related to all aspects of housing finance. *See, e.g., Treasury, HUD and FHFA Extend Homeowner Assistance Programs Through 2015*, available at: https://www.nscha.org/print/28264 (last visited Dec. 16, 2013); *FHFA, Treasury Working on GSE Risk Sharing Model*, National Mortgage News (June 4, 2012); Treasury and FHFA, *Reforming America's Housing Finance Market, A Report to Congress* (Feb. 2011). Both before and during the conservatorships they have played complementary roles in both housing finance generally and also in regulating Fannie and Freddie. And though HERA provides that "[w]hen acting as conservator or receiver, the Agency shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the Agency," 12 U.S.C. § 4617(a)(7), that language does not mean FHFA had such independence in its actions leading to and in imposing the conservatorships or at any time thereafter.

to prevent a duplicative recovery, does not apply here. Indeed, it would be unjust to hold that Plaintiffs could only proceed derivatively, when any recovery from that action would go in substantial part to the Government, which is responsible for the actions alleged here in the first place. *See Starr Int'l Co. v. United States,* 106 Fed. Cl. at 65 ("If Starr were to prevail on its derivative claim only, any recovery would go to AIG, with the Government receiving an amount corresponding to its ownership percentage. Because the party that suffers the alleged harm should be the beneficiary of any recovery, the Government's continuing ownership interest in AIG provides further support for the view that Plaintiffs have standing to bring a direct claim.") (discussed in subsection b, below). None of the Government's cases had the same set of concerns. Even in the receivership cases the Government cites,[29] the receiver did not also become an actual or *de facto* majority shareholder,[30] and that certainly was not true in the Government's cases decided outside the receivership context.[31]

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[28] The Government's claim that Plaintiffs have "admitted" that the Companies are the injured entities because the Complaint alleges that the Government's actions were "made with respect to the Companies" cannot be taken seriously. *See* Mot. at 21 (citing Compl. ¶ 170). Plaintiffs have made no such admission.

[29] *See In re Ionosphere Clubs, Inc.*, 17 F.3d 600 (2d Cir. 1994) (affirming injunction against corporation's preferred shareholders from bringing fundamentally derivative claims against the corporation after estate had been resolved in Chapter 11 proceeding); *Hometown Fin., Inc. v. United States*, 56 Fed. Cl. 477, 486-87 (2003) (holding shareholders lacked standing to directly recover lost equity damages out of concern for potential double recovery); *Statesman Sav. Holding Corp. v. United States*, 41 Fed. Cl. 1, 15-16 (1998) (holding shareholders lacked standing to recover "expectancy damages" in the form of lost profits or the bank's value as a going concern); *Robo Wash, Inc. v. United States*, 223 Ct. Cl. 693, 696-97 (1980) (holding employees and shareholders lacked standing to sue for breach of duties owed to corporation).

[30] In addition, in receivership cases, courts have been concerned that permitting direct recovery for breach of contract claims would allow shareholders to circumvent priority of recovery in a receivership statute. *Hometown*, 56 Fed. Cl. at 487; *Statesman*, 41 Fed. Cl. at 17-18; *cf. Ionosphere Clubs,* 17 F.3d at 606 (bankruptcy). In this case, there is no such concern because Plaintiffs' claims here do not make them creditors of the Companies.

[31] *See Holland v. United States*, 59 Fed. Cl. 735, 739 (2004), *partial reconsideration granted on other grounds*, 63 Fed. Cl. 147 (2004) (holding shareholders could not recover "expectancy damages" or lost profits from thrift).

Another reason courts prohibit shareholders from directly recovering for wrongs done to the corporation is to avoid allowing certain shareholders recovery at the expense of other shareholders. Here, of course, Plaintiffs have brought claims on behalf of proposed classes of shareholders of preferred and common stock of both Companies. Therefore, no such concerns exist. Indeed, the fact that this case is a proposed class action allows former shareholders who have since sold their stock to recover for their losses just as current shareholders do.

b. The loss of the value of Plaintiffs' shares is directly attributable to the Government's dilution of Plaintiffs' shares.

Plaintiffs' claims are direct because Plaintiffs seek to recover the value of their shares lost when the Companies overpaid the Government. Following Delaware law,[32] the *Starr* court recognized a "species" of "corporate overpayment claims," "premised on the notion that the corporation, by issuing additional equity for insufficient consideration, made the complaining stockholder's stake less valuable," and held that such a claim was "both derivative and direct in character." 106 Fed. Cl. at 62 (citations omitted). A corporate overpayment claim exists where:

> (1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and
>
> (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders.

[32] *See Gatz v. Ponsoldt*, 925 A.2d 1265, 1278-79 (Del. 2007); *Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006) ("[T]he public (or minority) stockholders also have a separate, and direct, claim arising out of that same transaction. Because the shares representing the 'overpayment' embody both economic value and voting power, the end result of this type of transaction is an improper transfer – or expropriation – of economic value and voting power from the public shareholders to the majority or controlling stockholder."); *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 330 (Del. 1993) ("Although it is true that claims of waste are derivative, a claim of stock dilution and a corresponding reduction in a stockholder's voting power is an individual claim."); *Feldman v. Cutaia*, 956 A.2d 644 (Del. Ch. 2007); *see also* FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5924 ("A claim of stock dilution and a corresponding reduction in a stockholder's voting power is an individual claim.").

Id. (citing *Rossette*, 906 A.2d at 100). The *Starr* court held that the two key aspects of such a claim existed where the corporation was forced to overpay for an asset and, by means of that overpayment, minority shareholders lost a portion of the economic value and voting power of their stock interest. *Id.* at 63.

In *Starr*, the plaintiff shareholder alleged that the corporation overpaid for an $85 billion loan in exchange for giving the Government a 79.9% stake in the corporation, which caused the plaintiff shareholder to lose a portion of the economic value and voting power of its outstanding shares. The Court held that, though there were factual disputes about when the alleged dilution occurred, it was "persuaded that the facts alleged here are sufficiently analogous to those in *Gatz* and *Rossette* to support Starr's right to maintain a direct claim for the taking of its equity and voting interests," *id.* at 65, because "the Government had an obligation not to appropriate the minority shareholders' property interests – irrespective of whether the Government was a stockholder when the purported dilution occurred." *Id.* (footnote omitted).

Here, the Government, which had effective control of Fannie Mae and Freddie Mac through FHFA, caused the Companies to issue $1 billion in senior preferred stock and additional senior preferred stock equal to the amount of any credit the Treasury extended to the Companies, as well as warrants to acquire 79.9% of each company's common stock for $8,000 for each Company, which resulted in an increase in the percentage of outstanding shares owned by Treasury. *See* Compl. ¶ 154.[33] And although the Government does not technically "own" the shares of common stock for which it has warrants, at the time of the *Starr* decision the Government likewise had not exercised those warrants. *See Starr,* 106 Fed. Cl. at 80. Moreover,

[33] *See also* N. Eric Weiss, Congressional Research Service, *Fannie Mae's and Freddie Mac's Financial Status: Frequently Asked Questions*, at 13. ("Because the appeal of the preferred stock is centered on the security of its dividend payments, the long-run value of the GSEs' preferred stock has been reduced. The value of common stock has been reduced because of the termination of their dividends and increased uncertainty over the future long-run viability of the enterprises.").

unlike with AIG, here there is no need for the Government to exercise the warrants because, by virtue of the conservatorships, the Government already has control of the Companies. And control is the relevant fact. As the Supreme Court of Delaware explained in *Rossette*:

> A rule that focuses on the degree or the extent of the expropriation, and requires that the expropriation attain a certain level before the minority stockholders may seek a judicial remedy directly, denigrates the gravity of the fiduciary breach and condones overreaching by fiduciaries – at least in cases where the resulting harm to the minority falls below the prescribed threshold for "materiality."

906 A.2d at 102.

Even though these facts are not identical to those in *Rossette* or *Starr*, the principles articulated in those cases and their progeny apply equally here.[34] For example, in *Rhodes v. Silkroad Equity, LLC*, 2007 WL 2058736 (Del. Ch. July 11, 2007), a firm's original shareholders who held 20% of the company alleged that the firm that owned 80% of the company initiated a scheme to depress the value of the firm so that they could later acquire it at a bargain. The Delaware Court of Chancery noted that these facts did not "fit snuggly within [the] 'transactional paradigm'" articulated in *Rossette*. *Id.* at *5. However, the court held that it was not restricted to "the abstract structuring of the transaction or course of conduct under scrutiny," but instead "must [be] focus[ed] on the 'true substantive effect' of the challenged transaction." *Id.* (citations omitted). Once focused on that "true substantive effect," it found that the defendants' actions had clearly harmed the original shareholders in a "substantially different" way than the company itself was harmed. *Id.*; *see also Gatz*, 925 A.2d at 1280-81 (finding it irrelevant that voting and

[34] *Starr* was decided under Delaware law because AIG is incorporated there. Fannie and Freddie's principal places of business are, respectively, Washington, D.C. and Virginia. Neither one of those jurisdictions has addressed whether a corporate overpayment claim is direct or derivative. However, both jurisdictions look to Delaware law on matters of corporate law. *See Jones & Assocs., Inc. v. D.C.*, 797 F. Supp. 2d 129, 135 (D.D.C. 2011); *U.S. Inspect, Inc. v. McGreevy*, 2000 WL 33232337, *4 (Va. Cir. Ct. Nov. 27, 2000) (looking to Delaware law for guidance in absence of guidance from Virginia Supreme Court).

economic power of shares was not maintained by controlling shareholder but instead was transferred to a third party because "[i]t is the very nature of equity to look beyond form to the substance of an arrangement," and "the fiduciary exercise[d] its stock control to expropriate, for its benefit, economic value and voting power from the public shareholders").

C. Plaintiffs Have Adequately Alleged Violations of the Takings Clause

Plaintiffs' Complaint more than adequately pleads takings claims based on the Government's conduct. At the height of a financial crisis, and after years of promising that shareholders' investments were secure and, in some cases, inducing the share purchases in the first instance, the Government capitalized on several opportunities to accomplish its public policy goals by seizing the Companies and using them as it saw fit to support the nation's economy, all to the detriment of the Companies' shareholders. Accordingly, Plaintiffs were – and remain – injured by the Government's conduct. The Government effected a taking of Plaintiffs' property to accomplish its own goals. The Fifth Amendment requires that the Government compensate Plaintiffs accordingly.

1. Plaintiffs' claims are ripe for judicial review.

"As with other justiciability doctrines, the Court of Federal Claims must address ripeness as a 'threshold consideration' before addressing the merits." *Brookfield Relocation, Inc. v. United States*, 113 Fed. Cl. 74, 79 (2013) (internal quotation marks and citation omitted). Whether a case is ripe for judicial review hinges on (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Judicial review is appropriate when "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-49. "Therefore, under the ripeness doctrine, this court is obligated to hear this case if the court determines that these plaintiffs will suffer real consequences if the court declines to consider their claims." *Hage v. United States*, 35 Fed. Cl. 147, 162 (1996). Plaintiffs' claims are ripe because they have plainly suffered concrete injuries from the Government's conduct and because, unless their claims are entertained now, Plaintiffs may never be able to obtain judicial review of the Government's conduct.

a. Plaintiffs' injuries are concrete.

An injury is sufficiently concrete for ripeness purposes when (1) the Government's action is "final," i.e., once a formal act has occurred, and (2) the action imposes legal consequences. *See Brookfield*, 113 Fed. Cl. at 79. The finality of, and consequences flowing from, the Government's conduct are made plain in the Complaint and throughout this Brief, and need not be repeated here. In short, damage has been done; nothing more is required for this Court to entertain Plaintiffs' claims.

Bizarrely, the Government chides Plaintiffs both for *waiting* to file suit, *see* Mot. at 15, and for filing *too soon*. *See id.* at 31-35. "Courts must be sensitive to the constitutional and prudential concerns reflected in the ripeness doctrine, while at the same time being aware that purposeful bureaucratic delay and obfuscation is not a valid basis for denial of judicial relief." *Bayou Des Familles Dev. Corp. v. United States*, 130 F.3d 1034, 1038 (Fed. Cir. 1997). As explained in Section IV(A)(2) above, there is nothing to the Government's delay argument: HERA does not affect Plaintiffs' claims for damages, and Plaintiffs' Complaint was filed well within the six-year limitations period. *See* 28 U.S.C. § 2501. As to the second point, the Government contends that Plaintiffs' injuries are not yet ripe for judicial review because anything could still be done with the Companies while they remain in conservatorship.[35] But this argument inappropriately conflates the magnitude of Plaintiffs' injuries with the existence

[35] Certainly, the Government could not reasonably contend that, with regard to any class members who have since disposed of their shares, such class members' injuries are speculative.

thereof and, as explained further below, highlights the urgent need for judicial review. The cases relied upon by the Government reflect this confusion and actually *support* the conclusion that Plaintiffs' claims are ripe.

For example, in *Commonwealth Edison Co. v. United States*, 56 Fed. Cl. 652 (2003), the Government sought summary judgment on the question whether the Department of Energy ("DOE") was obligated under the terms of a "Standard Contract" between DOE and a utility to accept certain nuclear waste for disposal. *See id.* at 655. The court denied the motion on ripeness grounds, reasoning that the plaintiff had not raised a claim for damages related to DOE's failure to accept such waste, and indeed had never even asked DOE to do so. *See id.* at 658. Moreover, the court noted that the terms of the Standard Contract required DOE to promulgate specific criteria used to classify potentially acceptable waste, but DOE had not yet done so. *See id.* Accordingly, the underlying question whether DOE would even be obligated to accept Commonwealth Edison's waste could not be addressed because "the issue is contingent upon future events that may not occur as anticipated." *Id.* at 658-59. *Commonwealth Edison* is thus distinguishable because Plaintiffs *have* alleged injuries and damages from the Government's conduct that are not contingent upon future events.

The holding in another one of the Government's cases, *Maritrans Inc. v. United States*, 342 F.3d 1344 (Fed. Cir. 2003), further illustrates that Plaintiffs' claims are ripe. In that case, Maritrans argued that it had suffered a taking in light of a provision of the Oil Pollution Act of 1990, which required the retirement of oil transport vessels that did not conform to the statute's double-hull requirement. *See id.* at 1349. The Federal Circuit held that Maritrans' claim with respect to several vessels was ripe because the vessels were subject to the retirement provision from the time of the statute's enactment and the retirement dates could be discerned from a schedule provided in the statute. *See id.* at 1359. Thus, "the permissible uses of the vessels after each retirement date are known to a reasonable degree of certainty," *id.*, and, accordingly, the value of the vessels was impacted upon enactment of the statute. The harm suffered by Plaintiffs is far less attenuated than that alleged in *Maritrans*, as Plaintiffs' injuries stemmed from contemporaneous government conduct, not the mere threat of government action.

Importantly, the *Maritrans* court was not concerned with the purely speculative conduct of the sort the Government urges this Court to consider – namely, the notion that the shareholders' futures are uncertain while the Companies remain in Government hands. Indeed, Congress could have amended or even rescinded the vessel retirement provisions at issue in *Maritrans*, just as FHFA and Treasury might take some future action with respect to the Companies that benefits or, more likely, harms their shareholders. But that does not eliminate the fact of an injury in the first instance; it is merely a question of *degree*.[36]

b. The indeterminate nature of the conservatorship further underscores the need for judicial review.

The substantial delay that Plaintiffs have endured, and potentially infinite delay they may continue to endure, is a sufficiently severe hardship to establish ripeness. *See White & Case LLP v. United States*, 67 Fed. Cl. 164, 174 (2005). In *White & Case*, a law firm sought an informant award for contributing information to the then-U.S. Customs Service regarding an illegal car part importation scheme. *See id.* at 165-68. The Government argued that because the Customs investigation was ongoing and because it had made assessments and obtained liquidated damages with regard to only 11 of the 98 instances in which White & Case had provided relevant

[36] *Cf. Underland v. Alter*, 2012 WL 2912330, at *2 (E.D. Pa. July 16, 2012), *reconsideration denied*, 2012 WL 4108998 (E.D. Pa. Sept. 18, 2012) ("The Advanta Defendants also argue that the controversy is not ripe for judicial review, as Plaintiffs may recover all of their alleged losses through Advanta's bankruptcy process. . . . Here, the Court finds that the parties are in an adversarial posture, the case involves the analysis of past Registration Statements, which will allow the Court to decide liability conclusively, and Plaintiffs have alleged a genuine injury. While their recovery from Advanta through the bankruptcy process might ultimately affect the Court's calculation of damages, the pending bankruptcy reorganization does not affect the ripeness of the controversy.").

information, White & Case had failed to wait for a final agency determination on its claim for an informant award, and therefore its claim for damages was unripe. *See id.* at 167-68. In evaluating the hardship to White & Case of withholding review, the court reasoned that the length of time the plaintiff had waited for an administrative decision – five and one-half years – and the indefinite nature of the administrative review process mandated the exercise of jurisdiction. *See id.* at 174. Here, more than five years have passed since the conservatorships were imposed, and the Government has given every indication that Plaintiffs may never be made whole for their injuries. As the Government concedes, "whether and when Fannie Mae and/or Freddie Mac will emerge from conservatorship is unknown . . . ." Mot. at 35.[37]

Moreover, this Court's refusal to review Plaintiffs' claims now would likely result in at least some – if not all – of those claims becoming time-barred, a substantial hardship in and of itself. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 111 (2d Cir. 2013) ("dismissing the City's claims as unripe would work a 'palpable and considerable hardship,'" because dismissal would result in a subsequent action being untimely).[38] For instance, Plaintiffs' claims with respect to the imposition of the conservatorships accrued in September 2008; those claims will no longer be actionable as of September 2014. Yet the Government would require that "the conservatorships . . . end before [any of] the plaintiffs'

[37] The indeterminacy of the conservatorships is further underscored by the drawn out but so far fruitless debate in Washington over the Companies' futures. *See, e.g.*, Nick Timiraos & Alan Zibel, *House Republicans Plan to Wind Down Fannie, Freddie*, *The Wall Street Journal*, July 12, 2013, http://online.wsj.com/news/articles/SB10001424127887324425204578599732524463590 ("Republicans promised to abolish Fannie and Freddie and drastically reduce the government's role in the mortgage market when they took control of the House in 2011, but so far they have little to show for those aims. President Barack Obama also hasn't made any serious effort to advance an overhaul. His administration issued a 'white paper' two years ago that called for a 'wind down' of Fannie and Freddie, but it hasn't advanced any detailed transition steps."), Ex. B to Berman Decl.

[38] *See also Hage*, 35 Fed. Cl. at 163 ("The court has an affirmative obligation to hear these claims," notwithstanding parallel administrative proceedings, because the parallel "adjudication began fifteen years ago and may take decades to complete. Such a delay would make a mockery of the Constitution's guarantee of both due process and just compensation.").

claims can ripen." Mot. at 35. It would cause undue hardship to Plaintiffs if they were forced to wait for what increasingly appears to be an unlikely event, particularly as long as the Companies remain profitable and continue to contribute to the Government's coffers, only to ultimately be put out of court. Thus, the hardship analysis weighs in favor of entertaining Plaintiffs' claims.

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

It is well settled that the existence of a cognizable property interest is determined by "looking to existing rules or understandings and background principles derived from an independent source such as state, federal, or common law." *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1376 (Fed. Cir. 2004) (internal quotation marks and citations omitted). This Court has recognized that a company's shareholders can have a cognizable property interest in the equity and rights associated with their shares. *See Starr*, 106 Fed. Cl. at 71-75. Plaintiffs' property interests are no different than those in *Starr*. The relevant question, then, is whether, prior to the conservatorships, Plaintiffs' equity and other rights associated with their shares were protected, or whether they "simply were enjoying a use of their property that the government chose not to disturb." *Am. Pelagic*, 379 F.3d at 1377. The *laissez faire* framework under which the Companies operated prior to the imposition of the conservatorships plainly reflects the fact that the Companies' shareholders retained protected interests in their shares.

As alleged in the Complaint, Fannie and Freddie received little in the way of safety and soundness oversight (insofar as such oversight would relate to shareholders' interests) from the time that their shares began trading publicly in 1968 and 1984, respectively, and, unlike in the banking industry, where the FDIC directly insures the deposits on account at banks, the Government never assumed liability for the Companies' business decisions. Although Congress first approved the Government's conservatorship authority over the Companies in 1992, investors in Fannie and Freddie were given every indication that the authority conferred by the Safety and Soundness Act was toothless: as reflected in later statements by members of Congress, this statutory scheme was far weaker than that governing "the banking system in our country." Compl. ¶ 61. And despite serious mismanagement and accounting scandals at both Fannie and Freddie that resulted in each of the Companies *restating their financial reports for several years*, the Government *never* found a reason to exercise its conservatorship authority. *See id.* ¶¶ 47-48.

Even the enactment of HERA, which ostensibly imposed a regulatory structure somewhat more akin to the one governing the banking system as compared to the former regulatory structure, did nothing to change the fact that Plaintiffs' rights were protected. This is because government officials *repeatedly* emphasized that the Companies were healthy and that the authority conferred by HERA – which included new receivership authority and expanded conservatorship authority – ***would not be used***. This view was pressed by officials at the Companies, *id.* ¶¶ 62-64, the members of Congress who worked to pass HERA, *id.* ¶¶ 58-61, Federal Reserve Chairman Bernanke, *id.* ¶ 63, and perhaps most importantly, the Companies' *chief regulators* – Secretary Paulson and the OFHEO director. *Id.* ¶¶ 57, 62-63, 65-66. And all the while, the Government promoted Fannie Mae and Freddie Mac securities as some of the safest, best protected investments on the market. *Id.* ¶ 19. Thus, by its words and actions, the Government established that the terms of the regulatory framework applicable to Fannie and Freddie did *nothing* to limit the rights of the Companies' shareholders.

a. The existence of a regulatory framework applicable to the Companies does not vitiate Plaintiffs' property interests.

The Government leaps to the conclusion that the mere existence of a regulatory framework is sufficient to vitiate any property interests that would otherwise inhere as a result of Plaintiffs' stock ownership. But this is easily rebutted: if the Government's ability to exercise *some* control over a company was sufficient to eliminate a cognizable property interest, there could never be a basis for a regulatory taking claim. Moreover, this oversimplification is clearly not the law. As the Federal Circuit held in *Cienega Gardens v. United States*, 331 F.3d 1319, 1350 (Fed. Cir. 2003), distinguishing the holding in *Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1995), the conclusion that an industry is "highly regulated" is not self-evident from the mere existence of a regulatory framework:

> *Branch* concerned the banking industry, and the power of the government to allocate the burdens of bank failures in a way that protects the public, regardless of the principle of limited corporate liability. All this shows is that ***at the extremes, where history shows consistent, intrusive and changing government regulation of all facets of all transactions even arguably within a field, for example, banking, the effect of being in so highly a regulated field is clear***. We have no evidence that the housing programs involved here were part of such an extreme field and therefore ***cannot . . . rely solely on the fact of regulation, but must probe into its content and other considerations***.

331 F.3d at 1350-51 (emphasis added and internal citations omitted).[39]

Looking solely to the conservatorship provisions in the Safety and Soundness Act and HERA, the Government analogizes those provisions to similarly-worded statutes applicable to the highly regulated banking industry, concluding that, as with investors in banks, Fannie Mae and Freddie Mac shareholders lack protected property interests. The problem with this argument is twofold. First, it is inapt to compare the regulatory framework applicable to the Companies to

[39] *See also id.* at 1350 ("Nor is the fact that the industry is regulated dispositive. A business that operates in a heavily-regulated industry should reasonably expect certain types of regulatory changes that may affect the value of its investments. But that does not mean that *all* regulatory changes are reasonably foreseeable or that regulated businesses can have *no* reasonable investment-backed expectations whatsoever." (emphasis in original)). Tellingly, the *Cienega Gardens* court also held that "the field of private mortgage lending," 331 F.3d at 1351 n.45, one involving what the Government might also broadly characterize as "financial institutions," "is one which cannot be considered highly regulated." *Id.*

that of the banking industry.[40] "[It] is well known that '[b]anking is one of the longest regulated and most closely supervised of public callings.'" *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992) (quoting *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947)). In contrast to the Government's historically hands-off approach with Fannie and Freddie, the regulatory framework applicable to banks historically limits the rights of banks' investors.[41]

The second problem with the Government's argument is that it fails to account for the *ways* in which it interfered with Plaintiffs' rights. The cases cited by the Government, including *Golden Pacific* and *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849 (Fed. Cir. 2009), merely stand for the proposition that a plaintiff's rights are not infringed for purposes of the Takings Clause when the Government, acting pursuant to a regulatory framework, engages in conduct that is entirely consistent with that framework. For instance, in *Golden Pacific*, the court reasoned that a defunct bank's majority shareholder lacked a cognizable property interest affected by the bank's seizure because, given the regulatory framework and the actual insolvency of the bank, the shareholder's "expectations could only have been that the FDIC would exert control over the Bank's assets if the Comptroller became satisfied that the Bank was insolvent and [consistent with the governing statute] chose to place it in receivership." 15 F.3d at 1074.

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[40] HERA's use of the term "regulated entities," in contrast to the Safety and Soundness Act's references to "enterprises," detracts nothing from Plaintiffs' argument. That change merely reflects the reorganization of provisions within the statute to encompass both the Companies and the Federal Home Loan Banks. *Compare* 12 U.S.C. § 4617(a) (West 1992) applying to "enterprises"), *with* 12 U.S.C. § 4617(a) (West 2013) (applying to "regulated entities," defined at 12 U.S.C. § 4502(20) as Fannie Mae, Freddie Mac, and the Federal Home Loan Banks).

[41] *See, e.g.*, *Branch*, 69 F.3d at 1575 ("The seizure and closure of the bank, once the bank became insolvent, did not constitute a taking. It is well established that it is not a taking for the government to close an insolvent bank and appoint a receiver to take control of the bank's assets. . . . Banking is a highly regulated industry, and an individual engaged in that industry is deemed to understand that if his bank becomes insolvent or is operated in violation of laws or regulations, the federal government may 'take possession of its premises and holdings,' . . . and no compensation for that governmental action will be due." (internal citations omitted)); *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1073-74 (Fed. Cir. 1994) ("Given the highly regulated nature of the banking industry, . . . Golden Pacific could not have had a historically rooted expectation of compensation for the Comptroller's actions[.]").

Likewise, in *Acceptance*, the court held that the plaintiff lacked a cognizable interest in selling its crop insurance policies to a third party because, under the applicable regulatory framework, *any* sale of such policies was subject to approval by the RMA, a governmental body. *See* 583 F.3d at 857-58. This conclusion was not altered by the RMA's previous approval of similar transactions, as the RMA could permissibly conclude in that instance that the sale would be "detrimental" to the relevant public interests. *See id.* at 858.

In contrast, the various Government actions challenged by Plaintiffs went far beyond anything authorized in HERA. Instead, FHFA, acting as conservator and regulator, and Treasury, acting as loan shark, took the unprecedented and unforeseeable move of placing the Companies into conservatorship, saddling them with largely unnecessary debt, using them parasitically to protect unrelated financial institutions, and then steering all of the Companies' profits to the Government's coffers *indefinitely* and without regard for the debts imposed upon the Companies by the Government itself – all at the expense of the Companies' shareholders. Each of these acts, which were part of a broad governmental scheme, had nothing to do with the statutorily-defined purpose of a conservatorship – to preserve and conserve the assets of an allegedly troubled institution – but were rather orchestrated to serve a wholly unrelated purpose, namely creating stability in the greater economy and providing Treasury with needed funds.

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

To the extent that the Government's conduct has effected a partial regulatory taking, in light of the factors set forth in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), Plaintiffs have alleged facts that plausibly give rise to a takings claim.[42] At the heart of

[42] The Government's blustering that Plaintiffs cannot establish a physical taking is plainly inconsistent with the Complaint. Nor is there any merit to the Government's argument that a regulatory "total wipeout" taking claim, as articulated in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014-19 (1992), is limited only to claims involving real property. Although *Lucas* and *Tahoe-Sierra Preservation*

the Government's challenge to Plaintiffs' takings claims is the simplistic notion that Fannie and Freddie are indistinguishable from run-of-the-mill banks and, in turn, the Companies' shareholders are indistinguishable from banks' shareholders. However, the Complaint's allegations describing in exhaustive detail the regulatory framework applicable to the Companies, Compl. ¶¶ 19, 42, 47-48, 56-66, 175-79, render the banking comparison inapt.

Commenting on the *Penn Central* framework in *Colonial Chevrolet Co., Inc. v. United States*, 103 Fed. Cl. 570 (2012), Judge Hodges emphasized that "[n]either the Supreme Court nor the Court of Appeals for the Federal Circuit has limited takings cases to strict or formulaic theories at the pleading stage." *Id.* at 575. Instead, the existence of a taking "'depends largely upon the particular circumstances'" of the case and there is no "'set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government.'" *Id.* (quoting *Penn Central*, 438 U.S. at 123-24). Accordingly, "reference to isolated facts in other takings cases provides limited guidance." *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1282 (Fed. Cir. 2009). For the reasons discussed below, Plaintiffs have adequately pleaded takings claims, and the novelty of the scenario described in Plaintiffs'

Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002), dealt only with land, neither case expressly held that interests unrelated to real property could not be the subject of a categorical taking. And the Federal Circuit has rejected the Government's argument before. *See, e.g.*, *Maritrans*, 342 F.3d at 1352-55 (rejecting Government's argument that "the concept of a categorical taking cannot be extended to regulations that restrict the use of personal property," but concluding that no categorical taking occurred). Finally, neither the Eighth Circuit's holding in *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430 (8th Cir. 2007), nor *Branch*, 69 F.3d 1571, support the Government's position. *Hawkeye*'s holding that *Lucas* applies only to real property, 486 F.3d at 441, rests on dubious reasoning: in reaching this conclusion, the *Hawkeye* court noted that *Lucas* and *Tahoe-Sierra* dealt only with land, and then perfunctorily extended the holding of *Parkridge Investors Ltd. P'ship v. Farmers Home Admin.*, 13 F.3d 1192 (8th Cir. 1994). But the *Parkridge Investors* court rejected a categorical taking claim on the basis that the government conduct at issue did not deprive the plaintiff of all economic use, *not* on the basis that a contractual property right, as opposed to land, was involved. *See id.* at 1199. Further, *Branch* involved a taking claim based on a monetary assessment, and is therefore distinguishable from Plaintiffs' claims. 69 F.3d at 1576-77. Accordingly, insofar as any facts asserted in the Complaint support the conclusion that the Government's conduct effected a "total wipeout," Plaintiffs may invoke *Lucas* as a basis for recovery.

Complaint begs judicial review. The Government's attempt to construe its actions here as analogous to those often exercised within the narrow context of the banking industry is inappropriate, and its motion should be denied.

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

As discussed in Section IV(C)(2), Plaintiffs have pleaded concrete, substantial economic harm resulting from the Government's conduct amounting to ***at least $41 billion***. *See also* Compl. ¶ 191. The Government cannot seriously contend that this amount is insufficient to state a *Penn Central* claim. *See generally Starr*, 106 Fed. Cl. 50 (no challenge to $23 billion economic impact allegation).

Rather, the Government argues that because the extent of Plaintiffs' damages is not, in its view, precisely calculable, Plaintiffs cannot "identify any actual economic impact . . . until the conservatorships end." Mot. at 30. But as explained in Section IV(C)(1) above, the Government's appeal to the ripeness doctrine is misplaced, and any questions regarding the magnitude of Plaintiffs' injuries are not appropriately resolved on a motion to dismiss.

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

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

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

Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (quoting *Commonwealth Edison*, 271 F.3d at 1348). As discussed in Section IV(C)(2) above, Fannie and Freddie's shareholders reasonably expected that the Government would not infringe upon their interests because the Companies operated under a unique, permissive regulatory structure and because Government officials expressly represented that the Companies would not be interfered with, especially in light of their stated belief that the Companies were financially secure.

Ignoring these facts, and relying solely on cases arising in the banking context, the Government argues that Plaintiffs' expectations were unreasonable based on the already debunked notion that the Companies were generic "financial institutions" participating in a "highly regulated industry." But the consistency and intensity of regulatory oversight in the *banking* context is starkly different than the regulatory framework applicable to the *Companies*, and accordingly, not all regulated industries are "*highly* regulated industries."[43]

As this Court's predecessor explained in *Am. Continental Corp. v. United States*, 22 Cl. Ct. 692, 695-96 (1991): "Federally insured banking is a highly regulated industry. In its effort to promote the strong public interest in a sound banking system, the federal government regulates many aspects of the business of federally insured savings and loan associations." Against this historical backdrop, the *American Continental* court held that taking claims were unavailable even with respect to property acquired by the bank at issue *before* the law authorized the bank to be placed in conservatorship or receivership, given that subsequent authority. *See id.* at 698. The court reasoned that the *American Continental* plaintiffs lacked reasonable investment-backed expectations because they "were on reasonable notice as to what the 'rules of the game' were": the statutory framework governing banks was specific, well-understood, and clearly designed to protect the interests of the banks at issue, their depositors, and the taxpayers who would be legally obligated to pay in the event of a bank's failure. *Id.* Moreover, the

[43] Moreover, even participation in a "highly regulated industry" does not *per se* preclude a conclusion that the reasonable investment-backed expectations factor weighs in favor of a plaintiff. *See, e.g.*, *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1191 (Fed. Cir. 2004) (approving trial court holding that new regulations applicable to company in highly regulated poultry and egg industry was not merely an extension of previous comparable regulations, but a wholesale change based on a new scientific understanding of disease transmission).

regulatory process through which the Government took control of the bank was transparent, finite, and returned all remaining proceeds to the shareholders. *See id.*

The Government's argument must fail here because, as discussed above in Section IV(C)(2), the Government did not have any direct liability associated with the Companies, as it does in the banking context, where the FDIC directly insures the deposits on account at federally insured banks, and it had never exercised its authority to place the Companies into conservatorship, unlike the banking industry, where this has happened hundreds, if not thousands, of times. In fact, the Government had repeatedly assured investors that it would not place the Companies into conservatorship. Certainly, investors could not have expected that the Government would do so for reasons tied to the Government's own public policy objectives, rather than for the reasons contemplated by HERA.

It is no answer for the Government to contend, as it likely will, that the Companies' boards of directors consented to the conservatorship, and that shareholders could not reasonably expect that FHFA would nevertheless stand aside. Even assuming that the boards validly consented to the conservatorship, and the imposition of the conservatorship was therefore authorized by HERA, the Complaint makes clear that, whatever troubles the Companies may have faced, they were not in such dire straits that the imposition of a conservatorship could be expected. Compl. ¶¶ 4, 12, 93-112, 119-36, 141-51. This is especially the case where, as here, the conservator, in collusion with Treasury, has used the conservatorship vehicle to shore up the foundering economy, not to "conserve and protect" the Companies. *Id.* ¶¶ 5-6, 13, 17-18, 74-78, 182-83. Taking these facts as true, the Court must conclude that Plaintiffs reasonably expected to be able to exclude the Government from interfering with their property interests; this was the very promise made by the Government.

Nor can the Government legitimately argue that the statutory language is the only factor relevant to the reasonable investment-backed expectations question. Indeed, courts have held that reasonable investment-backed expectations are limited not only by the existing regulatory framework, but also by *possible future regulatory regimes*. *See, e.g.*, *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." (internal quotation marks and citation omitted)); *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d at 959 ("Given this long history of government regulation of savings and loan associations, CHS and Saratoga were certainly on notice that Saratoga might be subjected to different regulatory burdens over time.").[44] It would defy logic to conclude that investors must reasonably take into account as ephemeral a concept as *what might be*, but that they cannot reasonably rely on *what is*, as expressed by those government officials charged with creating and implementing any such regulatory structure.

c. The Government was not rescuing the Companies; at most it was cleaning up its own mess.

Penn Central's "character of the governmental action" factor does not look to the wisdom of the Government's conduct, but rather to "'the actual burden imposed on property rights, or how that burden is allocated.'" *Rose Acre Farms*, 559 F.3d at 1278 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005)). The Government's conduct cannot be viewed as a rescue for two reasons. First, the Complaint pleads in detail that the Companies were not, in fact, in an "unsafe and unsound" financial condition. Compl. ¶¶ 4, 12, 93-112, 119-36, 141-51.

[44] Notably, however, the Federal Circuit clarified in *Cienega Gardens* that possible subsequent changes to a legislative scheme are relevant to the reasonableness of investment-backed expectations only insofar as those changes "clarif[y] the originally-intended meaning of an existing statute . . . ." 331 F.3d at 1351. "[L]egislative amendments that fundamentally *changed* the scheme legislated previously" do not count. *Id.* (emphasis in original).

Rather, although the Government ignores it, they were taken into conservatorship and manipulated to accomplish the Government's goal of stabilizing the economy; the Companies' shareholders alone were forced to bear this burden.[45] *Id.* ¶¶ 5-6, 13, 17-18, 74-78, 182-83.

Second, assuming *arguendo* that a rescue was required because of instability caused by the Companies' investments in the subprime and Alt-A mortgage markets, those investments were entirely attributable to the Government. When the Government itself creates the troubles within a private company and then must step in to remedy the situation, the Government – not the company's shareholders – must bear that burden. *See Starr*, 106 Fed. Cl. at 79-80. In *Starr*, the plaintiff alleged that AIG's board of directors was coerced by the Government into accepting the terms of a usurious loan agreement. *See id.* at 78. The Government countered that even if the board was coerced, the loan agreement was offered to AIG with the intention of bailing out the company from the consequences of its own business risks; such a rescue, in the Government's view, precluded a compensable taking. *See id.* at 79. This Court rejected the Government's argument, reasoning that "the Government's position . . . is not the position

[45] The Government argues the Complaint must be dismissed because it contains allegations that the Government "violated statutes or otherwise overstepped its authority." Mot. at 25. The Government improperly conflates actions that are unlawful with actions that are unauthorized. The Complaint clearly alleges the former, and it is well-established that "a court's conclusion that government agents acted unlawfully does not defeat a Tucker Act takings claim if the elements of a taking are otherwise satisfied." *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1363 (Fed. Cir. 1998). For this reason, "the Court of Federal Claims has held specifically that a plaintiff may advance a takings claim and an unlawful exaction claim concurrently." *Starr Int'l Co., Inc. v. United States*, 106 Fed. Cl. at 70 (citing *Figueroa v. United States*, 57 Fed. Cl. 488, 496 (2003)); *see also Rith Energy v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001) ("[A]n uncompensated taking and an unlawful government action constitute 'two separate wrongs [that] give rise to two separate causes of action' . . . . To proceed on the second cause of action does not require that the plaintiff first litigate, and lose, on the first.").

In the same vein, Defendant takes issue with Plaintiffs' allegations that the Government engaged in coercion, misrepresentation, an abuse of power, and accounting manipulation, arguing that such claims are not actionable in this Court. Mot. at 16-17. However, Plaintiffs do not rely on these allegations as freestanding torts; nor could they. *See Keene Corp. v. United States*, 508 U.S. 200, 214 (1993) ("tort cases are outside the jurisdiction of the Court of Federal Claims"). Rather, these ancillary tort allegations are pleaded in support of Plaintiffs' claim that the Government's conduct exceeded its authority, thus amounting to an illegal exaction. The Government raised this same argument in *Starr*, and this Court squarely rejected it. *See* 106 Fed. Cl. at 77 n.21.

alleged in Starr's Complaint. . . . Starr sets forth a very different account of the causes of its financial situation, placing significant blame on specific government actions and inaction . . . ." *Id.* Accordingly, the court denied the motion to dismiss the takings claim on the ground that the Government's conduct constituted a rescue. *See id.* at 79-80. As in *Starr*, Plaintiffs' Complaint demonstrates that the "poor performance" of Fannie Mae and Freddie Mac, Mot. at 31, was the result of regulators' insistence that the Companies take on substandard investments, many of which would not have met the Companies' own underwriting standards *but for regulatory adjustments*.[46] Compl. ¶¶ 2-4, 49-54. Thus, the Government's motion should be denied.

D. Plaintiffs State an Exaction Claim

The Complaint alleges that the Government engaged in two different types of exactions. First, the Government improperly imposed the conservatorships on the Companies without satisfying the criteria set forth in HERA for doing so. Compl. ¶¶ 91-153. Second, even if one of the statutory requirements for imposing a conservatorship was met, FHFA could only "take such action as may be . . . necessary to put the regulated entit[ies] in a sound and solvent condition[] and . . . appropriate to carry on the business of the regulated entit[ies] and conserve the assets and property of the regulated entit[ies]." 12 U.S.C. § 4617(b)(2)(D). Despite the existence of this obligation, FHFA, acting in concert with other governmental entities, including Treasury, exceeded its authority by using Fannie and Freddie for the Government's objectives. Compl. ¶¶ 7, 10, 13, 18, 154-70, 205-06.

The Government asserts that Plaintiffs' exaction claim fails because: (1) the Court must presume that FHFA's action in imposing the conservatorships was authorized; (2) HERA is not a

[46] The Motion to Dismiss conveniently overlooks these allegations. Similarly, in arguing that the Companies' shareholders should bear the burden of the Government's conduct because "taxpayers – not shareholders – intervened and risked billions to rescue the Enterprises," Mot. at 31, the Government blatantly ignores Plaintiffs' allegation that the Companies could have raised capital from the public equity markets had they been afforded adequate opportunity to do so. Compl. ¶¶ 130-31.

money mandating statute; (3) the Government purportedly did not exact anything from Plaintiffs; and (4) the effect of the Government's actions with regard to the Companies was indirect. Because all of these arguments are premised on the assumption that the Government may act unchecked in moments of financial crisis, they should be rejected.

1. The Government's actions were not presumptively authorized.

The Government says that the imposition of the conservatorships should not be subject to challenge because the conservatorships were "authorized" by HERA. Plainly, the law cannot be that, having statutory authorization to impose the conservatorships, the Government could do whatever it wanted during them. Yet this would be the logical result of the Government's argument that its conduct should be immunized because it was "authorized" in the sense the Government claims. Indeed, in all of the cases cited by the Government, the action challenged by the plaintiff related to "the exercise of powers of functions of the Agency as conservator or a receiver," 12 U.S.C. § 4617(f), and involved conduct by the FHFA to "preserve and conserve the assets and property of the [Companies]." 12 U.S.C. § 4617(b)(2)(D)(ii).[47] Here, the Complaint has alleged the Government did precisely the opposite.

The Government's argument also acts as if the language in HERA setting forth the criteria under which the Government could impose conservatorships did not exist. The Complaint alleges that the Government did not satisfy any of the 12 prongs necessary before a conservatorship can be imposed under HERA and that the Government's decision to place the

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[47] Both *County of Sonoma v. FHFA*, 710 F.3d 987 (9th Cir. 2013), and *Town of Babylon v. FHFA*, 699 F.3d 221 (2d Cir. 2012), were actions brought by municipalities to challenge an FHFA directive prohibiting Fannie and Freddie from purchasing mortgages on properties encumbered by liens made under the PACE (property-assessed clean energy) program. Both courts held that directive fell squarely within the conservator's powers. *See County of Sonoma*, 710 F.3d at 993 ("A decision not to buy assets that the FHFA deems risky is within its conservator power to 'carry on' the Enterprises' business and to 'preserve and conserve the assets and property of the [Enterprises].'" (citation omitted)); *Town of Babylon*, 699 F.3d at 227 ("Directing protective measures against perceived risks is squarely within FHFA's powers as a conservator."); *see also Leon County Fla. v. FHFA*, 700 F.3d 1273 (11th Cir. 2012).

Companies into conservatorship resulted from separate considerations neither covered by nor relevant to HERA. *See* Compl. ¶¶ 11, 91-153. While the Government disputes whether some of these criteria was satisfied, on a motion to dismiss the Court must accept Plaintiffs' allegations as true. Moreover, the Government has pointed to no evidence, even outside the Complaint, showing that, *at the time the conservatorships were imposed*, the Government believed any of the HERA criteria to be met. Indeed, in proclaiming that the Government's actions were "authorized," the Government does not even discuss the twelve circumstances under HERA where the Government could have properly imposed conservatorships.

2. Plaintiffs have alleged claims under money mandating statutes.

a. For Plaintiffs' claims concerning the conservatorship, Plaintiffs have sufficiently alleged that HERA is money mandating.

The Government also claims that HERA is not a money mandating statute. As an initial matter, this Court does not need to decide this issue now. In *Starr*, the Government argued that the Court should analogize cases decided outside the exaction context to hold that Section 13(3) of the Federal Reserve Act, 12 U.S.C. §§ 341 and 343, was not money mandating. 106 Fed. Cl. at 84. The court held that the argument was "novel" and, based on the limited briefing devoted to the issue, concluded that it was "premature at this stage to rule decisively on the issue, let alone treat it as dispositive for purposes of Starr's illegal exaction claim." *Id.* Likewise here, no court has ever decided the issue of whether HERA is money mandating. This is a novel issue that is premature to address at this stage of the litigation.

Even if this Court decides to address the issue, there is sufficient support for Plaintiffs' claim that HERA is money mandating. This Court has subject matter jurisdiction over a case "[w]here plaintiffs have invoked a money mandating statute and have made a non-frivolous assertion that they are entitled to relief under the statute." *Brodowy v. United States*, 482 F.3d 1370, 1375 (Fed. Cir. 2007) (citations omitted). A statute may be deemed money mandating if it can "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained" and is "reasonably amenable to the reading that it mandates a right of recovery in damages." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-73 (2003). In *White Mountain*, for example, the Supreme Court held that a federal statute requiring the Government to "maintain, protect, repair and preserve" property for the White Mountain Apache Tribe created a fiduciary trust relationship that made the Government subject to duties as a trustee and therefore potentially liable in damages for breach of that duty. It therefore remanded the action to the Court of Federal Claims to determine whether plaintiff stated a claim for breach of that duty. The Court held that "[t]his is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." *Id.* at 475. It further explained that "[t]o the extent that the Government would demand an explicit provision for money damages to support every claim that might be brought under the Tucker Act, it would substitute a plain and explicit statement standard for the less demanding requirement of fair inference that the law was meant to provide a damage remedy for breach of a duty." *Id.* at 477.

Likewise here, HERA established FHFA as a conservator for the Companies "for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2). Among other things, FHFA has the obligation to "preserve and conserve the assets and property of the regulated entity." § 4617(b)(2)(B)(iv). It may take such action as may be "(i) necessary to put the regulated entity in sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." § 4617(b)(2)(D).

There are abundant allegations in the Complaint to support that the Government did precisely the opposite. Rather than supporting the Companies on favorable terms similar to those offered to many other struggling financial institutions at that time, it took control of Fannie and Freddie to warehouse bad mortgage debt for other financial institutions deemed "too big to fail." Compl. ¶¶ 5, 74-78, 157. It entered into Stock Agreements that gave away the Companies' preferred stock and rights to its common stock for pennies while obligating them to pay onerous dividends – and eventually all of their profits – to the Treasury. *Id.* ¶¶ 154-69. Put in the terms of the *White Mountain* Court, it is elementary that, having assumed the role of conservator, the Government could not permissibly allow the Companies to fall into ruin – and certainly could not *cause* their eventual demise by, among other things, operating them for its own objectives and transferring all of the Companies' profits to itself – under its watch.

The Government will likely rely on *Franklin Sav. Corp. v. United States*, 56 Fed. Cl. 720 (2003), to distinguish *White Mountain* from these facts. In *Franklin*, the plaintiffs, a defunct savings and loan ("S&L") and its holding company, argued that, by virtue of its comprehensive regulation of the banking industry generally, as well as through FIRREA, the Government had assumed a fiduciary duty to the S&Ls over which it imposed conservatorships and receiverships. The plaintiff then alleged that the Government breached that duty by doing a number of things specifically authorized in FIRREA as part of a conservator's powers. *See id.* at 747. This Court rejected that claim. First, it held that the banking statutes relied on by the plaintiff did not provide a substantive source of law imposing fiduciary duties on the Government. *Id.* at 752. Second, it noted that FIRREA granted the Government significant power and discretion in regulating S&Ls and that it would be inconsistent with the statute's purpose to curtail that power. *Id.* at 752-53. It therefore concluded that "[u]nderlying [plaintiffs'] breach of a *Mitchell*[48] type trust claim is the hypothesis that pervasive regulation of an industry or endeavor creates a

[48] *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*); *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*).

fiduciary relationship between the United States and a regulated entity. . . . [Plaintiff] is here simply complaining of what Congress wrought: enactment and implementation of FIRREA." *Id.* at 754.

As an initial matter, *Franklin* preempts the Government's likely argument that the reasoning of the *White Mountain* Court is restricted to the Indian context in which it arose. Moreover, Plaintiffs' *White Mountain* arguments bear only superficial resemblance to the arguments made by the *Franklin* plaintiff. First, Plaintiffs are not challenging the Government's actions in fulfilling duties specifically given to the Government by HERA. Instead, Plaintiffs argue that HERA gave the Government the power to impose a conservatorship to preserve the Companies' assets and that the Government never came close to accomplishing that purpose.[49] Second, Plaintiffs are not arguing that the Government's duties arose from comprehensive regulation of the Companies, but instead from specific statutory language within HERA itself.

The Government also argues that Plaintiffs should not be entitled to any review of the Government's actions during the conservatorship because HERA allegedly only provides "limited judicial review of the conservatorship decision." Mot. at 40. But as discussed in Section IV(A)(2), HERA merely limits a plaintiff's ability to seek injunctive or declaratory relief related to the imposition of a conservatorship; it has no bearing on Plaintiffs' constitutional claims for damages. Moreover, as the *County of Sonoma* court acknowledged, "the anti-judicial review provision [in HERA] is inapplicable when FHFA acts beyond the scope of its conservator power." 710 F.3d at 992 (citing *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997)).

[49] *Cf., e.g.*, *Gibraltar Fin. Corp. v. Fed. Home Loan Bank Bd.*, 1990 WL 394298, at *3 (C.D. Cal. June 15, 1990) ("The case at hand is similar to the above-discussed cases. In imposing the conservatorship upon the Associations, the Defendants exceeded their normal regulatory and supervisory activities and assumed control of the operations of those institutions. Under these circumstances GFC, as a shareholder of the Associations, may state a claim for breach of fiduciary duty.").

b. For Plaintiffs' claims related to the Stock Agreements, Plaintiffs have alleged that the Companies' statutory charters were money mandating.

Plaintiffs have further alleged that the Government effected an exaction by forcing the Companies to enter into the Stock Agreements. In doing so, the Treasury invoked Section 304(g) of Fannie Mae's Charter Act, 12 U.S.C. § 1719(g), and Section 306(f) of Freddie Mac's Charter Act, 12 U.S.C. § 1455(f). *See* Compl. ¶ 155. However, Treasury never fulfilled the requirements in HERA that would have allowed it to purchase obligations and other securities issued by the Companies. *See* Compl. ¶¶ 155-58. Much like in *White Mountain*, both HERA and the Companies' charters imposed duties on the Government, and these provisions mandate that damages be paid to Plaintiffs, who were uniquely injured by the conservatorships as well as the subsequent entry into the Stock Agreements, including the Third Amendment.

3. The Government exacted something from Plaintiffs by breaching its duty to conserve the Companies' assets during the conservatorship.

The Government also argues that Plaintiffs' exaction claim fails because the Government purportedly doesn't have any of Plaintiffs' money "in its pocket" and Plaintiffs have not alleged that "the Government's coffers were increased by this – or any – amount." Mot. at 37, 38. Although the Government's Motion presumes only one, there are two types of exaction claims: (1) those in which the plaintiff has paid money over to the government, directly or in effect, and seeks return of that sum; and (2) those demands in which money has not been paid but the plaintiff asserts that it is nevertheless entitled, under a money mandating statute, to a payment from Treasury for damages sustained. *United States v. Testan*, 424 U.S. 392, 401-02 (1976); *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1007-08 (Ct. Cl. 1967). In the second group, where no such payment has been made, the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum. *Id.* As set forth above, Plaintiffs have identified such statutory authority.

Further, contrary to the Government's argument, even in the first category of exaction claim, there is no requirement that the plaintiff pay money directly into the Government's "pocket." *See Casa de Cambio Comdiv, S.A. de C.V. v. United States*, 291 F.3d 1356, 1364 (Fed Cir. 2002) (The Federal Circuit has held "that an illegal exaction claim lies even where money is not paid by the plaintiff directly to the government.") (internal quotation marks and citation omitted). Indeed, while the Government relies on *Aerolineas Argentinas v. United States*, 77 F.3d 1564 (Fed. Cir. 1996), in that case the Federal Circuit made clear that "if [the plaintiffs] made payments that by law the [government agency] was obliged to make, the government has 'in its pocket' money corresponding to the payments that were the government's statutory obligation." *Id.* at 1573; *see also id.* at 1579 (Nies, J., concurring) ("The government must order assumption of a government obligation. Thus, cases where the government itself had no financial obligation in the matter and receives no direct financial benefit are distinguishable.") (citations omitted).

4. The harm to Plaintiffs was not indirect; if Plaintiffs are not able to recover their losses, the Government's conduct will go without a remedy.

Finally, the Government argues that any harm to Plaintiffs is "indirect." The Government's argument assumes that its actions must have been aimed at Plaintiffs, but the test is whether the "causal connection" is sufficiently direct. *Norman v. United States*, 429 F.3d 1081, 1096 (Fed. Cir. 2005). Here, the Government does not – and cannot – seriously contend that Plaintiffs' harm was caused by anything other than the Government's imposition of the conservatorships and its conduct thereafter.[50] And to the extent the Government makes such a

[50] The Government half-heartedly claims that "[t]he loss of share value did not result as much from Government action as it did from the perceptions of countless, potential buyers and sellers of the Enterprises' stock," Mot. at 40, but neither the facts of the case nor the case the Government cites for it, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005), supports such an assertion. *Dura* simply held that a

claim, it is belied by the Government's own admissions after the conservatorships were imposed that the conservatorships "rendered the common [and preferred] shares of the Enterprises virtually worthless," thereby destroying the property rights of the Companies' shareholders who "effectively lost their investments," and that "[e]xisting common and preferred shareholders were effectively wiped out" by the conservatorships. Compl. ¶ 9.

In all of the cases on which the Government relies for its claim that Plaintiffs' injuries are insufficiently direct, there was an intervening third party that was more directly harmed by the Government's actions.[51] Here, in contrast, there is no intervening third party more directly injured. Indeed, if the Government's argument on directness is accepted, it would deny *any* recovery for the conduct alleged in the Complaint.

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

Based on the arguments set forth above, the Government has set forth no arguments justifying dismissal of Plaintiffs' claims at this early stage of ligation. However, if the Court finds the Complaint deficient, Plaintiffs respectfully request leave to amend their Complaint. Such amendment, if deemed necessary, is consistent with R.C.F.C. 15(a)(2), which provides that

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plaintiff bringing a claim for a securities violation must have relied on the representations made. This is not a misrepresentation case.

[51] In *Casa de Cambio Comdiv,* the depositor of a stolen Treasury check alleged that the Government's actions in recouping check funds from the presenting bank violated federal regulations and constituted a taking. The plaintiff argued that "the government committed a regulatory taking when it caused [a third party] to take [plaintiff's] property when the government debited [the presenting bank's] account." 291 F.3d at 1361. The court held that the relevant federal regulation was money mandating only with regard to the presenting bank, not the depositor plaintiff. *Id.* at 1361. (This holding was in the section of the court's discussion devoted to the plaintiff's takings claim, but the court later held that "[the illegal exaction] test is identical to the Takings test." *Id.* at 1364.) In *Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298 (Fed. Cir. 2004), the plaintiff alleged that the government had engaged in a taking by assessing excise taxes on U.S. suppliers who sold coal to the plaintiff, a Canadian power company. The court held that only the U.S. suppliers on whom the taxes were assessed had such a claim, and that the plaintiff was "one step removed" from them. *Id.* at 1302.

permission to amend should be freely given when justice so requires,[52] and is particularly appropriate in this case given the complexity of the facts and novel theories of law.

V. CONCLUSION

The Government effectively nationalized Fannie and Freddie to serve the Government's purposes. It cannot avoid paying Plaintiffs just compensation for its actions by cloaking its actions in statutory authority that the Government ignored in imposing the conservatorships in the first instance. Its Motion should be denied.

VI. REQUEST FOR ORAL ARGUMENT

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

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Respectfully submitted,

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

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