

No. 22-\_\_\_\_\_

---

IN THE  
**Supreme Court of the United States**

---

OWL CREEK ASIA I, L.P., *et al.*,  
*Petitioners,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

---

**On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Federal Circuit**

---

**APPENDIX**

---

Bruce Bennett	Lawrence D. Rosenberg
JONES DAY	<i>Counsel of Record</i>
555 S. Flower St.,	C. Kevin Marshall
50th Floor	JONES DAY
Los Angeles, CA 90071	51 Louisiana Ave., NW
	Washington, DC 20001
	(202) 879-3939
Chané Buck	ldrosenberg@jonesday.com
JONES DAY	
4655 Executive Dr.,	
Suite 1500	
San Diego, CA 92121	

*Counsel for Owl Creek Petitioners*

---

## TABLE OF CONTENTS

	Page
APPENDIX A: Opinion of the United States Court of Appeals for the Federal Circuit (Feb. 22, 2022) .....	1a
APPENDIX B: Opinion and Order of the United States Court of Federal Claims (Mar. 9, 2020) ( <i>Fairholme</i> ).....	58a
APPENDIX C: Opinion and Order of the United States Court of Federal Claims (June 8, 2020) ( <i>Owl Creek</i> ).....	162a
APPENDIX D: Opinion and Order of the United States Court of Federal Claims (June 8, 2020) ( <i>Appaloosa</i> ).....	228a
APPENDIX E: Opinion and Order of the United States Court of Federal Claims (June 8, 2020) ( <i>Mason</i> ).....	293a
APPENDIX F: Opinion and Order of the United States Court of Federal Claims (June 8, 2020) ( <i>CSS</i> ) .....	358a
APPENDIX G: Opinion and Order of the United States Court of Federal Claims (June 8, 2020) ( <i>Akanthos</i> ) .....	424a
APPENDIX H: Opinion and Order of the United States Court of Federal Claims (June 26, 2020) ( <i>Cacciapalle</i> ).....	489a

---

**APPENDIX A**

---

**United States Court of Appeals  
for the Federal Circuit**

---

**FAIRHOLME FUNDS, INC., ACADIA  
INSURANCE COMPANY, ADMIRAL  
INDEMNITY COMPANY, ADMIRAL  
INSURANCE COMPANY, BERKLEY  
INSURANCE COMPANY, BERKLEY  
REGIONAL INSURANCE COMPANY,  
CAROLINA CASUALTY INSURANCE  
COMPANY, CONTINENTAL WESTERN  
INSURANCE COMPANY, MIDWEST  
EMPLOYERS CASUALTY INSURANCE  
COMPANY, NAUTILUS INSURANCE  
COMPANY, PREFERRED EMPLOYERS  
INSURANCE COMPANY, FAIRHOLME FUND,  
ANDREW T. BARRETT,  
*Plaintiffs-Appellants***

**v.**

**UNITED STATES,  
*Defendant-Cross-Appellant***

---

**2020-1912, 2020-1914**

---

Appeals from the United States Court of Federal  
Claims in No. 1:13-cv-00465-MMS, Senior Judge  
Margaret M. Sweeney.

-----  
**OWL CREEK ASIA I, L.P., OWL CREEK ASIA II,  
L.P., OWL CREEK I, L.P., OWL CREEK II, L.P.,  
OWL CREEK ASIA MASTER FUND, LTD.,  
OWL CREEK CREDIT OPPORTUNITIES  
MASTER FUND, L.P., OWL CREEK OVERSEAS  
MASTER FUND, LTD., OWL CREEK SRI  
MASTER FUND, LTD.,**  
*Plaintiffs-Appellants*

**v.**

**UNITED STATES,**  
*Defendant-Appellee*

---

2020-1934

---

Appeal from the United States Court of Federal  
Claims in No. 1:18-cv-00281-MMS, Senior Judge  
Margaret M. Sweeney.

-----  
**MASON CAPITAL L.P., MASON CAPITAL  
MASTER FUND L.P.,**  
*Plaintiffs-Appellants*

**v.**

**UNITED STATES,**  
*Defendant-Appellee*

---

2020-1936

---

Appeal from the United States Court of Federal  
Claims in No. 1:18-cv-00529-MMS, Senior Judge  
Margaret M. Sweeney.

-----  
**AKANTHOS OPPORTUNITY FUND, L.P.,**  
*Plaintiff-Appellant*

**v.**

**UNITED STATES,**  
*Defendant-Appellee*

---

2020-1938

Appeal from the United States Court of Federal  
Claims in No. 1:18-cv-00369-MMS, Senior Judge  
Margaret M. Sweeney.

-----  
**APPALOOSA INVESTMENT LIMITED  
PARTNERSHIP I, PALOMINO MASTER LTD.,  
AZTECA PARTNERS LLC, PALOMINO FUND  
LTD.,**

*Plaintiffs-Appellants*

**v.**

**UNITED STATES,**  
*Defendant-Appellee*

---

2020-1954

Appeal from the United States Court of Federal  
Claims in No. 1:18-cv-00370-MMS, Senior Judge  
Margaret M. Sweeney.

-----  
**CSS, LLC,**  
*Plaintiff-Appellant*

**v.**

**UNITED STATES,**  
*Defendant-Appellee*

\_\_\_\_\_  
2020-1955

Appeal from the United States Court of Federal  
Claims in No. 1:18-cv-00371-MMS, Senior Judge  
Margaret M. Sweeney.

-----  
**ARROWOOD INDEMNITY COMPANY,  
ARROWOOD SURPLUS LINES INSURANCE  
COMPANY, FINANCIAL STRUCTURES  
LIMITED,**

*Plaintiffs-Appellants*

**v.**

**UNITED STATES,**  
*Defendant-Appellee*

\_\_\_\_\_  
2020-2020

Appeal from the United States Court of Federal  
Claims in No. 1:13-cv-00698-MMS, Senior Judge  
Margaret M. Sweeney.

-----  
**JOSEPH CACCIAPALLE,**  
*Plaintiff-Appellant*

**MELVIN BAREISS, ON BEHALF OF  
THEMSELVES AND ALL OTHERS SIMILARLY  
SITUATED, BRYNDON FISHER, BRUCE REID,  
ERICK SHIPMON, AMERICAN EUROPEAN  
INSURANCE COMPANY, FRANCIS J. DENNIS,**  
*Plaintiffs*

**v.**

**UNITED STATES,**  
*Defendant-Appellee*

\_\_\_\_\_  
2020-2037  
\_\_\_\_\_

Appeal from the United States Court of Federal  
Claims in No. 1:13-cv-00466-MMS, Senior Judge  
Margaret M. Sweeney.

\_\_\_\_\_  
Decided: February 22, 2022  
\_\_\_\_\_

BRIAN W. BARNES, Cooper & Kirk, PLLC,  
Washington, DC, argued for plaintiff-appellants  
Fairholme Funds, Inc., Acadia Insurance Company,  
Admiral Indemnity Company, Admiral Insurance  
Company, Berkley Insurance Company, Berkley  
Regional Insurance Company, Carolina Casualty  
Insurance Company, Continental Western Insurance  
Company, Midwest Employers Casualty Insurance  
Company, Nautilus Insurance Company, Preferred  
Employers Insurance Company, Fairholme Fund,  
Andrew T. Barrett. Also represented by VINCENT J.  
COLATRIANO, CHARLES J. COOPER, PETER A.  
PATTERSON, DAVID THOMPSON.

BRUCE BENNETT, Jones Day, Los Angeles, CA, argued for plaintiffs-appellants Owl Creek Asia I, L.P., Owl Creek Asia II, L.P., Owl Creek I, L.P., Owl Creek II, L.P., Owl Creek Asia Master Fund, Ltd., Owl Creek Credit Opportunities Master Fund, L.P., Owl Creek Overseas Master Fund, Ltd., Owl Creek SRI Master Fund, Ltd., Mason Capital L.P., Mason Capital Master Fund LP, Akanthos Opportunity Fund, L.P., Appaloosa Investment Limited Partnership I, Palomino Master Ltd., Azteca Partners LLC, Palomino Fund Ltd., CSS, LLC. Also argued by LAWRENCE D. ROSENBERG, Washington, DC. Also represented by C. KEVIN MARSHALL.

DREW WILLIAM MARROCCO, Dentons US LLP, Washington, DC, argued for plaintiffs-appellants Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, Financial Structures Limited. Also represented by RICHARD M. ZUCKERMAN, New York, NY.

HAMISH HUME, Boies Schiller & Flexner LLP, Washington, DC, argued for plaintiff-appellant Joseph Cacciapalle.

MARK B. STERN, Appellate Staff, Civil Division, United States Department of Justice, Washington, DC, argued for United States. Also represented by BRIAN M. BOYNTON, KYLE T. EDWARDS, GERARD SINZDAK, ABBY CHRISTINE WRIGHT.

NOAH SCHUBERT, Schubert Jonckheer & Kolbe LLP, San Francisco, CA, for amici curiae Bryndon Fisher, Bruce Reid, Erick Shipmon. Also represented by ROBERT SCHUBERT; PATRICK VALLELY, Shapiro Haber & Urmy LLP, Boston, MA.

---



Before LOURIE, PROST, and O'MALLEY,  
*Circuit Judges.*

O'MALLEY, *Circuit Judge.*

Certain shareholders of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) appeal a judgment of the United States Court of Federal Claims (Claims Court) granting-in-part the government's motion to dismiss their directly pled constitutional and non-constitutional claims for either lack of standing or lack of subject matter jurisdiction. *See Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1 (2019); *Owl Creek Asia I, L.P. v. United States*, 148 Fed. Cl. 614 (2020); *Mason Cap. L.P. v. United States*, 148 Fed. Cl. 712 (2020); *Akanthos Opportunity Master Fund, L.P. v. United States*, 148 Fed. Cl. 647 (2020); *Appaloosa Inv. Ltd. P'ship I v. United States*, 148 Fed. Cl. 679 (2020); *CSS, LLC v. United States*, 149 Fed. Cl. 363 (2020); *Arrowood Indem. Co. v. United States*, 148 Fed. Cl. 299 (2020); *Cacciapalle v. United States*, 148 Fed. Cl. 745 (2020). The government cross-appeals the portions of the Claims Court's judgment denying its motion to dismiss shareholders' derivative claims. Because we conclude that the Claims Court correctly dismissed shareholders' directly pled claims but erred in not dismissing shareholders' derivatively pled allegations, we affirm-in-part and reverse-in-part.

## I. BACKGROUND

Shareholders<sup>1</sup> own stock in Fannie Mae and Freddie Mac (collectively, the Enterprises). The Enterprises suffered devastating financial losses in 2008 when the national housing market collapsed. In response, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA). HERA created the Federal Housing Finance Agency (FHFA), an independent agency tasked with regulating the Enterprises and (if necessary) stepping in as conservator or receiver. 12 U.S.C. §§ 4511, 4617. HERA also contains a Succession Clause, which states that the FHFA “shall, as conservator or receiver . . . immediately succeed to [] all rights, titles, powers, and privileges of the [Enterprises], and of any stockholder . . . with respect to the [Enterprises] and the assets of the [Enterprises].” *Id.* § 4617(b)(2)(A)(i).

With the consent of the Enterprises’ boards of directors, the FHFA’s Director placed the Enterprises into conservatorship in September 2008. J.A. 497–98; J.A. 530. The FHFA Director then negotiated preferred stock purchase agreements (PSPAs) with the Department of Treasury (Treasury) in which Treasury agreed to allow the Enterprises to draw up to \$100 billion in capital in exchange for: (1) senior preferred non-voting stock having quarterly fixed-rate dividends and an initial liquidation preference of \$1 billion and (2) warrants to purchase up to 79.9% of the

---

<sup>1</sup> For conciseness, we refer collectively to appellants as “shareholders.” When necessary, however, we will call out individual shareholders by their respective names (e.g., Fairholme Funds, Barrett, Cacciapalle, etc.).

common stock of each Enterprise at a nominal price. J.A. 415–18; J.A. 498–99.

FHFA and Treasury amended the terms of the original PSPAs in the years that followed. Relevant to this appeal, a “net worth sweep” under the PSPAs replaced the fixed-rate dividend formula with a variable one that required the Enterprises to make quarterly payments equal to their entire net worth, minus a small capital reserve amount. J.A. 437; J.A. 506–07. The net worth sweep caused the Enterprises to transfer most, if not all, of their equity to Treasury, leaving no residual value that could be distributed to shareholders. J.A. 437; J.A. 506–07.

Shareholders launched a series of challenges to the net worth sweep that have worked their way through several fora, including the D.C. Circuit and the Supreme Court. *See, e.g., Perry Cap. LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014) (“*Perry I*”); *Perry Cap. LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017) (“*Perry II*”); *Collins v. Yellen*, 141 S. Ct. 1761 (2021) (“*Collins*”). Parallel to these unsuccessful attempts to undo the net worth sweep, shareholders filed complaints with the Claims Court, alleging the following direct claims: (1) the net worth sweep violated the Fifth Amendment for taking (or, alternatively, illegally exacting) the shareholders’ equity in the Enterprises without just compensation; (2) the FHFA breached its fiduciary duties by entering into the net worth sweep; and (3) the FHFA and the Enterprises breached an implied-in-fact contract (with shareholders as the intended third-party beneficiaries) by agreeing to the net worth sweep. *See, e.g., Fairholme*, 147 Fed. Cl. at 22. Barrett, an individual shareholder of the Enterprises, separately asserted derivative claims on behalf of the

Enterprises, alleging similar takings, illegal exaction, breach of fiduciary duty, and breach of contract claims. *See id.*

The government moved to dismiss the claims in every case before the Claims Court in a single, omnibus motion. *See id.* at 22 & n.11. The Claims Court first granted-in-part and denied-in-part the government's motion in one case, *Fairholme Funds, Inc. v. United States*. *See id.* at 15. Specifically, the Claims Court dismissed the shareholders' direct Fifth Amendment takings and illegal exaction claims for lack of standing because it found them to be substantively derivative in nature. *See, e.g., id.* at 45. The Claims Court also dismissed for lack of subject matter jurisdiction the shareholders' direct claims for breach of fiduciary duty, *see, e.g., id.* at 37, and breach of implied-in-fact contract, *see, e.g., id.* at 40. The Claims Court, however, found that Barrett had standing to bring his derivative claims, notwithstanding HERA's Succession Clause, under the conflict-of-interest exception espoused in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999). *See Fairholme*, 147 Fed. Cl. at 49.

Having dismissed the direct takings claims in *Fairholme*, the Claims Court solicited supplemental briefing from the parties in the other cases on the applicability of its holding in *Fairholme* to those cases. *See, e.g., Owl Creek Asia I*, 148 Fed. Cl. at 639. Following supplemental briefing, the Claims Court dismissed each of the other seven cases on appeal for the reasons explained in *Fairholme*. *See J.A.* 284–90. The shareholders appealed in all seven of those cases; we have jurisdiction under 28 U.S.C. § 1295(a)(3).

Because some of Barrett’s claims in the *Fairholme* case survived, the Claims Court certified its opinion in that case for interlocutory appeal and cross-appeal by the shareholders and the government, respectively, so that we could consider the matters collectively. *See Fairholme*, 147 Fed. Cl. at 53–54. We possess jurisdiction over the certified interlocutory appeal and cross-appeal under 28 U.S.C. § 1292(d). We, thus, are resolving eight appeals in this single opinion; seven from final judgments and one certified interlocutory appeal.<sup>2</sup>

## II. STANDARD OF REVIEW

We review a dismissal for lack of standing *de novo*. *See Rack Room Shoes v. United States*, 718 F.3d 1370, 1374 (Fed. Cir. 2013). We also review grants or denials of motions to dismiss for lack of subject matter jurisdiction *de novo*. *See Northrop Grumman Computing Sys., Inc. v. United States*, 709 F.3d 1107, 1111 (Fed. Cir. 2013); *see also Maher v. United States*, 314 F.3d 600, 603 (Fed. Cir. 2002).

---

<sup>2</sup> Some appellants chose to consolidate their cases for briefing purposes, but the actual appeals were never consolidated. We granted the motions of other appellants to consolidate the appeals in *Owl Creek Asia I, L.P. v. United States*, No. 20-1934, *Mason Capital L.P. v. United States*, No. 20-1936, *Akanthos Opportunity Fund, L.P. v. United States*, No. 20-1938, *Appaloosa Investment Ltd. Partnership I v. United States*, No. 20-1954, and *CSS, LLC v. United States*, No. 20-1955. *See, e.g., Order Granting Appellants’ Unopposed Mot. to Consolidate* at 4, *Owl Creek Asia I, L.P. v. United States*, No. 20-1934 (Fed. Cir. July 15, 2020), ECF No. 6. As a result, the docket reflects fewer than eight sets of briefing, but that does not alter the number of matters actually resolved.

There were times where the Claims Court predicated its dismissals on Rule of the Court of Federal Claims 12(b)(1) for lack of standing, or otherwise for lack of subject matter jurisdiction, but certain of the claims actually fail, in our view, to state a claim for which relief can be granted under Rule 12(b)(6). We find those procedural errors to be “of no moment” where the conclusion that dismissal under Rule 12 is otherwise warranted. *See Perry II*, 864 F.3d at 623–24 (citing *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997)); *see also Wyandot Nation of Kan. v. United States*, 858 F.3d 1392, 1397 (Fed. Cir. 2017) (noting that we may affirm the Claims Court’s dismissal of an action on any grounds supported by the record).

### III. THE SHAREHOLDERS’ DIRECT CLAIMS

The shareholders in all of these appeals challenge the Claims Court’s dismissal of their direct takings and illegal exaction claims for lack of standing. They also challenge the Claims Court’s dismissal of their direct breach of contract claims and breach of fiduciary duty claims for lack of jurisdiction. Cacciapalle separately disputes dismissal of an additional takings claim that only he asserts.<sup>3</sup>

The government cross-appeals in all cases, arguing that the Claims Court lacked jurisdiction over all the shareholders’ claims because they are not claims

---

<sup>3</sup> The Claims Court also dismissed Fairholme’s takings claim on the alternative ground that Fairholme did not own shares in the Enterprises at the time of the net worth sweep. Because we dismiss Fairholme’s direct claims on alternative grounds, we need not address the Claims Court’s alternative holding or the parties’ arguments relating to it.

against the United States. The government also argues that HERA's Succession Clause bars all of Barrett's derivative claims and that he is estopped from pursuing a derivative breach of contract claim.

We begin with the government's first argument on cross-appeal because that question is determinative of the Claims Court's jurisdiction to consider any of the shareholders' claims. We then address the shareholders' arguments regarding their direct claims before turning to those relating to their derivative claims. We address the government's other arguments on cross-appeal where they most logically fit in this analytical framework.

A. The FHFA, as conservator, is the United States

The Tucker Act grants the Claims Court subject matter jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). The shareholders' challenges to the net worth sweep may only proceed, therefore, if they are properly pled as claims "against the United States."

The Supreme Court previously interpreted the Succession Clause of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which contains nearly identical language to HERA's Succession Clause, to mean that, when a government agency serves as a receiver for an entity, it "steps into the shoes of the failed [institution]." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994) (internal quotation marks omitted). Relying on *O'Melveny*, several circuits have interpreted HERA's Succession

Clause to indicate that the FHFA steps into the Enterprises' shoes (and, thus, sheds its governmental character) when acting as the Enterprises' conservator. *See Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017); *see also Meridian Invs., Inc. v. Fed. Home Loan Mortg. Corp.*, 855 F.3d 573, 579 (4th Cir. 2017); *United States ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1261 (9th Cir. 2016).

Despite these cases, the Claims Court found that the FHFA's adoption of the net worth sweep during its tenure as conservator did not cause the FHFA to shed its governmental character. *See Fairholme*, 147 Fed. Cl. at 34. The Claims Court based its holding on the reasoning in a district court decision: *Sisti v. Federal Housing Finance Agency*, 324 F. Supp. 3d 273 (D.R.I. 2018). *See Fairholme*, 147 Fed. Cl. at 33–34 (citing *Sisti*, 324 F. Supp. 3d at 279). In the *Sisti* court's view, a receiver "step[s] into the shoes of the entity by assuming the fiduciary duties of the entity, but the conservator does not: it remains distinct, and rather owes a duty to the entity." *Sisti*, 324 F. Supp. 3d at 283 (internal quotation marks omitted) (emphasis in original). After the Claims Court's decision in this case, the First Circuit overruled *Sisti*. *Boss v. Fed. Hous. Fin. Agency*, 998 F.3d 532 (1st Cir. 2021). The First Circuit agreed with its sister circuits and concluded that the receiver versus conservator distinction did not support the district court's conclusion. It found that the FHFA was not a government actor when, pursuant to HERA's Succession Clause, it exercised the Enterprises' private contractual right to nonjudicially foreclose on appellants' mortgages. *Montilla v. Fed. Nat'l Mortg. Ass'n*, 999 F.3d 751, 757 (1st Cir. 2021).



After the Claims Court issued its opinion and the First Circuit overruled *Sisti*, the Supreme Court issued its decision in *Collins*, 141 S. Ct. 1761. *Collins* held that, in the context of a separation-of-powers claim, the FHFA retained its governmental character:

[E]ven when [the FHFA] acts as conservator or receiver, its authority stems from a special statute, not the laws that generally govern conservators and receivers. In deciding what it must do, what it cannot do, and the standards that govern its work, the FHFA must interpret [HERA], and “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”

*Id.* at 1785–86 (citing *Bowsher v. Synar*, 478 U.S. 714, 733 (1986)). The Supreme Court highlighted the critical differences between the FHFA’s powers under HERA and those of most conservators and receivers:

[The FHFA] can subordinate the best interests of the [Enterprises] to its own best interests and those of the public. See 12 U.S.C. § 4617(b)(2)(J)(ii). Its business decisions are protected from judicial review. § 4617(f). It is empowered to issue a “regulation or order” requiring stockholders, directors, and officers to exercise certain functions. § 4617(b)(2)(C). It is authorized to issue subpoenas. § 4617(b)(2)(I). And of course, it has the power to put the [Enterprises] into conservatorship and simultaneously appoint itself as conservator. § 4617(a)(1).

*Id.* For these reasons, the Court held that “the FHFA clearly exercises executive power” when acting as a conservator. *Id.* at 1786.<sup>4</sup>

The government contends that the Claims Court erred in holding that the FHFA retained its governmental character when it agreed to the net worth sweep in its role as conservator. According to the government, *Collins*’s holding is distinguishable because that case dealt with a separation-of-powers challenge to HERA’s restriction on the President’s power to remove the FHFA’s Director, while these cases deal with the FHFA’s adoption of the net worth sweep. For a separation-of-powers analysis, intones the government, courts look to all the functions and powers exercised by the relevant official. By contrast, outside the separation-of-powers context, courts focus on whether the agency’s specific actions are governmental in nature or are, instead, commercial activities typically performed by private entities. The government contends that, in agreeing to the net worth sweep, the FHFA exercised a non-governmental power that corporate officers and directors typically wield: the renegotiation of an existing lending agreement. The government

---

<sup>4</sup> The Supreme Court distinguished *O’Melveny* on grounds that it had interpreted FIRREA, and not HERA. The Supreme Court noted that *O’Melveny* “held that state law, not federal common law, governed an attribute of the FDIC’s status as receiver for an insolvent savings bank.” *Collins*, 141 S. Ct. at 1786 n.20. In contrast to the FDIC’s status under FIRREA, however, the Supreme Court concluded that “[t]he nature of the FDIC’s authority in that capacity sheds no light on the nature of the FHFA’s distinctive authority as conservator under [HERA].” *Id.*

analogizes the FHFA to the following non-governmental entities: (1) the Enterprises, which must pursue public policy goals and objectives pursuant to their charter and (2) private actors, which must interpret applicable federal law to determine what they can and cannot do and what standards govern their work.

We are not convinced. As the *Collins* court noted, “[i]n deciding what it must do, what it cannot do, and the standards that govern its work, the FHFA must interpret [HERA], and ‘[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of execution of the law.’” *Id.* at 1785 (citing *Bowsher*, 478 U.S. at 733) (alterations in original). Here, the FHFA exercised one of its powers under HERA—subordinating the best interests of the Enterprises and its shareholders to its own best interests and those of the public, 12 U.S.C. § 4617(b)(2)(J)(ii)—when it adopted the net worth sweep. *See Collins*, 141 S. Ct. at 1776–77, 1786. It necessarily interpreted its statutory mandate when reaching the conclusion that it possessed the authority to do so. We therefore hold that the FHFA’s adoption of the net worth sweep is attributable to the United States.<sup>5</sup>

Contrary to the government’s proffered analogies, moreover, the FHFA is distinguishable from the

---

<sup>5</sup> The government expresses concern for the “far-reaching” consequences of holding that the FHFA as conservator (and other government agencies that serve as conservators or receivers) is, at all times, the government. But our holding today is not so broad. We simply hold that, as to the net worth sweep, the FHFA was acting in an executive capacity.

Enterprises and private actors. Notwithstanding the Enterprises’ “federal governmental objectives,” the government does not control their operations through its appointees as is the case with the FHFA. *See Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1406–07 (9th Cir. 1996). Private actors interpreting the law are also distinguishable from the FHFA because they do not exercise any Congressionally granted powers. The FHFA, for example, published final regulations in the Federal Register reflecting the net worth sweep’s prohibition on distribution of capital while the Enterprises were in conservatorship. *See* Conservatorship and Receivership, 76 Fed. Reg. 35,724 (June 20, 2011) (codified at 12 C.F.R. pt. 1229, 1237); *see also* 12 C.F.R. § 1237.12. These regulations cite, *inter alia*, 12 U.S.C. § 4617 as their legislative source—which details the grant of authority to the FHFA to impose a conservatorship or receivership, *see* 12 U.S.C. § 4617(a)—as well as HERA’s Succession Clause, *see* 12 U.S.C. § 4617(b)(2)(A)(i). Thus, unlike private actors interpreting the law, the FHFA is different because it expressly wields executive power whenever it does so.

For these reasons, the shareholders’ claims are “against the United States” and the Claims Court properly exercised jurisdiction. *See* 28 U.S.C. § 1491(a)(1). We, thus, turn to the merits of shareholders’ claims, beginning with their direct constitutional claims.

#### B. Shareholders’ direct constitutional claims

The Claims Court dismissed shareholders’ direct takings and illegal exaction claims for lack of standing,

on the grounds that those claims were substantively derivative in nature. *See Fairholme*, 147 Fed. Cl. at 46 (“Because plaintiffs have not established that their ‘direct’ claims are substantively direct in nature, they cannot demonstrate that they have standing to litigate those claims.”). The Claims Court concluded that “[t]he gravamen of each claim is the same: [t]he government, via the [net worth sweep], compelled the Enterprises to overpay Treasury.” *Id.* Relying on the Delaware Supreme Court’s decision in *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006), which held that claims founded upon allegations of overpayment were substantively derivative, the Claims Court held that “[t]he claims remain derivative because plaintiffs’ purported harms are merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.” *Fairholme*, 147 Fed. Cl. at 47 (internal quotation marks omitted) (citations omitted) (citing *Protas v. Cavanagh*, No. 6555-VCG, 2012 WL 1580969, at \*6 (Del. Ch. May 4, 2012)). The Claims Court rejected shareholders’ contentions that their claims qualified as direct under Delaware’s then-extant dual nature doctrine, also described in *Gentile*.<sup>6</sup> *Id.* at 45–46.

---

<sup>6</sup> Delaware’s dual nature doctrine allowed a substantively derivative shareholder claim to *also* be direct when the following circumstances obtain: “(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.” *Gentile*, 906 A.2d at 100. During the pendency of this appeal, the Delaware Supreme Court abolished the dual nature doctrine by

Shareholders jointly argue that the Claims Court erred in finding that their direct constitutional claims are substantively derivative. Because shareholders are pursuing constitutional takings and illegal exaction claims, federal law dictates whether they have standing. *Cf. Starr Int’l Co. v. United States*, 856 F.3d 953, 965 (Fed. Cir. 2017) (“Because Starr presses the Equity Claims under federal law, federal law dictates whether Starr has direct standing.”) (citations omitted). According to federal law, only “shareholder[s] with a direct, personal interest in a cause of action,” rather than “injuries [that] are entirely derivative of their ownership interests” in a corporation, may bring a direct shareholder action. *Franchise Tax Bd. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336–37 (1990).

State law may inform federal law in the corporate law context, however. *See Starr*, 865 F.3d at 966 (“There exists a ‘presumption that state law should be incorporated into federal common law’ unless doing so in a particular context ‘would frustrate specific objectives of the federal programs.’”) (citing *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991)). We have explained that both federal law and Delaware law distinguish direct and derivative shareholder

---

overruling that aspect of *Gentile* and its progeny. *See Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1267 (Del. 2021) (en banc) (concluding: (1) that the dual nature doctrine is inconsistent with multiple Delaware Supreme Court articulations of the test for when claims are derivative in nature and also unworkable in practice and (2) that claims are derivative in nature whenever the shareholders’ claims are not completely independent from the claims of harm to the corporation).

suits based on the following two factors: “(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually).” *Id.* (quoting *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (en banc)).<sup>7</sup>

The shareholders rely on a mix of federal and state law principles to urge us to overturn the Claims Court’s holding. We address their joint and individual contentions in turn.

#### 1. The shareholders’ joint arguments

Citing the Delaware Supreme Court’s two-part test espoused in *Tooley*, shareholders argue that the Claims Court erred by characterizing the net worth sweep as an overpayment to Treasury that directly harmed the Enterprises by reducing their total assets. Shareholders assert that they satisfy prong one of *Tooley*’s test because the net worth sweep directly harmed them by depriving them of their rights to dividends and related distributions. And, under prong two of *Tooley*, shareholders aver that only a compensatory damages award paid to them would remedy their loss in equity as a result of the net worth sweep. As they did before the Claims Court, shareholders alternatively argue that, even if their claims are derivative, they are also direct under *Gentile*’s dual nature exception because the net worth sweep transferred to Treasury, “a dominant shareholder,” shareholders’ equity.

---

<sup>7</sup> The parties agree that Virginia law, which governs the claims at issue here, mirrors Delaware law on these points.

As explained above, shareholders' arguments based on the dual nature exception to the *Tooley* test are no longer viable; there is no such exception. *See supra*, at 17 n.6. That leaves shareholders' contention that they satisfy the two-part *Tooley* test. They do not.

As the Delaware Supreme Court made clear in *Brookfield Asset Management*, "equity overpayment[] claims, absent more, are exclusively derivative." 261 A.3d at 1267. We have said the same: "claims of corporate overpayment are treated as causing harm solely to the corporation and, thus, are regarded as derivative." *Starr*, 856 F.3d at 967 (quoting *Gentile*, 906 A.2d at 99, *rev'd on other grounds*, *Brookfield*, 261 A.3d 1251). An overpayment occurs whenever the fiduciaries of a corporation cause the entity to "exchange assets at a loss." *In re TerraForm Power, Inc. S'holders Litig.*, No. 2019-0757-SG, 2020 WL 6375859, at \*9 (Del. Ch. Oct. 30, 2020), *rev'd on other grounds*, *Brookfield*, 261 A.3d 1251. Here, shareholders' direct constitutional allegations describe how the net worth sweep resulted in an overpayment: in exchange for FHFA's conservatorship, both the Enterprises and shareholders were forced to pay Treasury at a loss. Fairholme, for example, alleged in its direct Fifth Amendment takings claim:

At the outset of conservatorship, FHFA's Director confirmed that both the preferred and common shareholders of Fannie and Freddie retained an economic interest in the [Enterprises]. As equity shareholders, that economic interest took the form of a claim on the [Enterprises'] equity that could be paid out in the form of dividends or a liquidation payment. Plaintiffs had both a



property interest and a reasonable, investment-backed expectation in the economic interest in the [Enterprises] they held due to their ownership of Common and Preferred Stock. *The Net Worth Sweep expropriated this economic interest by assigning the right to all of Fannie's and Freddie's equity to Treasury.*

J.A. 461 (¶ 169) (emphasis added). Fairholme employed this same language in its directly pled illegal exaction claim. *See* J.A. 466 (¶ 195). The other appellants similarly allege in their direct takings and illegal exaction claims that the government expropriated their economic interest by paying the Treasury the Enterprises' entire net worth. *See, e.g.*, J.A. 526 (¶ 115); J.A. 528 (¶ 119); J.A. 790 (¶ 133); J.A. 792 (¶ 141); J.A. 808 (¶ 13); J.A. 852 (¶ 128); J.A. 855 (¶ 144).

Because shareholders' complaints describe a species of corporate overpayment, they fail both prongs of *Tooley's* test. As the Delaware Supreme Court noted in the portion of *Gentile* that has not since been overruled, overpayment claims are normally regarded as derivative because:

[T]he corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow. . . . Such claims are not normally regarded as direct, because any dilution in value of the corporation's stock is merely the unavoidable result (from an accounting standpoint) of the reduction in the value of the entire corporate entity, of which each share of

equity represents an equal fraction. In the eyes of the law, such equal “injury” to the shares resulting from a corporate overpayment is not viewed as, or equated with, harm to specific shareholders individually.

906 A.2d at 99.

Despite this seemingly clear authority, shareholders claim that several federal cases still require that we classify their claims as sufficiently direct for standing purposes. They cite to our own decision in *Starr*, to the *Perry II* decision from the D.C. Circuit, and to the Supreme Court’s decisions in *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151 (1957) and *Collins*.<sup>8</sup>

In *Starr*, we considered a claim by shareholders of American International Group (AIG) relating to the government’s 2008 loan to AIG in return for, among other things, the issuance of new equity which placed the government in control of 79% of AIG’s shares. The AIG shareholders claimed that the government’s

---

<sup>8</sup> Shareholders also rely on one sentence from a dissent by Justice Felix Frankfurter in *Swanson v. Traer*, 354 U.S. 91 (1957). There, Justice Frankfurter said, with no citation to other authority, that “[i]f a corporation rearranges the relationship of different classes of security holders to the detriment of one class, a stockholder in the disadvantaged class may proceed against the corporation as a defendant to protect his own legal interest.” *Swanson*, 354 U.S. at 99. Putting aside the fact that musings in dissents, even from well-respected jurists, create no precedents, the majority only discussed whether federal diversity jurisdiction can be asserted in shareholder derivative claims and refused to consider “whether it is a proper case for assertion by a stockholder of that cause of action . . .” *Smith v. Sperling*, 354 U.S. 91, 94 (1957) (publishing the majority opinion under this case name and the dissent under the *Swanson* case name).

equity acquisition constituted a taking of their individual shareholder value by dramatically diluting that value. We concluded that the injuries the shareholders alleged with respect to the acquisition of AIG equity were “quintessentially ‘dependent on an injury to the corporation’” and were, thus, “exclusively derivative in nature.” *Starr*, 856 F.3d at 967 (quoting *Tooley*, 845 A.2d at 1036). That holding would seem to apply equally to the shareholders’ claims here. Shareholders claim it does just the opposite. They cite to a section of the opinion in which we declined to equate the issuance of new equity with “the ‘separate harm’ that results from ‘an extraction from the public shareholders and a redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest.’” *Id.* (quoting *Gentile*, 906 A.2d at 100). We said that the latter might constitute a “separate harm” that could give rise to a direct claim. *Id.*

The shareholders claim that, by acknowledging the possible existence of a “separate harm” arising from the redistribution of existing share value, we held, in that precedential decision, that allegations of such harm are actionable as direct claims. We did no such thing. While we acknowledged the possibility of a “separate harm” where shares of existing stock are physically taken away, that discussion related to our consideration of whether the AIG shareholder claims fell into the dual nature exception to the *Tooley* doctrine created by *Gentile*. But, as noted, that exception no longer exists. Indeed, the portion of *Starr* on which the shareholders rely cites to the portions of *Gentile* that were expressly overruled in *Brookfield*. We see nothing in *Starr* that compels the

conclusion that shareholders' direct claims are anything but derivative.

Shareholders' reliance on *Perry II* is similarly unhelpful. Shareholders' attempts to parallel their property rights in the Enterprises to the "obviously direct" breach of their contractual rights in *Perry II* are unpersuasive. The fact that shareholders possess a property interest in their shares of the Enterprises does not answer the question of whether they are asserting direct or indirect harm to that property right. Shareholders clearly allege a corporate overpayment by the Enterprises which, in turn, indirectly diluted the value of their shares. As explained above, assertions of corporate overpayment are substantively derivative claims.

Shareholders' reliance on *Alleghany* fares no better. Shareholders claim that *Alleghany* supports their proposition that, whenever rights are shifted from one class of shareholders to another, the disadvantaged shareholders may assert a direct claim. But, as we explained in *Starr*, *Alleghany* did not create a new doctrine of direct standing which would allow shareholders to bypass the requirement that harms to a corporation may only be challenged via derivative claims. *See Starr*, 856 F.3d at 971. Because the action in *Alleghany* was one between the shareholders and the corporation—and not one asserting harm to the corporation, as is the case with corporate overpayment claims—the court "had no occasion to address principles of third-party standing or the distinction between derivative and direct shareholder actions." *Id.* at 970–71. Indeed, the *Alleghany* court made clear it was not considering claims which would need to be asserted derivatively. *See Alleghany*, 353

U.S. at 159–60 (“This is not a case where . . . the injury feared is the indirect harm which may result to every stockholder from harm to the corporation.” (internal quotation marks omitted) (citation omitted)). The facts here are meaningfully distinguishable from those in *Alleghany*. We are unpersuaded that *Alleghany* changes the analysis where, as here, the complaints assert claims of corporate overpayment. We conclude that, though directly styled, shareholders’ claims are substantively derivative under Delaware law.

Finally, we turn to shareholders’ contention in supplemental briefing addressing the impact of *Collins* on these appeals. Shareholders contend that *Collins* not only confirms that, when acting as conservator, the FHFA was acting in its governmental capacity, it also confirms that shareholders have standing to assert their constitutional claims against the government. According to shareholders, because the *Collins* court held that the shareholders there had Article III standing to pursue separation-of-powers claims, the shareholders in this appeal must also possess standing to pursue their direct claims.

We are not persuaded by shareholders’ reading of *Collins*. The shareholders’ complaint in *Collins* alleged that HERA’s statutory restriction on the President’s power to remove the FHFA’s Director constituted a separation-of-powers (*i.e.*, Appointments Clause) violation. *Collins*, 141 S. Ct. at 1778. As the Court explained, that claim only required shareholders to establish Article III’s minimum standing requirements—injury, causation, and redress. *Id.* at 1779. In concluding that these threshold standing requirements were satisfied in

*Collins*, the Court explained that the unique claims at issue there did not derive from the plaintiffs' status as shareholders. Instead, the separation-of-powers claim asserted a right "shared by everyone in the country." *Id.* at 1781.

Here, by contrast, shareholders' claims implicate areas of corporate law that require them to go beyond Article III's standing requirements and establish the right to assert derivative third-party claims on behalf of the corporation. As explained above, only "shareholder[s] with a direct, personal interest in a cause of action," rather than "injuries [that] are entirely derivative of their ownership interests" in a corporation, may bring a direct shareholder action. *Franchise Tax Bd.*, 493 U.S. at 336–37. *Collins* did not change those legal principles. As the Delaware Supreme Court has made clear, moreover, a claim must be asserted derivatively whenever the alleged harm to the shareholders is not "*independent*" of harm to the corporation. *Brookfield*, 261 A.3d at 1272 (emphasis in original). Thus, although the Claims Court dismissed shareholders' claims on standing grounds and we find that shareholders' complaints do not adequately state a claim upon which relief may be granted, we find the Claims Court's reliance on this incorrect ground of dismissal harmless and affirm. *See Harmonia Holdings Grp., LLC v. United States*, 999 F.3d 1397, 1403–04 (Fed. Cir. 2021).

## 2. Cacciapalle's separate takings claim

As described below, the D.C. Circuit held in *Perry II* that HERA's Anti-Injunction Clause <sup>9</sup> barred shareholders' claims for equitable relief, *see Perry II*, 864 F.3d at 613–14, and that HERA's Succession Clause barred all non-constitutional shareholder derivative suits, *see id.* at 624. In Count II of his complaint before the Claims Court, Cacciapalle (a shareholder of the Enterprises) contended that *Perry II*'s ruling constituted a direct taking of private property without just compensation:

As holders of Preferred Stock, [shareholders] had the right to protect their investment by filing certain causes of action, including derivative lawsuits and claims seeking injunctive and declaratory relief. . . . These causes of action constitute property rights protected by the Fifth Amendment. . . . To the extent Plaintiffs are prevented from receiving a full remedy for the harm caused by the [net worth sweep] by virtue of any court's holding that certain HERA provisions block legal actions needed to fully remedy the harm caused by the [net worth sweep], the application of those provisions to [Cacciapalle's] challenges to the [net worth sweep] constitute a taking of private property without payment of just compensation.

J.A. 853–54 (¶ 134–37).

---

<sup>9</sup> HERA's Anti-Injunction Clause reads: "no court may take any action to restrain or affect the exercise of powers or function of the [FHFA] as a conservator or receiver." 12 U.S.C. § 4617(f).

The Claims Court dismissed Count II of Cacciapalle's complaint, reasoning that it impermissibly collaterally attacked *Perry II*'s holding. *See Cacciapalle*, 148 Fed. Cl. at 772 (citing, *inter alia*, *Campbell v. United States*, 932 F.3d 1331, 1340 (Fed. Cir. 2019) for the proposition that the Claims Court cannot entertain a constitutional claim that requires scrutinizing the actions of another tribunal). Cacciapalle appeals this decision, arguing that the Claims Court mischaracterized his claim as a collateral attack on *Perry II*, as well as a judicial taking. *See Cacciapalle Suppl. Opening Br.* 16–17. According to Cacciapalle, Count II instead asserts a direct takings claim under the Fifth Amendment because it contends that, as interpreted in *Perry II*, HERA is a regulatory taking of shareholders' rights to assert derivative claims and seek injunctive relief in connection with such claims. *See id.* at 18. In other words, Cacciapalle says he agrees with *Perry II*'s conclusion that the Succession Clause bars the assertion of derivative claims on behalf of the Enterprises. He says that *because* HERA clearly does that, it operates as a taking of his property right to assert derivative claims on behalf of the Enterprises.

However characterized, Count II of Cacciapalle's complaint must still be dismissed. First, *Perry II* did not hold that the Succession Clause is broad enough to bar derivative constitutional claims. *See Perry II*, 864 F.3d at 614 (“[HERA] does not prevent either constitutional claims (none are raised here) or judicial review through cognizable actions for damages like breach of contract.”). Thus, to the extent Cacciapalle purports to sweep his constitutional derivative claims into Count II, by his own reasoning he has failed to



assert a claim upon which relief may be granted. Second, even assuming that the right to assert non-constitutional derivative claims is a property right for Fifth Amendment purposes, the corporation on whose behalf a shareholder wishes to bring such a claim must itself possess an underlying cause of action that it could plausibly assert. While Count II is silent regarding the nature of the claim Cacciapalle would assert on behalf of the Enterprises if he could, the only one identified in his complaint or any of his briefing is a claim that the FHFA breached its fiduciary duties to the Enterprises when it implemented the net worth sweep. The problem for Cacciapalle is that *Perry II*, the very case he says he “do[es] not challenge” and is both “correct and final,” Cacciapalle Suppl. Opening Br. 18, concluded that the FHFA owed no fiduciary duties to the Enterprises, as conservator or otherwise, *Perry II*, 864 F.3d at 625. As we explained above, moreover, the Supreme Court has since confirmed that the FHFA was authorized to adopt the net worth sweep without regard to the interests of the Enterprises or its shareholders. *See Collins*, 141 S. Ct. at 1777. Thus, even if the Claims Court was wrong to characterize Count II of Cacciapalle’s complaint as a collateral attack on the reasoning in *Perry II*, it was correct to dismiss that claim. There is simply no claim embedded in that count upon which relief may be granted.

### C. Shareholders’ direct non-constitutional claims

#### 1. Breach of implied-in-fact contract

Shareholders again proffer both joint and individual arguments on appeal as to why we should

overturn the Claims Court’s dismissal of their direct breach of contract claims. We address each in turn.

a. Joint arguments regarding the contract claims

Under the Tucker Act, the Claims Court has jurisdiction “to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States.” 28 U.S.C. § 1491(a)(1). The Claims Court dismissed shareholders’ direct breach of implied-in-fact contract claims, holding that it lacked subject matter jurisdiction under the Tucker Act. *See, e.g., Fairholme*, 147 Fed. Cl. at 41. The Claims Court explained that, even if an implied-in-fact contract existed between the FHFA and the Enterprises where—despite its statutory authority not to do so—the FHFA chose to agree to operate the Enterprises for the shareholders’ benefit, the shareholders failed to sufficiently allege their status as third-party beneficiaries of that alleged contract. *Id.* at 42. On appeal, the shareholders contend that the Claims Court erred in this finding and urge us to reinstate this directly pled claim. We decline to do so.

An implied-in-fact contract is one “founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.” *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998) (quoting *Balt. & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923)). Like an express contract, an implied-in-fact contract requires: (1) mutuality of intent to contract; (2) consideration; and (3) unambiguous offer and

acceptance. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990). When the government is a party, an implied-in-fact contract also requires that (4) the government representative whose conduct is relied upon must have actual authority to bind the government in contract. *Id.*

As a general rule, for purposes of Tucker Act jurisdiction, the government consents to be sued only by those with whom it has privity of contract. *Fid. & Guar. Ins. Underwriters, Inc. v. United States*, 805 F.3d 1082, 1087 (Fed. Cir. 2015). There are exceptions to this general rule, including that intended third-party beneficiaries may bring suits against the government. *First Hartford*, 194 F.3d at 1289. “Third party beneficiary status is an ‘exceptional privilege.’” *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (quoting *German All. Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912)). The requirements for establishing such status are “stringent.” *Anderson v. United States*, 344 F.3d 1343, 1352 (Fed. Cir. 2003). “[S]hareholders seeking status to sue as third-party beneficiaries of an allegedly breached contract must ‘demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.’” *Castle v. United States*, 301 F.3d 1328, 1338 (Fed. Cir. 2002) (quoting *Glass*, 258 F.3d at 1354). Specifically, “the contract must express the intent of the [promisor] to benefit the shareholder personally, independently of his or her status as shareholder.” *Glass*, 258 F.3d at 1353–54. One way to ascertain the presence of that intent is to determine “whether the beneficiary would be reasonable in relying on the promise as

manifesting an intention to confer a right” on her. *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997) (citing *Restatement (Second) of Contracts* § 302(1)(b) & cmt. d (Am. L. Inst. 1981)).

Here, even assuming shareholders have sufficiently alleged the requisite facts to establish an implied-in-fact contract with the Enterprises, their complaints still do not establish third-party beneficiary status. As the complaints state, the FHFA and the Enterprises did not enter into the implied-in-fact contract to benefit shareholders; they, instead, entered the conservatorship to “preserve and conserve the [Enterprises’] assets and property’ and restore the [Enterprises] to a ‘sound and solvent condition.’” J.A. 478 (¶ 260); J.A. 530 (¶ 132); J.A. 796 (¶ 163). Although shareholders may indirectly benefit from the terms of the alleged implied-in-fact contract, that alone is not enough to establish third-party beneficiary status. *See FDIC v. United States*, 342 F.3d 1313, 1320 (Fed. Cir. 2003) (holding that indirect benefits resulting solely from being a shareholder, without more, are insufficient to establish third-party beneficiary status). As we explained *supra*, moreover, in *Collins*, at the time of the alleged contract, HERA expressly authorized the FHFA, as conservator, to act in ways which were not designed to benefit either the Enterprises *or* its shareholders. *See supra*, at 15–16. We therefore affirm the Claims Court’s decision to dismiss shareholders’ direct breach of contract claims. Again, although the Claims Court dismissed on jurisdictional grounds and we find that the complaints do not state a claim upon which relief may be granted, we find this alternative ground for dismissal harmless. *See Harmonia Holdings Grp.*, 999 F.3d at 1403–04.

b. Cacciapalle contract claim

Cacciapalle's breach of contract claim alleges that his stock certificates established a contract between shareholders and the Enterprises guaranteeing him certain rights to dividends, liquidation preferences, and voting rights, and contained an implied covenant of good faith and fair dealing. *See* J.A. 855–57. Once the FHFA assumed its role as conservator, Cacciapalle contends that these contracts became contracts between shareholders and the United States. *Id.* Before the Claims Court, Cacciapalle argued that the FHFA breached these contracts by executing the net worth sweep. *See Cacciapalle*, 148 Fed. Cl. at 779.

The Claims Court held that Cacciapalle lacked standing to pursue these allegations because he failed to establish that he was in contractual privity with the United States. *Id.* The Claims Court declined Cacciapalle's invitation to find that *First Hartford* established any applicable exception to the general requirement that, to pursue a claim for breach of contract against the United States, a party must first establish that it is in privity with the United States. *Id.* Noting that the unifying principle behind the privity exceptions on which Cacciapalle relied requires "the party standing outside of privity by contractual obligation [to] stand[] in the shoes of a party within privity," the Claims Court found that Cacciapalle had cited no legal authority to support his assertion that the FHFA, as conservator, stood in the shoes of the Enterprises. *Id.* at 780 (citing *First Hartford*, 194 F.3d at 1289).

Cacciapalle contends on appeal that the Claims Court misunderstood the basis of his argument.

Rather than analogize the facts of his complaint to those in *First Hartford* to assert that the FHFA as conservator stepped into the Enterprises' shoes, Cacciapalle now insists that he relies on HERA's Succession Clause for this proposition. Because HERA states that the FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of [the Enterprises]," Cacciapalle argues that the conservatorship caused the FHFA to succeed to the Enterprises' contractual obligations. Cacciapalle Suppl. Opening Br. 26–27. And, because the FHFA "retains [its] government character" as conservator, Cacciapalle argues that he has established privity of contract with the United States. *Id.* at 28.

Though creative, we disagree that Cacciapalle may pursue his contract claim. HERA establishes that the FHFA may act in a governmental capacity: "the [FHFA] . . . shall be an independent agency of the Federal Government." 12 U.S.C. § 4511(a). As discussed above, *Collins* made clear that the FHFA retains its governmental character whenever it interprets federal law to undertake an action (such as interpreting HERA's Best Interests clause when adopting the net worth sweep). *See supra*, at 15–16 (citing *Collins*, 141 S. Ct. at 1776–77, 1785–86). But, in cases involving hybrid entities exercising traditional governmental functions and private commercial ones, the Supreme Court has also held that "suits based on a public corporation's *commercial* activity may proceed as they would against a private company." *Thacker v. Tenn. Valley Auth.*, 139 S. Ct. 1435, 1439, 1443 (2019) (emphasis in original); *see also Montilla*, 999 F.3d at 757 (holding that the FHFA

as conservator did not act in any governmental capacity when it succeeded to the Enterprises' private contractual rights and nonjudicially foreclosed on certain properties).

In succeeding to the Enterprises' private contractual agreement with Cacciapalle, we conclude the FHFA does not retain its governmental character. Unlike the FHFA's adoption of the net worth sweep—which, as discussed above, necessarily required the FHFA to exercise its statutory power to subordinate the Enterprises' and shareholders' best interests to its own, *see supra*, at 15–16—succeeding to the preexisting contracts between the Enterprises and Cacciapalle does not implicate any such governmental activity. To be sure, Cacciapalle's complaint makes clear that the FHFA's succession to the Enterprises' obligations only involves interpreting contractual terms, not federal law. *See* J.A. 856 (¶ 153) (“FHFA assumed the responsibility to act consistently with the [Enterprises'] contractual obligations when it became the [Enterprises'] conservator.”). Because Cacciapalle's breach of contract claim fails to implicate any governmental activity on the FHFA's part, the requisite privity of contract with the United States is absent. *See Erickson Air Crane Co. of Wash. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984) (holding that the “government consents to be sued only by those with whom it has privity of contract”). We, thus, affirm the Claims Court's decision to dismiss these claims on standing (privity) grounds. To the extent Cacciapalle has a contract claim, it cannot be asserted against the United States.

## 2. Breach of fiduciary duty

The Tucker Act also provides the Claims Court with subject matter jurisdiction over claims “against the United States founded . . . upon . . . liquidated or unliquidated damages in cases not sounding in tort.” 28 U.S.C. § 1491(a)(1). Although a claim for breach of fiduciary duty is normally classified as a tort, *see Newby v. United States*, 57 Fed. Cl. 382, 294 (2003), the Claims Court has jurisdiction over claims alleging the breach of a fiduciary duty that the government “specifically accepts by statute or regulation.” *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015). The Claims Court also has jurisdiction over a plaintiff’s breach of fiduciary duty claim “grounded in a contractually based obligation” to the plaintiff. *Cleveland Chair Co. v. United States*, 557 F.2d 244, 246 (Ct. Cl. 1977).

The Claims Court held that it lacked subject matter jurisdiction under the Tucker Act to hear shareholders’ directly pled fiduciary duty claims because they sounded in tort. The Claims Court first reasoned that HERA was not a statutory source for any fiduciary duties of the FHFA to shareholders because it provides that, as conservator, the FHFA was only required to act in the interests of itself or the Enterprises. *Fairholme*, 147 Fed. Cl. at 38 (citing 12 U.S.C. § 4617(b)(2)(J)). The court explained that 12 U.S.C. § 4617(b)(2)(J) “reflects a clear intent: the FHFA [as conservator] does not owe a fiduciary duty to shareholders because the conservator is not required to consider shareholders’ interests.” *Id.* Similarly, although Congress directed the Treasury Secretary to consider, e.g., the need to maintain the Enterprises as privately owned companies before



purchasing securities under HERA, the court declined to find a fiduciary relationship between Treasury and the shareholders “based on any incidental benefit shareholders may derive” from the consideration of that need. *Id.* at 39.

The Claims Court also reasoned that the PSPAs did not confer a fiduciary duty on Treasury—as the controlling shareholder—to the other shareholders. The Claims Court noted that shareholders’ allegations are “not founded on a contract within the meaning of the Tucker Act” but premised on “the application of state-law principles.” *Id.* The court further noted that the shareholders failed to explain why it should or could draw on state-law tort principles here. *Id.*

Shareholders appeal the Claims Court’s holding. First, they argue that the FHFA has fiduciary duties to shareholders because, under HERA, the FHFA is a conservator that “obtains total control of an entity, with a view to preserving and conserving its assets, making it sound and solvent, and carrying on its business.” Appellants’ Joint Opening Br. 73 (citing 12 U.S.C. § 4617(b)(2)(A), (B), (D)). Shareholders analogize HERA to FIRREA and cite to other cases where courts have recognized that the FDIC owes fiduciary duties to the creditors and shareholders of the banks for whom it is a receiver. Shareholders contend that the provision in HERA permitting the FHFA to take any action that is in the best interest of the Enterprises or the agency is an additional requirement that is “entirely consistent with recognizing that [the agency] has a fiduciary duty to shareholders.” *Id.* at 75–76. Second, shareholders argue that, because the PSPAs made Treasury a controlling shareholder of the Enterprises, the

Treasury owes fiduciary duties to the remaining shareholders, even if the FHFA as conservator does not. They contend that the Tucker Act’s jurisdictional grant is broad and that the allegedly breached fiduciary duty need not be stated in the terms of the contract but can arise from contract terms as a matter of law. They also contend that the court should have looked to state-law principles to inform the terms of the contract arising from the PSPAs.

We do not find shareholders’ arguments that HERA provides a source of fiduciary duty availing. The Supreme Court’s analysis of HERA in *Collins* is highly instructive. Notably, the Supreme Court held that, because HERA authorizes the FHFA to act in the best interests of the Enterprises *or itself*, the agency “may aim to rehabilitate the [Enterprises] in a way that, while not in the best interests of the [Enterprises], is beneficial to the [FHFA] and, by extension, the public it serves.” *Collins*, 141 S. Ct. at 1776; *see* 12 U.S.C. § 4617(b)(2)(J)(ii). The Court added that the FHFA lawfully adopted the net worth sweep, “[w]hether or not this new arrangement was in the best interests of the companies *or their shareholders*.” *Collins*, 141 S. Ct. at 1777 (emphasis added). Because the FHFA could adopt the net worth sweep without regard for the interests of the shareholders, we hold that the agency owed no fiduciary duties to the shareholders under HERA.

We disagree with the shareholders that 12 U.S.C. § 4617(b)(2)(A), (B), and (D) gave rise to fiduciary duties owed by the FHFA to shareholders. Those provisions—which outline the FHFA’s powers and duties as conservator and empower the FHFA to preserve and conserve the assets and property of the

Enterprises or to carry on the business of the Enterprises—are permissive, not mandatory: “[t]he [FHFA] *may*, as conservator, take such action as may be . . . appropriate to carry on the business of the [Enterprises] and preserve and conserve the assets and property of the [Enterprises].” 12 U.S.C. § 4617(b)(2)(D)(ii) (emphasis added). This precatory language cannot fairly be said to establish a fiduciary duty owed to shareholders. As the D.C. Circuit concluded in *Perry II*, “the most natural reading of [HERA] is that it permits FHFA, but does not compel it in any judicially enforceable sense, to preserve and conserve [the Enterprises’] assets and to return the [Enterprises] to private operation.” 864 F.3d at 607. We are also not persuaded by case law recognizing fiduciary duties in the context of the FDIC when acting as receiver under FIRREA. The Supreme Court’s analysis in *Collins* is more persuasive authority because it both dealt with HERA and considered the FHFA’s rights and obligations *as conservator*. And the Court’s conclusion that 12 U.S.C. § 4617(b)(2)(J) permits the FHFA to act without regard to the best interests of the shareholders refutes the shareholders’ argument that the provision is an additional requirement consistent with the creation of a fiduciary duty to shareholders; it, in fact, negates such a duty. *See Collins*, 141 S. Ct. at 1777; *see also Perry II*, 864 F.3d at 608 (distinguishing HERA from FIRREA because FIRREA permits the FDIC to consider the interests of depositors while HERA refers only to the best interests of the Enterprises and the FHFA).

We are also unpersuaded by shareholders’ contentions that the PSPAs imposed on the Treasury

a fiduciary duty to the shareholders. Instead, we agree with the D.C. Circuit’s analysis and reasoning in *Perry II*. There, the court considered whether the Administrative Procedure Act (APA) waived sovereign immunity for the plaintiffs’ claims that the Treasury, as a controlling shareholder of the Enterprises, violated its fiduciary duties to the shareholders by executing the net worth sweep.<sup>10</sup> *Perry II*, 864 F.3d at 617. The D.C. Circuit found that subject matter jurisdiction over the plaintiffs’ claims was proper because they were not founded upon a contract. *Id.* at 619–21 (“These claims against Treasury . . . do not seek to enforce any duty imposed upon Treasury by the [PSPAs].”). The court specifically rejected the view that “*any* case requiring *some* reference to . . . a contract is necessarily . . . *on the contract* and therefore directly within the Tucker Act.” *Id.* (quoting *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967–68 (D.C. Cir. 1982)).

The D.C. Circuit’s reasoning in *Perry II* is helpful here; the shareholders’ direct breach of fiduciary duty claims are substantively similar to the claims in *Perry II*. Here, the shareholders contend that the Treasury, as a controlling shareholder of the Enterprises, breached its fiduciary duties to the shareholders by entering into the net worth sweep. *E.g.*, J.A. 528–29 (¶¶ 125–26). They invoke the PSPAs only to establish that the Treasury owns warrants to 79.9% of the Enterprises’ common stock and therefore is a

---

<sup>10</sup> The APA’s waiver provision does not apply “if any other statute that grants consent to suit,” including the Tucker Act, “expressly or impliedly forbids the relief which is sought.” *Perry II*, 864 F.3d at 617 (quoting 5 U.S.C. § 702).

controlling shareholder. This reference to the impact of the PSPAs does not change the fact that their breach of fiduciary duty claims are founded on state common-law obligations that a controlling shareholder generally owes to minority shareholders, not the PSPAs. The Claims Court correctly recognized that shareholders failed to allege a breach of fiduciary duty claim against Treasury founded on a contract.<sup>11</sup> We hold that the Claims Court correctly dismissed all the shareholders' direct fiduciary duty claims for lack of subject matter jurisdiction.

#### IV. BARRETT'S DERIVATIVE CLAIMS

##### A. The derivative non-constitutional claims

As mentioned above, shareholders of the Enterprises challenged the net worth sweep in various other fora. One such challenge involved a class action against the FHFA and Treasury over the net worth sweep in the United States District Court for the District of Columbia. *See Perry I*, 70 F. Supp. 3d 208. Relevant here, class plaintiffs derivatively

---

<sup>11</sup> We see no inconsistency between the Claims Court's treatment of state-law principles here and its analysis of state-law principles to determine whether the shareholders' direct takings and illegal exaction claims are substantively derivative. As to the breach of fiduciary duty claims, the Claims Court addressed an issue of subject matter jurisdiction—whether the claims were founded on a contract with the United States or were for liquidated or unliquidated damages in cases not sounding in tort. By contrast, as to the takings and illegal exaction claims, the Claims Court addressed the distinct issue of third-party standing. For those claims, there was no dispute that the Claims Court had subject matter jurisdiction; the claims were founded upon the Constitution. References to state law there were to inform the third-party standing inquiry.

pled that the FHFA had breached its fiduciary duties to the Enterprises. *Id.* at 218. The district court dismissed class plaintiffs’ derivative claims, reasoning that HERA’s Succession Clause unambiguously bars shareholder derivative suits because it transferred all the shareholders’ rights, including their rights to assert claims on behalf of the Enterprises, to the FHFA. *Id.* at 229–30 (citing 12 U.S.C. § 4617(b)(2)(A)(i)). The district court declined class plaintiffs’ invitation to read a conflict-of-interest exception into HERA’s Succession Clause. *See id.* at 230 (citing *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012)).

Class plaintiffs appealed, *inter alia*, this portion of the district court’s ruling in *Perry I*. *See Perry II*, 864 F.3d 591. The *Perry II* court affirmed, holding that, without exception, HERA’s Succession Clause barred non-constitutional derivative shareholder suits. *See id.* at 623–25. The D.C. Circuit disagreed with class plaintiffs that the Succession Clause contained an implicit conflict-of-interest exception, reasoning that “it makes little sense to base an exception to the rule against derivative suits in the Succession Clause on the purpose of the derivative suit mechanism, rather than the plain statutory text to the contrary.” *Id.* at 625 (internal quotation marks and citation omitted). In doing so, it acknowledged, but refused to follow, our conclusion in *First Hartford* that an identical succession clause in FIRREA was subject to a conflict-of-interest exception. *Id.*

Before the Claims Court, the government argued that Barrett was collaterally estopped from pursuing his derivative claims because *Perry I* and *II* dealt with the same issue before the Claims Court: whether the

class of shareholders had standing to pursue non-constitutional derivative claims. *See Fairholme*, 147 Fed. Cl. at 47. The Claims Court disagreed, noting that, because shareholders in *Perry I* and *II* could not assert derivative claims due to HERA's Succession Clause, they did not adequately represent Barrett's interests in this case. *Id.* at 48.

In its cross-appeal, the government contends that the Claims Court erroneously ignored the fact that the *Perry* line of cases resolved a threshold question that extends to *any* plaintiff who tries to bring a derivative suit on the Enterprises' behalf. Gov't Resp. Br. 76–78. Barrett responds by arguing that, because *Perry II* held that HERA's Succession Clause barred derivative shareholder suits, the decision was tantamount to dismissing the class plaintiffs' suit "on the ground that the shareholders who sued lacked the legal capacity to represent the [Enterprises]." Appellants' Joint Reply Br. 92 (citing *Fairholme*, 147 Fed. Cl. at 47–48). This incapacity to represent the Enterprises, Barrett reasons, leads to the conclusion that Barrett is not collaterally estopped because his interests were not adequately represented in *Perry II*. Appellants' Joint Reply Br. 92; *see also* Appellants' Joint Reply Br. 94 ("When a putative shareholder derivative suit is dismissed on the theory that the plaintiff is legally prohibited from representing the corporation in litigation, the judgment cannot bind the corporation or its other shareholders."). Barrett also contends that the issues are not identical: *Perry II* only involved derivatively pled breach of fiduciary duty claims, whereas here, Barrett pled both a breach of fiduciary duty and breach of contract claim, as well as derivative constitutional claims. Appellants' Joint

Reply Br. 95–96. Shareholders also jointly argue that, because the Supreme Court in *Collins* found standing for plaintiffs asserting constitutional rights notwithstanding HERA’s Succession Clause, we should find standing here. See Fairholme Suppl. Br. on *Collins* 13–14.

We agree with the government that Barrett is collaterally estopped from re-litigating whether HERA’s Succession Clause bars his non-constitutional derivative claims. Issue preclusion bars successive litigation when the following elements are met: (1) “[t]he issue previously decided is identical with the one presented in the action in question”; (2) “[t]he prior action has been finally adjudicated on the merits”; (3) “[t]he party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication”; and (4) “[t]he party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.” *Jones v. United States*, 846 F.3d 1343, 1361 (Fed. Cir. 2017).

We first disagree with both the shareholders and the Claims Court that, because *Perry II* concluded that HERA bars shareholders from bringing derivative claims, the class plaintiffs there did not adequately represent the interests of all shareholders. The Supreme Court in *Taylor v. Sturgell*, 553 U.S. 880 (2008) held that “[a] party’s representation of a nonparty is adequate for preclusion purposes only if, at a minimum: (1) [t]he interests of the nonparty and her representative are aligned . . . and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty.” *Id.* at 900 (internal quotation marks and citations omitted).



Here, the *Perry II* court affirmatively answered the question of whether HERA's Succession Clause bars all non-constitutional derivative shareholder suits. On this issue, the interests of the *Perry II* class plaintiffs and Barrett are "aligned." *See id.* The class plaintiffs and Barrett both sought to bring derivative state law claims on the Enterprises' behalf to challenge the net worth sweep. And they both advocated for an interpretation of the Succession Clause that recognizes a conflict-of-interest exception. *See, e.g., Perry II*, 864 F.3d at 625; *Fairholme*, 147 Fed. Cl. at 49.

In litigating the applicability of HERA's Succession Clause to derivative claims, the class plaintiffs in *Perry I* and *II* also understood themselves to be "acting in a representative capacity." As the court in *Perry I* noted, "[t]he purported class plaintiffs consist of private individual and institutional investors who own either preferred or common stock in the [Enterprises]." *Perry I*, 70 F. Supp. 3d at 214. Because shareholders' complaints note that Barrett "has continuously owned shares of [the Enterprises] since September 2008," we find that Barrett falls under the class described in the *Perry* cases. J.A. 398 (¶ 31). And the pure legal question of whether HERA's Succession Clause bars all non-constitutional derivative shareholder claims is not applicable only to certain shareholders. It, instead, applies to any shareholder attempting to bring a derivative claim on the Enterprises' behalf. Indeed, while the particular named shareholders pursuing derivative lawsuits that challenge the net worth sweep may change from case to case, HERA's statutory text does not. Barrett was, thus, adequately represented by the class

plaintiffs in *Perry I* and *II*. The fact that the plaintiffs in *Perry I* and *Perry II* failed to convince the D.C. courts that their non-constitutional claims were not barred by the Succession Clause does not mean they failed to represent Barrett's interests on that point. See *In re Sonus Networks, Inc, S'holder Derivative Litig.*, 499 F.3d 47, 64 (1st Cir. 2007).

We are also unconvinced by shareholders' contentions that collateral estoppel does not apply here because Barrett's derivative non-constitutional claims do not perfectly coincide with the derivative breach of fiduciary duty claims at issue in *Perry II*.<sup>12</sup> The Supreme Court has held that collateral estoppel applies, "even if the issue recurs in the context of a different claim." *Taylor*, 553 U.S. at 892. Here, regardless of what the derivative non-constitutional claims entail, the issue subject to collateral estoppel remains whether HERA bars those claims vis à vis its Succession Clause. Because the class plaintiffs in *Perry II*, who adequately represented Barrett's interests, already litigated this question, we find that issue preclusion principles militate in favor of collaterally estopping Barrett from re-litigating it. The four issue-preclusion elements outlined in *Jones* are met. The Claims Court, therefore, erred by not finding collateral estoppel applicable here.

Shareholders' joint arguments based on *Collins* do not require a different result. As discussed above, in

---

<sup>12</sup> To the extent shareholders contend that issue preclusion does not apply to their derivative constitutional claims, we agree. As detailed in the next section, however, we hold that shareholders' derivative constitutional claims fail for independent reasons.

response to a separation-of-powers challenge to HERA's restrictions on the President's ability to remove the FHFA Director, the Supreme Court found that the shareholders had standing to litigate those claims, despite HERA's Succession Clause, because "the right asserted . . . is a right shared by everyone in this country." *Collins*, 141 S. Ct. at 1781. That is not the case here, where Barrett is attempting to derivatively sue on behalf of the Enterprises' rights to assert its interests in its net worth.

B. Barrett's constitutional derivative claims

We finally turn to Barrett's constitutional derivative claims. Because the *Perry II* court never decided any constitutional claims and expressly pointed out that it had no occasion to do so, we decline to dismiss these claims on the ground that Barrett is collaterally estopped from asserting them. *See Perry II*, 864 F.3d at 606 n.7. That leaves us to decide whether Barrett's claims are barred by the Succession Clause or are subject to dismissal on other grounds.

The Claims Court held that Barrett had standing to pursue his constitutional claims, despite the Succession Clause. *See Fairholme*, 147 Fed. Cl. at 47. To arrive at that conclusion, the Claims Court relied on our precedent in *First Hartford*. *Id.* at 49. Reasoning that a conflict of interest would arise if the FHFA were to decide whether to sue itself over the net worth sweep in a direct suit, the Claims Court applied the conflict-of-interest exception that our court established in *First Hartford* to conclude that HERA's Succession Clause did not deprive Barrett of standing to bring his constitutional derivative claims. *See id.* at 49–51.

The government cross-appeals the Claims Court’s reliance on *First Hartford* and argues that Barrett lacks standing to assert his derivative claims. Among other things, the government argues that *First Hartford* must be limited to the specific FIRREA context in which it arose. It contends that HERA’s statutory construct makes clear that its Succession Clause “admits of no exceptions.” Gov’t Resp. Br. 79. Because we conclude that, as a matter of law, Barrett failed to state a claim upon which relief may be granted in either his takings or illegal exaction derivative claims, we reverse the Claims Court on those issues, without the need to address *First Hartford*.<sup>13</sup>

#### 1. Barrett’s takings claims

The Fifth Amendment provides that the United States may not take private property for public use without just compensation. *See* U.S. Const. amend. V. To adequately plead a takings claim, claimants must identify an authorized government action that deprived them of their property interest. *Short v. United States*, 50 F.3d 994, 1000 (Fed. Cir. 1995). Government action may result in a compensable

---

<sup>13</sup> We note, however, that both the *Collins* court and the *Perry II* court concluded that the FDIC’s authority as receiver under FIRREA is very different from the FHFA’s authority as conservator under HERA. *See Collins*, 141 S. Ct. at 1785 (“[A]s we have already mentioned, . . . the FHFA’s powers under [HERA] differ critically from those of most conservators and receivers.”); *see also Perry II*, 864 F.3d at 608 (“Notably, while FIRREA explicitly permits FDIC to factor the best interests of depositors into its conservatorship judgments, [HERA] refers only to the best interests of FHFA and the [Enterprises]—and *not* those of the [Enterprises]’ shareholders or creditors.”).

taking if it either involves the physical invasion of property or an extensive restriction on the use of property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982). Relevant to this appeal, regulatory action constitutes a per se taking when it “completely deprive[s] an owner of ‘all economically beneficial us[e]’ of her property.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)). The Supreme Court has explained that whether a government action constitutes a taking involves an ad hoc inquiry where several factors are relevant: (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with investment-backed expectations; and (3) the character of the governmental action. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

Here, Barrett’s derivative takings claims allege that the net worth sweep constituted a regulatory taking because it deprived the Enterprises of “all economically beneficial uses” of their net worth. J.A. 464 (¶ 181); J.A. 465 (¶ 190). As a matter of law, Barrett fails to state a claim upon which relief may be granted. Supreme Court case law has long held that the right to exclude is an essential element of property ownership. *See Loretto*, 458 U.S. at 435–36 (“The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.” (citation omitted)). And our case law is clear that regulated financial entities lack the fundamental right to exclude the government from their property when the government could place the entities into conservatorship or receivership. *See Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955,

958 (Fed. Cir. 1992) (“Saratoga lacked the fundamental right to exclude the government from its property at those times when the government could legally impose a conservatorship or receivership on Saratoga.”); *see also Golden Pac. Bancorp. v. United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994) (“At those times when the Comptroller could legally inspect the Bank or place it in receivership, the Bank . . . was unable to exclude the government from its property.”).

When Congress passed HERA in 2008, it gave the FHFA the unrestricted authority to place the Enterprises into conservatorship or receivership. *See* 12 U.S.C. § 4617(a). And, as *Collins* explains, HERA gave the FHFA very broad authority, as conservator, to act in ways that are not in the best interests of the Enterprises. *Collins*, 141 S. Ct. at 1776. As of at least 2008, then, the Enterprises lost their right to exclude the government from their property, including their net worth. They also lost the right to complain if and when the FHFA chose to elevate its interests, and the interests of the public, above the interests of the Enterprises. Without this right to exclude, the Enterprises lack any cognizable property interest on which Barrett may base a derivative Fifth Amendment takings claim. *See Golden Pac.*, 15 F.3d at 1074. This conclusion is bolstered, moreover, by the fact that the Enterprises consented to the conservatorship, and consented to one where the conservator had extremely broad statutory powers. Because the Enterprises lacked the right to exclude the government from their net worth after the passage of HERA, and especially after the imposition of the conservatorship, they had no investment-backed expectation that the FHFA would protect their

interests and not dilute their equity. We find, accordingly, that the Claims Court erred in failing to dismiss Barrett’s derivative takings claim under Rule of the Court of Federal Claims 12(b)(6). While this logic applies equally to Barrett’s derivatively pled illegal exaction claims, there are additional reasons his illegal exaction claim fails, which we address below.<sup>14</sup>

## 2. Barrett’s illegal exaction claim

Unlike a Fifth Amendment takings allegation, which involves lawful government action, illegal exaction claims “involve[] money that was ‘improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.’” *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (citation omitted). Barrett’s complaint alleges that HERA did not authorize the “FHFA or Treasury to expropriate [the Enterprises] net worth for the benefit of the Government.” J.A. 468 ¶ 206; *see also* J.A. 470 (¶ 216). In other words, he claims the FHFA exceeded the bounds of its statutory authority in connection with the net worth sweep. The Claims Court denied the government’s motion to dismiss Barrett’s claims, reasoning that he had stated enough facts in his complaint to sufficiently allege an illegal exaction. *See Fairholme*, 147 Fed. Cl. at 51–52. After the Supreme Court’s recent ruling in *Collins*, it

---

<sup>14</sup> Because the plaintiffs in *Golden Pacific* included the bank’s shareholders (as well as the regulated entity), our reasoning here would apply to the shareholders’ direct takings claims—including those asserted by Fairholme and Cacciapalle. Because we affirm dismissal of those claims on independent grounds, we need not rely on their lack of a cognizable property interest to do so.

is clear that Barrett fails to state a plausible derivative illegal exaction claim. We therefore reverse the Claims Court's holding to the contrary.

Barrett fails to state a plausible illegal exaction claim under the theory that the FHFA's adoption of the net worth sweep exceeded the agency's statutory authority. In *Collins*, shareholders of the Enterprises also alleged that the FHFA exceeded its statutory authority under HERA by agreeing to the net worth sweep. 141 S. Ct. at 1775. The Supreme Court disagreed. *Id.* Citing HERA's grant of authority to the FHFA to act "in the best interests of the [Enterprises] or the [FHFA]," the Supreme Court reasoned that, "when the FHFA acts as a conservator, it may aim to rehabilitate the [Enterprises] in a way that, while not in the best interests of the [Enterprises], is beneficial to the [FHFA] and, by extension, the public it serves." *Id.* at 1776. Because "the FHFA could have reasonably concluded that it was in the best interests of members of the public who rely on a stable secondary mortgage market" to adopt the net worth sweep, the Court concluded that the net worth sweep was well within the FHFA's statutory authority under HERA. *Id.* at 1777; accord *Perry II*, 864 F.3d at 607 ("FHFA's execution of the [net worth sweep] falls squarely within its statutory authority . . ."). *Collins* makes clear that Barrett cannot plausibly allege an illegal exaction claim predicated on his contention that adopting the net worth sweep fell outside the FHFA's statutory authority.

We, thus, reverse the Claims Court's refusal to dismiss Barrett's illegal exaction claim to the extent that that claim is predicated on his contention that



the net worth sweep was beyond the scope of the FHFA's authority under HERA.

### 3. Barrett's separation-of-powers claim

The final issue we must address is whether the Claims Court erred in allowing Barrett's separation-of-powers claim to proceed.<sup>15</sup> The Claims Court was correct that Barrett had standing to allege a separation-of-powers violation. *Collins* answers that question for us. *Collins*, 141 S. Ct. at 1781. And the Claims Court was correct to the extent it concluded that Barrett asserted a plausible separation-of-powers violation. Indeed, the *Collins* court decided that the for-cause removal provision relating to removal of the Director of the FHFA violates separation-of-powers principles. But that does not end our inquiry.

The problem for Barrett is that there is no viable remedy available to him relating to this structural defect. First, as the Supreme Court pointed out in *Collins*, the FHFA and Treasury entered into a fourth amendment in 2019 which eliminated the variable dividend formula the shareholders claim caused their injury. That amendment eliminated any claim for prospective relief which shareholders could assert with respect to the net worth sweep. Second, the *Collins* court also explained that, because the net

---

<sup>15</sup> Barrett included his objection to the fact that the Director of the FHFA was not removable at will when the net worth sweep was both implemented and remained in place within his illegal exaction claim. While that characterization of a separation-of-powers cause of action is incorrect, we do not find that the label placed on his separation-of-powers claim changes our analysis regarding Barrett's ability to assert it.

worth sweep was implemented under the direction of an *acting* Director, rather than a permanent, congressionally-confirmed Director, the original implementation of the net worth sweep could not be attacked. In other words, because the acting Director was removable at will, his actions were not constitutionally infirm. That means the only possible remedy other than severance of the unconstitutional for-cause discharge provision—which the *Collins* court has already effectuated—would be possible relief for retroactive harm caused by any confirmed Director’s actions in not undoing the net worth sweep. That extremely limited potential harm is even more minimized by the fact that, while there were confirmed Directors under both Presidents Obama and Trump, their terms were limited, with an acting Director serving between the two (whose implementation decisions are as unassailable as those of the acting Director who implemented the net worth sweep). And, as the Fifth Circuit concluded, we may take judicial notice of the fact that the acting Director under President Obama filed multiple court filings approving of the net worth sweep with no opposition from the President, and the confirmed Director under President Trump never filed anything indicating opposition to it, which the President could have asked him to do. *See Collins v. Mnuchin*, 938 F.3d 553, 594–95 (5th Cir. 2019).

Finally, and most importantly, there was adequate presidential oversight over the actions of all FHFA Directors regarding the net worth sweep by virtue of the fact that all the FHFA’s policies relating to its actions as conservator of the Enterprises were “jointly created by the FHFA and Treasury” and the latter’s

Secretary was removable at will. *Id.* at 594; *see also Collins*, 141 S. Ct. at 1802 (Kagan, J., concurring-in-part and concurring in the judgment) (noting that, because the Fifth Circuit in *Collins* “already considered and decided the issue remanded today,” the “lower court proceedings [on remand] may be brief indeed”). Presidents Obama and Trump could have directed the Treasury Secretary to refuse to continue the net worth sweep at any time, but did not do so.

Given all these realities, especially the Supreme Court’s description of the extreme limits on the possible relief available to similarly situated shareholders, we agree with the Fifth Circuit that the shareholders have already been afforded the only possible remedy available for Barrett’s alleged separation-of-powers violation. We thus conclude that Barrett no longer can assert such a claim on which relief can be granted and that his separation-of-powers claim must also be dismissed under Rule 12(b)(6).

#### V. CONCLUSION

For the reasons discussed above, we affirm-in-part because the Claims Court did not err in dismissing shareholders’ direct claims and reverse-in-part because the Claims Court improperly failed to dismiss the remaining derivative claims.

**AFFIRMED;**

**CROSS-APPEAL REVERSED**

COSTS

No costs.

---

**APPENDIX B**

---

**In the United States Court of Federal Claims**

No. 13-465C

(Filed Under Seal: December 6, 2019)

(Reissued for Publication: December 13, 2019)\*

(Reissued Following Motion to Certify Interlocutory

Appeal: March 9, 2020)\*\*

\*\*\*\*\*

FAIRHOLME FUNDS,	* Motion to Dismiss;
INC. et al.,	* RCFC 12(b)(1);
Plaintiffs,	* RCFC 12(b)(6);
	* Jurisdiction;
v.	* Standing;
THE UNITED STATES,	* Derivative Claim;
Defendant.	* Direct Claims;
	* Instrumentalities;
	* Coercion; Agent;
	* Collateral Estoppel;
	* Issue Preclusion;
	* Conservators;

---

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

\*\* Following the issuance of this opinion, the parties moved to certify the opinion for interlocutory appeal. The court granted that motion on March 6, 2020, and explained in that order that it would amend the opinion to incorporate the necessary language to certify the opinion. The language is set forth in Part VIII, *supra*.

- \* Conflict of Interest;
- \* Third-Party
- \* Beneficiaries; Stock;
- \* Shareholders;
- \* Fannie; Freddie;
- \* FHFA; Certification
- \* of Interlocutory
- \* Appeal

\*\*\*\*\*

*Charles J. Cooper*, Washington, DC, for plaintiffs.

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

### **OPINION AND ORDER**

**SWEENEY**, Chief Judge

Plaintiffs in this case challenge the actions of the United States during the conservatorships of the Federal National Mortgage Association (“Fannie”) and the Federal Home Loan Mortgage Corporation (“Freddie”). Specifically, plaintiffs take issue with the conservator for Fannie and Freddie (collectively, the “Enterprises”) amending a funding agreement between the Enterprises and the United States Department of the Treasury (“Treasury”). Based on the revisions to that agreement, plaintiffs seek the return of money illegally exacted, damages for breach of contract and breach of fiduciary duty, and compensation for a taking pursuant to the Fifth Amendment to the United States Constitution (“Constitution”). Defendant moves to dismiss plaintiffs’ complaint, arguing that the court lacks subject-matter jurisdiction over plaintiffs’ claims, plaintiffs lack standing to pursue certain claims, and plaintiffs fail to state a claim upon which relief may

be granted. For the reasons stated below, the court grants in part and denies in part defendant's motion to dismiss.

## **I. BACKGROUND**

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

#### **1. The Enterprises operated independently before the financial crisis.**

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities that are sold to investors. 2d Am. Compl. ¶ 36. Congress chartered Fannie in 1938 and established Freddie in 1980. *Id.* ¶ 37. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. *Id.* Freddie is organized under Virginia law, and Fannie is organized under Delaware law. *Id.* ¶¶ 33–34. The Enterprises, consistent with the applicable state laws, issued their own common and preferred stock. *Id.* ¶ 38. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. *Id.* ¶ 42. Those owning preferred stock acquired the right to receive dividends and a liquidation preference. *Id.* ¶ 41.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. *Id.* ¶ 43. Although the Enterprises recorded losses in 2007 and the first two quarters of 2008, the

Enterprises continued to generate sufficient cash to pay their debts and retained sufficient capital to operate. *Id.* ¶ 44. Otherwise stated, the Enterprises were not in financial distress or otherwise at risk of insolvency. *Id.* ¶¶ 45, 64.

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

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (“HERA”), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency (“FHFA”) and provided it with supervisory and regulatory authority over the Enterprises. *See* 12 U.S.C. § 4511(a)–(b) (2018).<sup>1</sup> Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator (“FHFA-C”) for each Enterprise to reorganize, rehabilitate, or wind up its affairs.<sup>2</sup> *Id.* § 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its obligations. *Id.* § 4617(a)(3).<sup>3</sup> The

---

<sup>1</sup> Congress has not amended the relevant portions of HERA since enacting the law in 2008. The court, therefore, refers to the most recent version of the United States Code.

<sup>2</sup> To avoid any ambiguity, the court reiterates that it is using “FHFA” to refer to the agency acting in its regulatory role and “FHFA-C” when discussing the agency acting as a conservator.

<sup>3</sup> Congress enticed the Enterprises to consent to a conservatorship by insulating their board members from any

conservator, once appointed, functions independently; it is not “subject to the direction or supervision of any other agency of the United States or any State in the exercise of [its] rights, powers, and privileges . . . .” *Id.* § 4617(a)(7).

Congress also delineated the scope of the FHFA-C’s powers in HERA. *See generally id.* § 4617. As soon as it is appointed, the FHFA-C “immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . . .” *Id.* § 4617(b)(2)(A). Congress also conferred the conservator with the power to “[o]perate the [Enterprise].” *Id.* § 4617(b)(2)(B). Pursuant to that power, the conservator “may,” among other things, “perform all functions of the [Enterprise],” “preserve and conserve the assets and property of the [Enterprise],” and “provide by contract for assistance in fulfilling any function . . . of the [conservator].” *Id.* The conservator “may” also “take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise].” *Id.* § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator “may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]” and “take any action authorized by [12 U.S.C.

---

liability to shareholders or creditors for agreeing in good faith to the FHFA’s appointment of a conservator. 12 U.S.C. § 4617(a)(6).



§ 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA].” *Id.* § 4617(b)(2)(J). By describing the FHFA-C’s role primarily in terms of what powers it “may” exercise, *see generally id.* § 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its powers, *see United States v. Rodgers*, 461 U.S. 677, 706 (1983) (“The word ‘may,’ when used in a statute, usually implies some degree of discretion.”). Simply stated, the FHFA has “extraordinarily broad flexibility to carry out its role as conservator.” *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 606 (D.C. Cir. 2017) (“*Perry II*”), *cert. denied*, 138 S. Ct. 978 (2018).

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

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(*g*) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. *Id.* §§ 1455(*l*)(4), 1719(*g*)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the availability of mortgage finance, and protect taxpayers. *Id.* §§ 1455(*l*)(1)(B), 1719(*g*)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

- (i) The need for preferences or priorities regarding payments to the Government.

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

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

#### **4. The FHFA became the conservator for each Enterprise.**

After Congress enacted HERA, Treasury “urg[ed]” the FHFA to place each Enterprise into conservatorship. 2d Am. Compl. ¶ 4. The FHFA and Treasury subsequently sought to persuade each Enterprise’s board of directors to consent to conservatorship. *Id.* ¶ 64. The FHFA and Treasury told each Enterprise’s board that the FHFA would seize the Enterprises if the board did not consent to the conservatorship. *Id.* Around the same time, the FHFA made an offer to each board: consent to a conservatorship in exchange for the FHFA-C aiming to preserve and conserve the Enterprises’ assets, attempting to restore the Enterprises to sound and solvent condition, and terminating the

conservatorships when those goals were achieved. *Id.* ¶ 260. Each Enterprise’s board accepted that offer and consented to a conservatorship on September 6, 2008, with an understanding that the FHFA-C would operate in the aforementioned limited ways. *Id.* ¶¶ 64, 67; *see also id.* ¶¶ 259–63 (discussing the purported offer and acceptance). The FHFA, soon thereafter, issued statements echoing each board’s understanding. *Id.* ¶¶ 66, 261.

The conservatorships became effective on September 6, 2008, upon each Enterprise’s board’s consent. *See id.* ¶¶ 64 (discussing the timing of the Enterprises’ consent), 259 (alleging that, prior to becoming conservator, the FHFA had not made any of the findings under 12 U.S.C. § 4617(a)(3) that would permit conservatorships without the Enterprises’ consent); *see also* 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when “[t]he [Enterprise], by resolution of its board of directors or its shareholders or members, consents to the appointment”).

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

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement (“PSPA”) with Treasury for each Enterprise. 2d Am. Compl. ¶ 68. Treasury entered into the agreements pursuant to its authority under HERA to buy the Enterprises’ securities. *Id.* ¶ 69. The PSPA for each Enterprise is materially identical. *Id.* ¶ 72. Under the PSPAs, Treasury committed to provide up to \$100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. *Id.* If an Enterprise’s

liabilities exceeded its assets, then the Enterprise could draw on Treasury's funding commitment in an amount equal to the difference between the Enterprise's liabilities and assets. *Id.*

In return for Treasury's funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their respective common stock at a nominal price. *Id.* ¶ 73. Treasury's preferred stock had an initial liquidation preference of \$1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury's funding commitment. *Id.* ¶ 74. In the event of a liquidation, Treasury was entitled to recover the full liquidation value of its shares before any other shareholder would receive compensation. *Id.* Second, Treasury bargained for the right to a quarterly cash dividend equal to 10% of its liquidation preference. *Id.* ¶ 76. An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. *Id.* Those in-kind payments, however, did not count as a draw from Treasury's funding commitment. *Id.* ¶ 80. Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. *Id.* ¶ 81. If Treasury did not waive the fee, the Enterprise could elect to pay the amount in cash or make an in-kind payment by increasing the liquidation preference. *Id.* Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises

needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. *Id.* ¶ 82.

The FHFA-C and Treasury amended each Enterprise's PSPA on May 6, 2009, to increase Treasury's funding commitment to each Enterprise from \$100 billion to \$200 billion. *Id.* ¶ 84. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed \$200 billion. *Id.*

#### **6. The Enterprises' finances improved during their conservatorships.**

In the early stages of the conservatorships, each Enterprise's net worth decreased as it reported losses. The bulk of the losses resulted from the FHFA-C writing down the value of deferred tax assets and designating large loan loss reserves.<sup>4</sup> *Id.* ¶ 85. Notwithstanding those on-paper losses, the Enterprises' cash receipts consistently exceeded their expenses; they maintained net operating revenue in excess of their net operating expenses from the onset

---

<sup>4</sup> A loan loss reserve is an entry on a company's balance sheet that reduces its net worth to reflect anticipated losses on mortgages that it owns. 2d Am. Compl. ¶ 87. A deferred tax asset is an asset that may be used to offset future tax liability. *Id.* ¶ 86. A company must write down the value of that deferred asset if it is unlikely to be used to offset future taxable profits. *Id.* This write down occurs, for example, if a company predicts it will not be profitable in the future. *Id.*

of the conservatorships under the PSPAs and through the first two amendments to the agreements. *Id.* ¶ 91.

By 2012, the Enterprises' financial outlooks were promising. In addition to an improvement in the housing market, the Enterprises began generating consistent profits and anticipated losing less money on their newer mortgages. *Id.* ¶¶ 92, 94–95. They were positioned to further improve their financial condition by settling lawsuits brought by each Enterprise, *id.* ¶ 109, and revising their valuations of (1) deferred tax assets because of growing profits and (2) loan loss reserves because losses were less than expected, *id.* ¶¶ 98–99. The FHFA-C and Treasury were aware of those forthcoming changes and the Enterprises' improving outlooks. *Id.* ¶¶ 94–104. In August 2012, Treasury noted that the Enterprises would post “[r]ecord earnings,” *id.* ¶ 98 (alteration in original) (quoting Treasury document), and Treasury received projections reflecting that the Enterprises would have positive comprehensive income between 2012 and 2022, *id.* ¶ 101. The FHFA-C had similar information; in July 2012, it circulated, within the FHFA, comparable projections and meeting minutes in which Fannie's treasurer was reported as stating that that the next eight years were likely to be “the golden years of [the Enterprises'] earnings.” *Id.* ¶ 103 (quoting the minutes). Otherwise stated, the FHFA-C and Treasury knew, by early August 2012, that the Enterprises were poised to generate profits in excess of their respective dividend obligations to Treasury. *Id.* ¶ 97.

**7. Treasury and the FHFA-C agreed to a third amendment to the PSPAs.**

At an unspecified time prior to August 2012, the Treasury and the FHFA-C began considering a third amendment to each PSPA. Treasury was the driving force behind the initiative to amend the PSPAs' terms. *Id.* ¶ 147. Indeed, an FHFA official reported in early August 2012 that Treasury was making a "renewed push" to implement a new amendment. *Id.* ¶ 146 (quoting the FHFA official). The FHFA-C learned of the proposed changes before the Enterprises; Treasury informed the Enterprises that the new terms were forthcoming and announced the changes to the Enterprises at a subsequent meeting. *Id.* ¶ 147. Treasury officials who were involved with the process do not recall Treasury making any backup or contingency plans in the event that the FHFA-C rejected the proposed terms. *Id.* The FHFA-C accepted the changes without advocating for different terms. *Id.*

Treasury and the FHFA-C decided to announce the changed terms in mid-August 2012 because, according to Treasury, the Enterprises would be reporting earnings exceeding their dividend obligation at the beginning of that month. *Id.* ¶ 133. On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA ("PSPA Amendment"). *Id.* ¶ 112. A key component of the amended PSPAs is the requirement—referred to as the "Net Worth Sweep"—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise's net worth (except for a small capital reserve amount) rather than a dividend based on a set percentage of the

liquidation preference.<sup>5</sup> *Id.* ¶ 113. Additionally, under the amended PSPAs, the Enterprises are not obligated to pay a periodic commitment fee. *Id.* ¶ 115.

**a. Treasury wanted to ensure that it benefited from the new terms.**

With the PSPAs, Treasury sought to secure a more beneficial arrangement for itself, as a representative for taxpayers. During the lead-up to the PSPA Amendments, a Treasury official acknowledged in a December 2010 memorandum to the Treasury Secretary that the government was “committ[ed] to ensur[ing] existing common equity holders will not have access to any positive earnings from the [Enterprises] in the future.” *Id.* ¶ 118 (quoting the memorandum). In another Treasury document, an official noted that the amended PSPAs would put the taxpayer “in a better position” because, rather than having “Treasury’s upside . . . capped at the 10% dividend, now the taxpayer will be the beneficiary of any future earnings produced by the [Enterprises].” *Id.* ¶ 130 (quoting the document); *accord id.* ¶ 133 (quoting a Treasury official as stating that the Net Worth Sweep would place the taxpayers “in a better position”). Treasury recognized its goal of obtaining all of the Enterprises’ profits by executing the PSPA Amendments; when the changes were announced, it noted that “every dollar of earnings that [the Enterprises] generate will be used to benefit

---

<sup>5</sup> The capital reserve for each Enterprise started at \$3 billion and was set to decrease to \$0 by January 2018, but the Enterprises and Treasury agreed in December 2017 to reset the capital reserve amount to \$3 billion in the first quarter of 2018. 2d Am. Compl. ¶ 105.



taxpayers.” *Id.* ¶ 118 (quoting a Treasury press release).

**b. The FHFA-C agreed to changes that benefit Treasury.**

For its part, the FHFA-C was operating under the belief that Treasury would benefit from the PSPA Amendments. An internal Treasury communication indicates that Treasury anticipated that its receipts under the PSPA Amendments would “‘exceed the amount that would have been paid if the 10% [dividend] was still in effect’ and that the changes would lead to ‘a better outcome’ for Treasury.” *Id.* ¶ 130 (quoting the communication). Moreover, Mel Watts—a former FHFA Director—confirmed that he was concerned with how decisions affect the taxpayers. *Id.* ¶ 119. During an interview conducted while he was Director, he stated that he does not “‘lay awake at night worrying what’s fair to the shareholders’ but rather focuses on ‘what is responsible for the taxpayers.’” *Id.* (quoting the interview).

**c. Treasury and the FHFA understood that the PSPA Amendments would not facilitate the Enterprises exiting conservatorship.**

Treasury was aware that the new terms of the PSPAs were not conducive to the Enterprises exiting conservatorship. When announcing the PSPA Amendments, Treasury openly acknowledged that the new terms would “expedite the wind down of Fannie Mae and Freddie Mac.” *Id.* ¶ 134 (quoting a Treasury press release). Treasury further explained that the new deal would ensure that the Enterprises “will be wound down and will not be allowed to retain profits,

rebuild capital, and return to the market in their prior form.” *Id.*; *accord id.* ¶ 114 (explaining that Treasury noted that, “[b]y taking all of their profits going forward, we are making clear that [the Enterprises] will not ever be allowed to return to profitable entities”). Indeed, a White House official sent a message to a Treasury official on the day the deal was announced noting that “we’ve closed off [the] possibility that [the Enterprises] ever[] go (pretend) private again.” *Id.* ¶ 138 (alterations in original) (quoting the message); *accord id.* (noting in a separate message that a quotation “in Bloomberg” was “exactly right on substance and intent” when describing the deal as depriving the Enterprises of the capital they needed to go private).

The FHFA shared a similar sentiment. The FHFA’s former Acting Director, Edward DeMarco, testified before the United States Senate that the PSPA Amendments “reinforce the notion that the [Enterprises] will not be building capital as a potential step to regaining their former corporate status.” *Id.* ¶ 135 (quoting the testimony). He also stated that he had no intention of returning the Enterprises to private control under their existing charters, while another FHFA official testified that the agency’s objective “was not for Fannie and Freddie . . . to emerge from conservatorship.” *Id.* ¶ 136 (quoting the testimony). Indeed, the FHFA explained in its 2012 report to Congress that the agency had begun “prioritizing [its] actions to move the housing industry to a new state, one without Fannie and Freddie . . . .” *Id.* ¶ 135 (quoting the report). Consistent with those actions, the FHFA acknowledged that it would continue to serve as

conservator until “Congress determines the future of Fannie Mae and Freddie Mac and the housing finance market.” *Id.* ¶ 136 (quoting an FHFA statement).

**d. Treasury has benefited from the PSPA Amendments at the expense of the Enterprises and other shareholders.**

There are four significant effects that flowed from the PSPA Amendments. First, plaintiffs lost their economic interests in the Enterprises because, under the new terms, private shareholders can never receive dividends or liquidation distributions. *Id.* ¶ 117; *see also id.* (alleging that, in the event of liquidation, private shareholders will receive nothing because an Enterprise will never have enough money to pay Treasury’s dividend and liquidation preferences). Second, Treasury acquired plaintiffs’ economic interests in the Enterprises because Treasury now “has the right to all residual profits, and it hence owns all the equity.” *Id.* ¶ 120. Third, Treasury reaped a windfall of \$124 billion in comparison to what it would have received absent changes to the PSPAs. *Id.* ¶ 123; *see id.* ¶¶ 122–23 (alleging that the Enterprises paid Treasury \$223.7 billion under the PSPA Amendments but would have only paid Treasury \$95.5 billion under the previous terms). Fourth, the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink of insolvency. *Id.* ¶ 125.

**8. Treasury and the FHFA are committed to ending the conservatorships.**

On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the

Treasury Secretary to develop, “as soon as practicable,” a plan for “[e]nding the conservatorships of the [Enterprises] upon the completion of specified reforms . . . .”<sup>6</sup> Memorandum on Federal Housing Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must include proposals for “[s]etting the conditions necessary for the termination of the conservatorships” and outlined some of those conditions. *Id.* at 12,480. Subsequently, Treasury issued a plan in which it advocated for “begin[ning] the process of ending the [Enterprises’] conservatorships.”<sup>7</sup> U.S. Dep’t of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), <https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf> [<https://perma.cc/RGH8-N385>]; *accord id.* at 26 (“It is,

---

<sup>6</sup> The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source, the Federal Register. *See Murakami v. United States*, 46 Fed. Cl. 731, 739 (2000) (noting that the court may take judicial notice of government documents), *aff’d*, 398 F.3d 1342, 1354–55 (Fed. Cir. 2005); *see also Democracy Forward Found. v. White House Office of Am. Innovation*, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) (“[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum.”). *See generally* Fed. R. Evid. 201 (discussing judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the court may consider facts derived from sources subject to judicial notice without converting the motion into one for summary judgment. *Sebastian v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

<sup>7</sup> The court takes judicial notice of Treasury’s reform plan because it is a government record available from a reliable source, Treasury’s website. *See supra* note 6.

after 11 years, time to bring the conservatorships to an end.”). As part of the plan to end the conservatorships, Treasury proposed that it and the FHFA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. *Id.* at 26–27.

The FHFA shares Treasury’s goals with respect to the conservatorships. Mark Calabria, the current FHFA Director, testified during his confirmation hearing that he wanted to end the conservatorships.<sup>8</sup> 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony). *See generally* *Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 116th Cong. 10–40, 74–75, 148–85 (2019) [hereinafter *Calabria Testimony*] (documenting Mr. Calabria’s testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that each Enterprise retains. *Calabria Testimony, supra*, at 150; *see also id.* at 25 (“I support the idea of having significantly more capital at the [Enterprises].”).

### **B. Plaintiffs own or owned Fannie and Freddie stock.**

There are three categories of plaintiffs in this case. The first category consists of Andrew Barrett, an individual who has continually owned common stock

---

<sup>8</sup> The court takes judicial notice of the relevant testimony because the statements are recorded in government documents. *See supra* note 6.

of both Fannie and Freddie since September 2008. 2d Am. Compl. ¶ 31. The second category consists of Fairholme Funds, Inc.—on behalf of its series, The Fairholme Fund—and The Fairholme Fund, a series of Fairholme Funds, Inc., which owns preferred stock in both Enterprises. *Id.* ¶ 19. The third category consists of W.R. Berkley Corporation (“Berkley”) and ten other plaintiffs that Berkley directly or indirectly owns: Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Continental Western Insurance Company, Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, and Preferred Employers Insurance Company (collectively, with Berkley, “Berkley Companies”). *Id.* ¶ 20. One of the Berkley Companies, Berkley Insurance Company, has owned preferred stock in Fannie since 2005 and Freddie since 2009. *Id.* ¶ 40. The other Berkley Companies acquired preferred stock in both Enterprises before and after August 2012, and many of those shares were later transferred to Berkley Insurance Company.<sup>9</sup> *Id.*

---

<sup>9</sup> With the exception of Berkley Insurance Company, it is unclear whether each (or just some) of the Berkley Companies owned stock in the Enterprises before August 2012. *See* 2d Am. Compl. ¶ 40.

## II. PROCEDURAL HISTORY

Plaintiffs filed their complaint on July 9, 2013.<sup>10</sup> Defendant moved to dismiss the complaint on December 9, 2013. Eleven days later, plaintiffs moved to stay briefing on defendant's motion and requested permission to conduct fact discovery for the purpose of responding to defendant's motion. On February 26, 2014, the court granted plaintiffs' motion, and the parties spent the next four years engaged in discovery.

While discovery was ongoing, Michael Sammons filed a motion to intervene in this case. In his motion, Mr. Sammons alleged that he owned Fannie and Freddie preferred stock and sought to intervene for the limited purpose of challenging this court's jurisdiction. He argued that only a court established under Article III of the Constitution can hear Fifth Amendment takings claims and therefore, the United States Court of Federal Claims ("Court of Federal Claims"), as a court established under Article I of the Constitution, is constitutionally barred from entertaining the takings claims at issue in this case. Mr. Sammons further argued that the principle of sovereign immunity does not apply to claims asserted under the Takings Clause of the Fifth Amendment. The court denied Mr. Sammons's motion, and he appealed to the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). On appeal, the Federal Circuit affirmed the denial of Mr. Sammons's motion to intervene based on his failure to satisfy the requirements of Rule 24(a) of the Rules of the United

---

<sup>10</sup> At that time, Mr. Barrett was not a plaintiff. He was added as a plaintiff in the first amended complaint, which was filed on March 3, 2018.

States Court of Federal Claims (“RCFC”). *See Fairholme Funds, Inc. v. United States*, 681 F. App’x 945, 948–49 (Fed. Cir. 2017) (per curiam). The Federal Circuit, however, did not address Mr. Sammons’s argument that the Court of Federal Claims, as an Article I court, is precluded from adjudicating claims arising under the Takings Clause. *See id.* at 949. Rather, it directed this court to address the argument. *See id.* at 949–50 (“That argument, to the extent it is a jurisdictional one, must be addressed by the Court of Federal Claims . . . even if Mr. Sammons is not a party and even if no party makes the argument he makes.”).

Following the Federal Circuit’s decision and the completion of discovery related to defendant’s motion to dismiss, plaintiffs filed an amended complaint on March 3, 2018, and a second amended complaint on August 3, 2018. In their most recent complaint, plaintiffs plead twelve claims: four direct claims in their individual capacities and eight derivative claims on behalf of the Enterprises. With respect to the direct claims, which are brought by all plaintiffs, plaintiffs first assert that the Net Worth Sweep constitutes a Fifth Amendment taking (count I) of their economic interests in their stock. Plaintiffs next assert that the Net Worth Sweep constitutes an illegal exaction (count IV) of those same economic interests because the (1) FHFA was operating unconstitutionally and (2) FHFA-C and Treasury exceeded their statutory and regulatory authority when they approved the PSPA Amendments. Plaintiffs also plead a breach-of-fiduciary-duty claim (“fiduciary duty claim”) (count VII) premised on the Net Worth Sweep being unfair; constituting waste,



self dealing, gross overreach, and gross abuse of discretion; and failing to further a valid business purpose or reflect a good faith business judgment. Additionally, plaintiffs assert a breach-of-implied-contract claim (count X) based on a purported agreement by which the Enterprises consented to the conservatorship in exchange for the FHFA agreeing to preserve the Enterprises' assets with the goal of making them safe and solvent. Specifically, plaintiffs assert that each dividend payment under the Net Worth Sweep constitutes a breach because it depletes the Enterprises' assets in a manner that undermines the goals of conservatorship. Finally, Mr. Barrett asserts substantively the same claims as derivative claims on behalf Fannie (counts II, V, VIII, XI) and Freddie (counts III, VI, IX, XII).

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case and eleven related cases before the undersigned.<sup>11</sup> The plaintiffs in each of the twelve cases filed a response brief on their respective dockets; some of the plaintiffs relied on a joint brief, while others filed a joint brief and a supplemental response brief. Defendant filed its omnibus reply brief in each of the

---

<sup>11</sup> The eleven related cases are *Washington Federal v. United States*, No. 13-385C; *Cacciapalle v. United States*, No. 13-466C; *Fisher v. United States*, No. 13-608C; *Arrowood Indemnity Company v. United States*, No. 13-698C; *Reid v. United States*, No. 14-152C; *Rafter v. United States*, No. 14-740C; *Owl Creek Asia I, L.P. v. United States*, No. 18-281C; *Akanthos Opportunity Master Fund, L.P. v. United States*, No. 18-369C; *Appaloosa Investment Limited Partnership I v. United States*, No. 18-370C; *CSS, LLC v. United States*, No. 18-371C; and *Mason Capital L.P. v. United States*, No. 18-529C.

cases on May 6, 2019. At the court's request, defendant filed a statement in which it identified which claims were the subject of each argument in its motion to dismiss ("notice of arguments"). The parties have fully briefed defendant's motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiffs in this case have adopted the favorable arguments made by the plaintiffs in the related cases to the extent that such arguments are relevant.<sup>12</sup> Defendant's motion to dismiss is now ripe for adjudication.

### III. STANDARD OF REVIEW

In ruling on a motion to dismiss a complaint pursuant to RCFC 12(b)(1) and RCFC 12(b)(6), the court generally assumes that the allegations in the complaint are true and construes those allegations in the plaintiff's favor. *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011). With respect to RCFC 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of the evidence, that the court possesses subject-matter jurisdiction. *Id.* The allegations in the complaint must include "the

---

<sup>12</sup> Given that the plaintiffs in this case are arguing that they alleged both direct and derivative claims, the court does not infer that they adopted the *Reid* and *Fisher* plaintiffs' argument that "the shareholder claims asserted in connection with the [PSPA Amendments] are properly asserted as derivative claims." Reid Supp'l Mem. in Opp'n to Def.'s Omnibus Mot. to Dismiss 2; accord Fisher Supp'l Mem. in Opp'n to Def.'s Omnibus Mot. to Dismiss 2.

facts essential to show jurisdiction.” *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). And, if such jurisdictional facts are challenged in a motion to dismiss, the plaintiff “must support them by competent proof.” *Id.*; accord *Land v. Dollar*, 330 U.S. 731, 735 & n.4 (1947) (“[W]hen a question of the District Court’s jurisdiction is raised, . . . the court may inquire by affidavits or otherwise, into the facts as they exist.” (citations omitted)). If the court finds that it lacks subject-matter jurisdiction, it must, pursuant to RCFC 12(h)(3), dismiss the complaint.

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

#### IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a “threshold matter.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998). Subject-matter jurisdiction cannot be waived or forfeited because it

“involves a court’s power to hear a case.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Ex parte McCordle*, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it is “an inflexible matter that must be considered before proceeding to evaluate the merits of a case.” *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006); accord *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1004–05 (Fed. Cir. 2015). Either party, or the court *sua sponte*, may challenge the court’s subject-matter jurisdiction at any time. *Arbaugh*, 546 U.S. at 506; see also *Jeun v. United States*, 128 Fed. Cl. 203, 209–10 (2016) (collecting cases).

The ability of the Court of Federal Claims to entertain suits against the United States is limited. “The United States, as sovereign, is immune from suit save as it consents to be sued.” *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The waiver of immunity “may not be inferred, but must be unequivocally expressed.” *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). Any such waiver must be narrowly construed. *Smith v. Orr*, 855 F.2d 1544, 1552 (Fed. Cir. 1988). The Tucker Act, the principal statute governing the jurisdiction of this court, waives sovereign immunity for claims against the United States, not sounding in tort, that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States. 28 U.S.C.

§ 1491(a)(1) (2018); *White Mountain*, 537 U.S. at 472. However, the Tucker Act is merely a jurisdictional statute and “does not create any substantive right enforceable against the United States for money damages.” *United States v. Testan*, 424 U.S. 392, 298 (1976). Instead, the substantive right must appear in another source of law, such as a “money-mandating constitutional provision, statute or regulation that has been violated, or an express or implied contract with the United States.” *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc).

Defendant challenges the court’s jurisdiction to entertain plaintiffs’ claims on a number of bases. Specifically, defendant argues that 28 U.S.C. § 1500 bars plaintiffs’ claims, plaintiffs have not asserted claims against the United States, and that the court lacks jurisdiction over the subject matter of certain claims. The court addresses each of these contentions and Mr. Sammons’s argument that the court lacks jurisdiction over Fifth Amendment takings claims.

**A. Plaintiffs are not barred by 28 U.S.C. § 1500 from litigating their claims in this court.**

The court first addresses defendant’s argument that the court lacks jurisdiction to consider plaintiffs’ claims because plaintiffs initiated lawsuits in other courts after filing their complaint in this court. Specifically, defendant asserts that the claims are barred by 28 U.S.C. § 1500, which provides:

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the

United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Defendant acknowledges that, under binding precedent, § 1500 is not a bar in this case because the limitation only applies “when the suit shall have been commenced in the other court before the claim was filed in [the Court of Federal Claims].” *Tecon Eng’rs, Inc. v. United States*, 343 F.2d 943, 949 (Ct. Cl. 1965). Nonetheless, defendant asserts that the court should reinterpret § 1500 as creating a jurisdictional bar regardless of the timing of the filings. Plaintiffs counter that the court cannot disregard the binding precedent.

As defendant acknowledges, its argument is foreclosed by binding precedent: the jurisdictional limitation in § 1500 does not apply in this case because plaintiffs filed their complaint in this court before seeking redress in other jurisdictions. See *Tecon*, 343 F.2d at 949; see also *Res. Invs., Inc. v. United States*, 785 F.3d 660, 670 (Fed. Cir. 2015) (noting that *Tecon* remains good law in this circuit). Compare Compl. (filed July 9, 2013), with Compl., *Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency*, No. 13-1053 (D.D.C. July 10, 2013). Although defendant urges the court to reconsider the rule set forth in *Tecon*, the court cannot do so because it is bound by that precedent. See *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1353 (Fed. Cir. 2006) (“There can be no question that the Court of Federal Claims is required to follow the precedent of . . . our court, and

our predecessor court, the Court of Claims.”). Plaintiffs’ claims, therefore, are not barred by § 1500.

**B. Plaintiffs have asserted claims against the United States.**

The court next considers whether plaintiffs have asserted claims against the United States, a necessary element of jurisdiction in the Court of Federal Claims. As set forth in their second amended complaint, plaintiffs’ Fifth Amendment takings, illegal exaction, and breach-of-implied-contract claims are premised on actions taken by the FHFA-C and Treasury, while plaintiffs’ fiduciary duty claims are premised on the FHFA-C’s actions. Defendant argues that the court lacks jurisdiction to consider any claims premised on the FHFA-C’s or Treasury’s conduct. In response, plaintiffs contend that they have asserted claims against the government because (1) Treasury was involved in the challenged conduct, (2) the FHFA-C exercised nontraditional conservator powers such that its actions must be deemed those of the government, (3) the FHFA-C was the government’s agent, (4) the FHFA-C was coerced by the government, and (5) the FHFA-C is a government actor. The court addresses each contention in turn.

**1. The court cannot exercise jurisdiction based on allegations of Treasury’s involvement.**

Plaintiffs initially argue that the court has jurisdiction over their Fifth Amendment takings and illegal-exaction claims because they have alleged the involvement of Treasury—indisputably a part of the federal government—in the action underlying these claims, i.e., the Net Worth Sweep. Defendant counters that Treasury alone could not have

implemented the PSPA Amendments, and Treasury's role as a counterparty to the voluntary agreement with the Enterprises is not sufficient to establish jurisdiction over plaintiffs' takings claims. Defendant further asserts that the court's order allowing jurisdictional discovery reflects that plaintiffs' allegations concerning Treasury alone are insufficient to confer jurisdiction.

The parties' dispute on the import of allegations concerning Treasury is ultimately immaterial in light of the court's determination, explained below, that the FHFA-C—the other party involved in the PSPA Amendments—is the United States. Nonetheless, the court notes, as defendant asserts, that it implicitly acknowledged in its February 26, 2014 discovery order that the allegations concerning Treasury alone were insufficient to support jurisdiction. In that order, the court permitted plaintiffs to conduct fact discovery on whether the FHFA-C was “the ‘United States’ for purposes of the Tucker Act.” *Fairholme Funds, Inc. v. United States*, 114 Fed. Cl. 718, 721 (2014). The aforementioned discovery would have been unnecessary (and unwarranted) if, as plaintiffs assert, the court has jurisdiction over plaintiffs' claims based on their allegations concerning Treasury.

**2. The FHFA-C exercised its statutory conservatorship powers when it approved the PSPA Amendments for each Enterprise.**

Plaintiffs next argue that the FHFA-C must be considered the United States because the FHFA-C acted beyond its authority when it expropriated the Enterprises' assets for the government's benefit.



Defendant counters that, irrespective of the “expropriation” label assigned by plaintiffs, the FHFA-C’s execution of the PSPA Amendments was consistent with its statutory authority and purpose.

The FHFA-C is the United States for any claims challenging the conservator’s conduct that exceeded the applicable statutory authority. *Cf. Slattery v. United States*, 583 F.3d 800, 827–28 (Fed. Cir. 2009) (noting that the Federal Deposit Insurance Company (“FDIC”) as receiver is the United States for claims premised on allegations that the receiver failed to distribute funds as required by statute). Thus, resolving the parties’ dispute requires determining whether the FHFA-C had statutory authority to enter into the PSPA Amendments. The answer depends on HERA. Under HERA, the FHFA-C has exceptionally broad powers. *See Jacobs v. Fed. Hous. Fin. Agency*, 908 F.3d 884, 889 (3d Cir. 2018) (noting that the FHFA-C’s “powers are many and mostly discretionary”); *see also Saxton v. Fed. Hous. Fin. Agency*, 901 F.3d 954, 960 (8th Cir. 2018) (Stras, J., concurring) (“Congress came close to handing a blank check to the FHFA.”). The FHFA-C wields complete control over the Enterprises; it succeeds to the rights and powers of the Enterprises as well as their shareholders, directors, and officers. 12 U.S.C. § 4617(b)(2)(A)(i). The FHFA-C may (but is not required to) use that power to, among other things, further the FHFA’s interests, carry on the Enterprises’ business, preserve and conserve the Enterprises’ assets, and place the Enterprises in

sound and solvent condition.<sup>13</sup> *Id.* § 4617(b)(2)(B), (D), (J) (noting actions that the FHFA-C “may” undertake); *see also Roberts v. Fed. Hous. Fin. Agency*, 889 F.3d 397, 403 (7th Cir. 2018) (explaining that Congress’s use of “may” reflects that the FHFA-C has discretionary authority).

Congress’s broad grant of power to the FHFA-C colors the analysis of whether the FHFA-C became the United States by approving the PSPA Amendments. As an initial matter, plaintiffs’ contention that the FHFA-C exceeded its statutory authority by expropriating the Enterprises’ assets for the government is unavailing because the FHFA-C is authorized to act in its own interest without regard for the effects on the Enterprises. Moreover, the FHFA-C’s approval of the PSPA Amendments is in accordance with its authority to operate the Enterprises and preserve their assets. As operating businesses, the Enterprises needed to “secure ongoing access to capital, manage debt loads, control cash flow, and decide whether and how to pay dividends.” *Jacobs*, 908 F.3d at 890. The FHFA-C achieved those

---

<sup>13</sup> The conclusion that the FHFA-C has some discretionary powers is buttressed by the fact that Congress stated the conservator “may” do certain things but “shall” do others. *See Huston v. United States*, 956 F.2d 259, 262 (Fed. Cir. 1992) (“When, within the same statute, Congress uses both ‘shall’ and ‘may,’ it is differentiating between mandatory and discretionary tasks.”). *Compare* 12 U.S.C. § 4617(b)(2)(D) (“The [FHFA] *may*, as conservator, take such action as may be . . . necessary to put the regulated entity in sound and solvent condition . . . .” (emphasis added)), *with id.* § 4617(b)(14)(A) (“The [FHFA] as conservator or receiver *shall* . . . maintain a full accounting of each conservatorship and receivership or other disposition of a[n Enterprise] in default.” (emphasis added)).

goals with the PSPA Amendments, which are, “in essence[,] a renegotiation of an existing lending agreement.” *Id.* By agreeing to the PSPA Amendments, the FHFA-C eliminated the risk of the Enterprises consuming all of their financial lifeline (Treasury’s funding commitment) through cash-dividend payments or entering a cycle of an ever-increasing liquidation preference.<sup>14</sup> *Roberts*, 889 F.3d at 404–05; *see also Jacobs*, 908 F.3d at 890 (noting that the Enterprises increased their future obligations and reduced their available funds by drawing funds from Treasury to pay the dividend); *Saxton*, 901 F.3d at 962 (Callas, J., concurring) (“Crushing dividend payments could have led the entities toward insolvency.”). The FHFA-C, with the amendments, also protected the Enterprises against future financial downturns.<sup>15</sup> *See Jacobs*, 908 F.3d at 890 (“The [PSPA Amendments] insured the [Enterprises] against downturns and ‘death spirals,’

---

<sup>14</sup> If, under the terms of the PSPAs before the PSPA Amendments, the Enterprises chose to make their dividend payment by increasing Treasury’s liquidation preference, the future dividends would be more expensive because the dividends were a set percentage of the liquidation preference. Making future dividends more expensive would, in turn, increase the likelihood that the Enterprises would again need to rely on increasing Treasury’s liquidation preference rather than making a cash payment. The end result is a cycle in which the Enterprises continue to increase Treasury’s liquidation preference.

<sup>15</sup> Although the FHFA-C anticipated continued profitability for the Enterprises in the near term, this fact does not undermine the propriety of the PSPA Amendments because ensuring the continued functioning of a company includes guarding against long-term risks. These long-term outlooks are especially important given the indefinite nature of the FHFA-C’s role.

preventing unpayable dividends from ratcheting up their debt loads to unsustainable levels.”); *see also Roberts*, 889 F.3d at 405 (noting that the Enterprises fared better in some years and worse in other years under the terms of the PSPA Amendments as compared to the previous agreements).

In light of the above, the FHFA-C’s execution of the PSPA Amendment for each Enterprise was a “quintessential conservatorship task[]” that is appropriate under HERA. *Perry II*, 864 F.3d at 607. Although “stockholders no doubt disagree about the necessity and fiscal wisdom of the [PSPA Amendments] . . . , Congress could not have been clearer about leaving those hard operational calls to the FHFA’s managerial judgment.” *Id.* In sum, the court joins the growing consensus that the FHFA-C acted within its statutory authority when it entered into the PSPA Amendments. *See Jacobs*, 908 F.3d at 894; *Saxton*, 901 F.3d at 963; *Roberts*, 889 F.3d at 403; *Robinson v. Fed. Hous. Fin. Agency*, 876 F.3d 220, 231 (6th Cir. 2017); *Perry II*, 864 F.3d at 606. *But see Collins v. Mnuchin*, 938 F.3d 553, 582 (5th Cir. 2019) (en banc) (holding, over the dissent of seven judges, that the plaintiffs stated a plausible claim that the FHFA-C exceeded its statutory authority). Thus, plaintiffs’ theory that the FHFA-C is the United States because the FHFA-C exceeded its statutory authority is not persuasive.

### **3. The FHFA-C was not coerced into approving the PSPA Amendments.**

Plaintiffs also argue that the FHFA-C is the United States because the FHFA-C was coerced into approving the PSPA Amendments by Treasury.

Plaintiffs assert that Treasury coerced the FHFA-C into approving the PSPA Amendments because (1) Treasury drove the amendment process, (2) Treasury did not plan for the possibility that the FHFA-C would reject the amendments, and (3) the FHFA-C did not propose any alternatives to the amendments. In the alternative, plaintiffs contend that the FHFA, in its role as regulator, coerced the FHFA-C to approve the amendments because the two entities were not acting independently. Specifically, plaintiffs aver that the lines between the FHFA and the FHFA-C were blurred because (1) the FHFA's consent was required for any dividend payment and (2) the FHFA-C approved the amendments to achieve governmental objectives.

Defendant counters that the FHFA-C was not coerced by Treasury because the FHFA-C had a choice of whether to accept or reject the PSPA Amendments. Defendant asserts that there is no coercion if a party has a choice, regardless of how difficult refusal of a particular option may be. With respect to Treasury's involvement, defendant contends that plaintiffs fail to proffer any allegations that Treasury required the FHFA-C to enter into the agreements against its will. Defendant further asserts that other courts have declined to conclude that the FHFA-C felt compelled to follow Treasury based on allegations that Treasury invented the amendment concept or led the process. Defendant also argues that the FHFA-C was not coerced by the FHFA in the latter's role as regulator

because there were clear statutory lines delineating the FHFA's authority in each role.<sup>16</sup>

**a. The court has jurisdiction over claims based on actions that resulted from government coercion.**

The court has jurisdiction over claims premised on the FHFA-C's actions if Treasury's "influence over the" FHFA-C "was coercive rather than merely persuasive." *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154 (Fed. Cir. 2014). The line between coercion and persuasion "is highly fact-specific." *Id.* Federal Circuit precedent frames the contours of the inquiry. In *Langenegger v. United States*, the plaintiffs pleaded that the United States coerced El Salvador by threatening to withhold financial and military assistance unless El Salvador passed legislation expropriating private property. 756 F.2d 1565, 1567 (Fed. Cir. 1985). The Federal Circuit disagreed with the plaintiffs' characterization of the threats because "[d]iplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of [coercion], however difficult refusal may be as a practical matter." *Id.* at 1572. Similarly, the Federal Circuit concluded in *B & G Enterprises, Ltd. v. United States* that California was not coerced into enacting restrictions on smoking, notwithstanding the federal government conditioning grants on states enacting such limits. 220 F.3d 1318, 1321, 1325 (Fed. Cir. 2000); *see also A & D Auto*, 748 F.3d at 1155

---

<sup>16</sup> Defendant frames its argument as addressing whether the FHFA-C acted as an agent for the FHFA in its role as regulator, but defendant is responding to plaintiffs' coercion argument.

(explaining that “coercion was not established” in *B & G*). The court explained that “it was California’s decision to create [the] restrictions[;] . . . Congress may have provided the bait, but California decided to bite.” *B & G*, 220 F.3d at 1325. In *A & D Auto*, the Federal Circuit addressed coercion in the context of the government allegedly conditioning vital financial assistance to bankrupt automobile companies on those companies terminating some of their franchise agreements. 748 F.3d at 1145. Unable to resolve the issue due to gaps in the record, the court noted in dicta that a relevant consideration was “whether the government financing was essential to the companies.” *Id.*

A common thread runs through the Federal Circuit’s decisions: the importance of choice. A nonfederal actor is not coerced when it can choose to go against the wishes of the United States, even if doing so will cause significant hardships, *Langenegger*, 756 F.2d at 1567, or result in a loss of prospective benefits, *id.*; *B & G*, 220 F.3d at 1325. But there is no choice, in any meaningful sense, when there is only one realistic option. *A & D Auto*, 748 F.3d at 1145 (noting the importance of considering whether the companies could survive without accepting the government’s offer); *cf. Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) (noting that, with respect to Congress’s spending powers, “the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions”). Put differently, the nonfederal actor must make a voluntary decision, which it cannot do if there is only

one realistic option. *See BMR Gold Corp. v. United States*, 41 Fed. Cl. 277, 282 (1998) (finding that the “the necessary element of coerciveness” for a taking was missing because the plaintiff granted the military permission to cross his land); *accord Henn v. Nat’l Geographic Soc.*, 819 F.2d 824, 826 (7th Cir. 1987) (noting that hard choices remain voluntary when they are not akin to “Don Corelone’s ‘make him an offer he can’t refuse’”). In sum, the FHFA-C was not coerced if it voluntarily chose to enter into the PSPA Amendments.

**b. Plaintiffs have not established that  
Treasury coerced the FHFA-C into  
approving the PSPA Amendments.**

In support of their contention that Treasury coerced the FHFA-C into approving the PSPA Amendments, plaintiffs allege that Treasury proposed the terms of the amendments, and the FHFA-C did not make a counteroffer. Those allegations are not enough to establish coercion. First, given the Enterprises’ improving financial condition and Treasury’s existing funding commitment, the FHFA-C’s decision to execute the PSPA Amendments was voluntary because it could reject the deals without imperiling the Enterprises. The facts here, therefore, are diametrically opposed to the circumstances in *A & D Auto* that the Federal Circuit suggested may support coercion because the automobile dealers faced insolvency if they did not accede to the financing terms. *See* 748 F.3d at 1145. Second, the FHFA-C’s lack of protestation is informative. “[T]he very fact that FHFA[-C] itself [did] not br[ing] suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA[-C] was an independent, willing



participant in its negotiations with the Treasury.” *Robinson v. Fed. Hous. Fin. Agency*, 223 F. Supp. 3d 659, 668 (E.D. Ky. 2016), *aff’d*, 876 F.3d at 220. The court’s conclusion is bolstered by the fact that another court has held that materially similar allegations to those at issue here did not “come close to a reasonable inference that [the] FHFA[-C] considered itself bound to do whatever Treasury ordered.” *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) (“*Perry I*”), *aff’d in part, rev’d in part sub nom.* 864 F.3d at 591. This court agrees with the reasoning in *Perry I*: the PSPA Amendments were executed by sophisticated parties, and many agreements arise from a party’s proposal being accepted by the other party. *Id.*

**c. Plaintiffs have not established that the FHFA coerced the FHFA-C into approving the PSPA Amendments.**

Plaintiffs also have not alleged facts reflecting that the FHFA coerced the FHFA-C into agreeing to the PSPA Amendments. As an initial matter, plaintiffs have not alleged that the FHFA unduly influenced the FHFA-C’s decision-making process with respect to the proposed agreements. They merely allege that the FHFA did not silo its regulatory and conservator roles. The lack of a firewall (without more), however, does not indicate that the FHFA deprived the FHFA-C of meaningful choice. Moreover, plaintiffs’ focus on the FHFA-C allegedly pursuing government objectives when it approved the PSPA Amendments is a red herring. The purported pursuit of government objectives is not germane to the coercion inquiry because it does not suggest that the FHFA-C lacked any choice in the matter. Even if it was relevant to

coercion (or to some other theory for jurisdiction), plaintiffs would not prevail because Congress permitted the FHFA-C to act in the interests of the government. *See* 12 U.S.C. § 4617(b)(2)(J) (allowing the FHFA-C to “take any action” that “is in the interests of the [Enterprises] or the [FHFA]”). The mere pursuit of government objectives, therefore, would not reflect a blending of any roles but rather the FHFA-C using powers afforded to it by Congress.

In conclusion, plaintiffs have not established that the FHFA-C was coerced into approving the PSPA Amendments by Treasury or the FHFA.

#### **4. The FHFA-C is not Treasury’s agent.**

Plaintiffs further argue that that the FHFA-C’s actions are attributable to the United States because the FHFA-C is Treasury’s agent. Plaintiffs assert that the FHFA-C is a government agent because (1) Treasury, by virtue of the PSPAs, had a major role in conservator decisions; (2) the FHFA-C approved the PSPA Amendments for the taxpayers’ benefit; and (3) the FHFA-C could not have approved the amendments absent statutory authority. Defendant counters that plaintiffs have not pleaded an agency relationship because Treasury does not control the FHFA-C’s operations and is statutorily barred from exercising such control.

The United States is subject to claims in this court for the actions of a third party “if [that] party is acting as the government’s agent . . .” *A & D Auto*, 748 F.3d at 1154. “An essential element of agency is the principal’s right to control the agent’s actions.” *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01, cmt. f

(Am. Law. Inst. 2005)); *accord O'Neill v. Dep't of Hous. & Urban Dev.*, 220 F.3d 1354, 1360 (Fed. Cir. 2000) (acknowledging that the common-law meaning of agency requires, among other things, that the principal has the right to control the agent's conduct); *see also Preseault v. United States*, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (concluding that a state's actions were attributable to the United States when the state acted pursuant to the Interstate Commerce Commission's order); *Hendler v. United States*, 952 F.2d 1364, 1378–79 (Fed. Cir. 1991) (attributing a state's actions to the United States when the state acted under authority flowing from an Environmental Protection Agency order). The facts, as alleged, do not reflect that Treasury controlled the FHFA-C's actions because Congress explicitly precluded the FHFA-C from being subservient to another agency, 12 U.S.C. § 4617(a)(7) (providing that the FHFA-C cannot be subject to the “direction or supervision” of any other agency), and plaintiffs have not alleged facts indicating that Treasury exercised such control notwithstanding the statutory bar. Although the FHFA-C was required by the PSPAs to obtain Treasury's approval for certain actions (e.g., issuing dividends), the PSPAs did not provide Treasury with the right to unilaterally order amendments. Moreover, plaintiffs describe an FHFA-C that made decisions independently; Treasury “urg[ed]” the FHFA to pursue conservatorship and “push[ed]” for the PSPA Amendments. 2d Am. Compl. ¶¶ 4, 146. Simply stated, plaintiffs have not alleged facts establishing that Treasury exercised the control over the FHFA-C that is necessary for an agency relationship.

**5. The FHFA-C is the United States  
because the FHFA-C retains the FHFA's  
governmental character.**

Finally, plaintiffs contend that the FHFA-C is itself a government actor. Defendant disagrees. First, relying on *O'Melveny & Myers v. FDIC*, 412 U.S. 79 (1994), defendant argues that the FHFA-C is not the United States because the FHFA-C stands in the Enterprises' shoes. Specifically, defendant asserts that Congress's decision to have the FHFA-C succeed to the Enterprises' rights reflects that Congress intended that the FHFA-C step into the Enterprises' private shoes and shed its government character. Second, defendant argues that the FHFA-C's exercise of nontraditional conservatorship powers is immaterial because Congress can expand the conservator's role without transforming it into it into a government actor. Third, defendant argues that the Enterprises are not government instrumentalities—which means that the FHFA did not step into the shoes of a government actor when it became the Enterprises' conservator—because the government does not retain permanent authority to appoint the Enterprises' directors. Defendant contends that the government only has temporary, albeit indefinite, control over the Enterprises because conservatorships are not permanent.

In response, plaintiffs dispute the premise of defendant's argument that, pursuant to *O'Melveny*, the FHFA becomes the Enterprises when acting as conservator. Plaintiffs assert that *O'Melveny* does not concern whether an entity is the United States or, if the decision can be read as addressing that issue, is distinguishable because it concerns receivers or is

limited to conservators exercising traditional conservator powers. Second, plaintiffs argue that the FHFA has not shed its government status, even if it has stepped into the Enterprises' shoes, when it acts as conservator. Specifically, plaintiffs assert that the FHFA-C retains the FHFA's government status because (1) the FHFA-C has acted beyond the traditional conservator powers and (2) Congress expressed its intention for that result by precluding the conservator from being subject to the supervision of "any *other* agency." 12 U.S.C. § 4617 (emphasis added). Third, plaintiffs argue that their claims are against the United States, even if the FHFA-C steps into the shoes of the Enterprises, because the Enterprises are government instrumentalities.<sup>17</sup>

In short, the parties disagree over the government status of the FHFA-C. The FHFA is indisputably the United States, *see* 12 U.S.C. § 4511(a) (establishing the FHFA as an "independent agency of the Federal Government"), and so the only question is whether the FHFA sheds that status when it acts as conservator.

---

<sup>17</sup> The court notes that, with respect to the derivative claims, the parties fail to address a critical implication of plaintiffs' government instrumentality argument: there is only one party if the Enterprises are government instrumentalities. The defendant would be the United States because the FHFA-C, according to plaintiffs, stepped into the shoes of government instrumentalities—the Enterprises. The plaintiffs would also be the United States because the Enterprises are the real plaintiffs for any derivative claims. Simply stated, if the Enterprises are government instrumentalities, the defendant and derivative plaintiffs would both be the United States, which could pose justiciability issues. The court, however, does not consider such issues because it concludes that the Enterprises are not government instrumentalities.

In other jurisdictions, courts have held (with near unanimity) that the FHFA loses its government status pursuant to *O'Melveny*. In *O'Melveny*, the United States Supreme Court (“Supreme Court”) explained that the FDIC “steps into [the] shoes” of a private company when acting as receiver and sheds its government character because the FDIC “succeed[s] to . . . all rights, titles, powers, and privileges of the [entity in receivership] . . .” 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); *see also AG Route Seven P’ship v. United States*, 57 Fed. Cl. 521, 534 (2003) (citing *O'Melveny* for the proposition that the FDIC as receiver is a “private party, and not the government *per se*” because it “is merely standing in the shoes . . . of the defunct thrift”). The courts drawing from *O'Melveny* have concluded that the FHFA steps into the shoes of the Enterprises and sheds its government character when acting as conservator because Congress provided that the FHFA-C exercises the same rights with respect to the Enterprises as Congress granted to the FDIC as receiver. *See, e.g., Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017); *cf. Ameristar Fin. Servicing Co. v. United States*, 75 Fed. Cl. 807, 811 (2007) (concluding, with respect to the FDIC, that the step-into-the-shoes principle set forth in *O'Melveny* also applies in the conservator context).

**a. The FHFA-C is not the United States if the FHFA steps into the Enterprises’ shoes when acting as conservator.**

Plaintiffs initially contend that defendant’s reliance on *O'Melveny* is a red herring because, assuming that *O'Melveny* applies, the FHFA-C is the United States even though it steps into the Enterprises’ shoes.

Specifically, plaintiffs assert that the FHFA-C is the United States under the facts alleged because (1) the FHFA-C exercises nontraditional conservator powers, (2) Congress intended that the FHFA-C retain the FHFA's government status, and (3) the FHFA-C steps into the shoes of a government instrumentality. The court addresses each assertion in turn.

First, the FHFA-C did not become a government actor by exercising powers beyond those traditionally afforded to a conservator. As a threshold matter, plaintiffs have not alleged facts reflecting that the FHFA-C used such powers; the execution of the PSPA Amendments was a “quintessential conservatorship” function. *Perry II*, 864 F.3d at 607; *see also supra* Section IV.B.2 (discussing the FHFA-C's exercise of its powers). More importantly, however, plaintiffs would not prevail even if the FHFA-C exercised nontraditional conservatorship powers in agreeing to the PSPA Amendments. When this argument was pressed in other jurisdictions, it was rejected:

It may well be true that FHFA's actions would not be allowed under traditional principles of corporate or conservatorship law, but it does not follow that those actions are therefore governmental. Legislatures can expand conservatorship and similar powers without transforming conservators into agents of the government. *Cf. Pegram v. Herdrich*, 530 U.S. 211, 225–26 (2000) (explaining that the Employee Retirement Income Security Act altered the common law of trusts to permit certain actions that would otherwise violate the trustee's fiduciary duties).

*Bhatti v. Fed. Hous. Fin. Agency*, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (footnote omitted). The court agrees with that reasoning, and plaintiffs provide no authority that supports a contrary result. Although plaintiffs state that the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) decision in *Waterview Management Co. v. FDIC*, 105 F.3d 696 (D.C. Cir. 1997), supports their position, they are mistaken. *Waterview* is not on point because the D.C. Circuit did not hold that a conservator is *per se* the United States when acting pursuant to a congressional grant of broad powers. Rather, it held that, as a matter of statutory interpretation, the existence of a receivership did not preempt a prereceivership contract. *Id.* at 699–702.

Second, Congress’s instruction that the FHFA-C is not subject to the supervision of any other agency does not reflect congressional intent for the FHFA to retain its government status when acting as conservator even if it steps into the shoes of the Enterprises. Because the court only reaches this issue by assuming that *O’Melveny* is instructive, the statutory language concerning supervision of the FHFA-C does not support a finding of jurisdiction because the same language is present in the statute that the Supreme Court addressed in *O’Melveny*. See 512 U.S. at 85–86 (discussing 12 U.S.C. § 1821). Compare 12 U.S.C. § 1821(c)(3)(C) (“When acting as conservator or receiver . . . , [the FDIC] shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC’s] rights, powers, and privileges.”), with *id.* § 4617(a)(7) (“When acting as conservator or receiver, the [FHFA] 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 [FHFA].”).

The third argument advanced by plaintiffs—that the FHFA-C is the United States because it steps into the shoes of a government instrumentality—also is not meritorious. A government instrumentality’s actions are attributable to the United States for purposes of the Tucker Act. *See Corr v. Metro. Wash. Airports Auth.*, 702 F.3d 1334, 1336 (Fed. Cir. 2012) (noting that a claim against a government instrumentality is a claim against the United States for purposes of the Little Tucker Act, 28 U.S.C. § 1346(a)(2)). The Supreme Court established in *Lebron v. National Railroad Passenger Corp.* that a company is a government instrumentality when (1) it is created by “special law,” (2) it is established “for the furtherance of governmental objectives,” and (3) the federal government “retains for itself permanent authority to appoint a majority of the [company’s] directors . . . .” 513 U.S. 374, 400 (1995). After *Lebron*, the Supreme Court clarified that, for purposes of the instrumentality test, “the practical reality of federal control and supervision prevails over Congress’ disclaimer of the [the entity’s] governmental status.” *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1233 (2015).

There is no dispute that the Enterprises satisfy the first two prongs of the *Lebron* test; Congress created the Enterprises by special law to achieve governmental objectives related to the housing market. *See* 12 U.S.C. § 4501; *see also Herron*, 861 F.3d at 167 (addressing claims involving Fannie and

noting that “[t]his case satisfies the first two *Lebron* criteria”); *Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1406–07 (9th Cir. 1996) (reaching same conclusion for Freddie). The status of the Enterprises, therefore, turns on the third prong: whether the government retains permanent authority to appoint a majority of the Enterprises’ directors.

The Federal Circuit has not addressed the government-control prong with respect to the Enterprises, but courts in other jurisdictions have done so. Those decisions provide a starting point for the court. It appears that every court to consider the issue, with the exception of one district court, has held that the government does not exercise permanent control over the Enterprises. *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 279 (D.R.I. 2018) (concluding that the government retains permanent authority to control the Enterprises after noting that “[t]he non-controlling precedent to date” has reached the opposite conclusion). Most of the courts that concluded that the government lacks permanent control over the Enterprises issued their decisions before the Supreme Court in *Association of American Railroads*, emphasized the importance of evaluating the practical reality over nomenclature, and the other courts focused on the statutory purpose for the conservatorships rather than the Enterprises’ actual situation. *E.g.*, *Herron*, 861 F.3d at 169 (relying on the notion that a conservatorship is fundamentally temporary). In other words, the courts adopting the prevailing view considered the issue of control without regard for the Supreme Court’s instruction to focus on

the practical reality. The court, therefore, does not find those decisions persuasive.

The crux of the inquiry, as the Supreme Court mandates, is on the practical reality of the government's control over the Enterprises. *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1233. It is of no import that Congress nominally authorized a facially temporary conservatorship, *see* 12 U.S.C. § 4617(a) (permitting the FHFA to act as conservator to “reorganiz[e]” or “rehabilitat[e]” the Enterprises), because Congress's disclaimers are no substitute for the court's obligation to assess the government's actual control, *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1233. The court focuses on the length of the conservatorship because the FHFA-C wields complete control over the Enterprises so long as they are in conservatorship. *See generally* 12 U.S.C. § 4617.

Plaintiffs allege that the Enterprises will remain undercapitalized—and thus subject to conservatorship pursuant to 12 U.S.C. § 4617(a)(3)(J)—until the PSPAs, in their current form, are changed because the Enterprises cannot accumulate any capital under the existing terms of the PSPAs. Although the PSPAs could be further amended, plaintiffs' allegations reflect that Treasury and the FHFA-C will not do so because the purpose of the PSPA Amendments is to prevent the Enterprises from accumulating the necessary capital to become independent companies. Plaintiffs, in short, have alleged that the government intended, and has taken steps to ensure, that the conservatorships never end. Those facts, viewed in isolation, would support a conclusion that the practical reality is that the Enterprises are under permanent government

control. The court's inquiry, however, is not limited to plaintiffs' allegations because it has taken judicial notice of relevant facts reflecting that the status quo has changed: the Treasury Secretary and the FHFA Director are now both committed to ending the conservatorships. Moreover, the idea that the Enterprises are permanently subject to government control because they can never accumulate the capital needed to exit the conservatorships is undermined by recent developments. Indeed, Treasury proposed amending the Net Worth Sweep to allow the Enterprises to retain more capital, and the FHFA Director testified during his confirmation hearing that, if confirmed, he would seek to increase the amount of capital that the Enterprises retain. Simply stated, the practical reality is that the Enterprises are not subject to permanent government control because the relevant parties are working to terminate the conservatorships.<sup>18</sup>

---

<sup>18</sup> Plaintiffs may disagree with the court's conclusion that events occurring after the PSPA Amendments are relevant to determining whether the Enterprises were under permanent government control during the events discussed in plaintiffs' complaint. Even if the court agreed that events occurring after the PSPA Amendments are not germane, plaintiffs still would not prevail because they allege that the conservatorships began as temporary measures. *See* 2d Am. Compl. ¶¶ 66 ("FHFA also emphasized that the conservatorship was temporary: 'Upon the [FHFA] Director's determination that the [FHFA-C's] plan to restore the [Enterprises] to safe and solvent condition has been completed, the Director will issue an order terminating the conservatorships'" (quoting FHFA publication)), 110 (noting that, when the conservatorships were imposed, the FHFA Director "vowed" that the Enterprises would "exit conservatorship" and "return to normal business operations").

In sum, the FHFA-C does not become the United States if the FHFA steps into the Enterprises' shoes when serving as conservator.

**b. The FHFA-C retains the FHFA's government character because the FHFA-C does not step into the Enterprises' shoes.**

The key inquiry, therefore, is whether the FHFA steps into the shoes of the Enterprises when acting as conservator. Defendant argues that the FHFA-C sheds its government character and assumes the identity of the Enterprises based on the reasoning in *O'Melveny*. Defendant's reliance on *O'Melveny* is misplaced. *O'Melveny* concerns a receiver stepping into the shoes of a failed bank. 512 U.S. at 86. The roles of a conservator and receiver are meaningfully different. In a recent decision, the United States District Court for the District of Rhode Island artfully explained the differences and their import for assessing whether the FHFA-C is the government:

The *O'Melveny* Court held that FDIC, when acting as a receiver for a private entity, steps into the shoes of that private entity for state law claims. This holding makes sense given the purpose of receivership: "to preserve a company's assets, for the benefit of creditors, in the face of bankruptcy." When FDIC is appointed receiver, it must dispose of the received entity's assets, resolving obligations and claims made against the entity. Notably, "[i]n receivership, the receiver owes fiduciary duties to the creditors, which the corporation would otherwise owe to

---

Thus, the Enterprises were not under permanent government control before the PSPA Amendments.

creditors during a period of insolvency.” It logically follows, then, that the receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity.

Conservatorship, in contrast, serves a different function. FHFA has described the purpose of conservatorship is “to establish control and oversight of a company to put it in a sound and solvent condition.” Conservators, unlike receivers, have a fiduciary duty running to the corporation itself.

This is “critically distinct” from the fiduciary duties owed as a receiver—the receiver does indeed “step into the shoes” of the entity by assuming the fiduciary duties *of* the entity, but the conservator does not: it remains distinct, and rather owes a duty *to* the entity. Given the difference in fiduciary duties, *O’Melveny’s* “steps into the shoes” holding makes sense in the context of receivership, but not in the context of conservatorship.

*Sisti*, 324 F. Supp. 3d at 282–83 (citations and footnotes omitted). *See generally* Brian Taylor Goldman, *The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State-Action*, 17 J. Bus. & Sec. L. 11, 23–30 (2016). The district court, relying on the above analysis, declined to treat the FHFA-C as a private actor. *Sisti*, 324 F. Supp. 3d at 284. This court agrees with the reasoning and conclusion in *Sisti*: the FHFA does not shed its government character when acting as conservator because it does not step into the shoes of the Enterprises. Otherwise stated, the FHFA-C is the United States because it retains the

FHFA’s government character. Plaintiffs’ claims, therefore, are against the United States for purposes of the Tucker Act.

**C. The court has jurisdiction over takings claims.**

The court next addresses, as instructed by the Federal Circuit, whether the Court of Federal Claims lacks jurisdiction to entertain takings claims because it is not an Article III tribunal. *See Fairholme Funds*, 681 F. App’x at 949–50.

**1. The judges on this court do not exercise Article III power.**

Article III, § 1, of the Constitution states that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Article III judges “hold their Offices during good Behaviour” and receive compensation “for their Services, . . . which shall not be diminished during their Continuance in Office.” U.S. Const. art. III, § 1; *see also Ortiz v. United States*, 138 S. Ct. 2165, 2176 (2018) (noting that the United States Court of Appeals for the Armed Forces is not an Article III court because, among other reasons, “its members lack the tenure and salary protections that are the hallmarks of the Article III judiciary” (citing 10 U.S.C. § 942 (2018)); *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938 (2015) (observing that “bankruptcy and magistrate judges . . . do not enjoy the protections of Article III,” namely, “life tenure and pay that cannot be diminished”). It is well settled that Congress cannot confer the Article III judicial power on non-Article III courts. *See Oil States Energy Servs., LLC*

*v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1372–73 (2018); *Stern v. Marshall*, 564 U.S. 462, 484 (2011); *see also Stern*, 564 U.S. at 484 (“[I]n general, Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’” 564 U.S. at 484 (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855))).

Congress expressly established the Court of Federal Claims “under article I of the Constitution of the United States.” 28 U.S.C. § 171(a). And, although judges of the Court of Federal Claims enjoy the salary protections of Article III judges, *see id.* § 172(b) (“Each judge shall receive a salary at the rate of pay, and in the same manner, as judges of the district courts of the United States.”), they do not enjoy the life tenure of Article III judges, *see id.* §§ 172(a) (“Each judge . . . shall be appointed for a term of fifteen years.”), 176 (allowing for the removal from office by the Federal Circuit). Consequently, the court’s judges do not exercise Article III judicial power.

## **2. Court of Federal Claims judges can adjudicate public rights.**

Although Court of Federal Claims judges cannot adjudicate the same panoply of issues as Article III judges, the judges on this court may adjudicate a category of cases involving what the Supreme Court has denominated “public rights.” *See Oil States*, 138 S. Ct. at 1373. “When determining whether a proceeding involves an exercise of Article III judicial power, [the Supreme Court’s] precedents have distinguished between ‘public rights’ and ‘private rights.’ Those precedents have given Congress



significant latitude to assign adjudication of public rights to entities other than Article III courts.” *Id.*; accord *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67–68 (1982) (plurality opinion) (“[T]his Court has upheld the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving ‘public rights.’”).

While the Supreme Court “has not ‘definitively explained’ the distinction between public and private rights,” *Oil States*, 138 S. Ct. at 1373 (quoting *N. Pipeline*, 458 U.S. at 69), “and its precedents applying the public-rights doctrine have ‘not been entirely consistent,’” *id.* (quoting *Stern*, 564 U.S. at 488), public rights include, at a minimum, those “matters ‘which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,’” *id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)). “In other words, the public-rights doctrine applies to matters ‘arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.”” *Id.* (quoting *Crowell*, 285 U.S. at 50).

In addition, if an action cannot be brought absent the government’s waiver of sovereign immunity, then the case involves a public right. See *Stern*, 564 U.S. at 489 (“The challenge in *Murray’s Lessee* . . . fell within the ‘public rights’ category of cases, because it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity.”). In other words, “Congress may set the terms of adjudicating a suit when the suit could not otherwise

proceed at all.” *Id.*; see *N. Pipeline*, 458 U.S. at 67 (explaining that the rationale for the public rights exception stems in part from “the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued”).

**3. The right to compensation for a taking is a public right subject to adjudication in the Court of Federal Claims.**

The right to just compensation enshrined in the Takings Clause of the Fifth Amendment is a public right for three reasons. The court addresses each reason in turn.

The first reason a takings claim concerns a public right relates to the parties involved. A takings claim is an allegation, by a private party, that the government is liable to it for just compensation. In other words, a takings claim necessarily “arise[s] between the Government and persons subject to its authority.” *Oil States*, 138 S. Ct. at 1373 (quoting *Crowell*, 285 U.S. at 50). To this court’s knowledge, the Supreme Court has never held that such a dispute between private persons and the United States must be heard in an Article III court. Instead, it has implied that such disputes fall squarely within the public rights exception. See *Stern*, 564 U.S. at 490 (noting that it has “rejected the limitation of the public rights exception to actions involving the Government as a party”); see also *N. Pipeline*, 458 U.S. at 70 (“[C]ontroversies [between the government and others] may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination.”).

The second reason a takings claim concerns a public right relates to the nature of the alleged liability—namely, just compensation. The Takings Clause requires that the government pay “just compensation” for “private property” that is “taken for public use.” U.S. Const. amend. V. When the federal government takes private property for public use, the payment of just compensation is authorized by Congress in its exercise of its Article I power to pay the United States’ debts. *See Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929) (“[E]xamining and determin[ing] claims for money against the United States . . . is a function [that] belongs primarily to Congress as an incident of its power to pay the debts of the United States.”); *see also* U.S. Const. art. I, § 8, cl. 1 (“The Congress shall have Power . . . to pay the Debts . . . of the United States . . .”). Only Article III courts may exercise the judicial power, but Congress may exercise its Article I powers “through judicial as well as non-judicial agencies.” *Sherwood*, 312 U.S. at 587. Therefore, takings claims “arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the . . . legislative department[],” *Crowell*, 285 U.S. at 50, i.e., the payment of a debt with money from the United States treasury. *Accord Brott v. United States*, 858 F.3d 425, 435 (6th Cir. 2017) (holding that plaintiffs pursuing takings claims are not constitutionally entitled to have those claims adjudicated in an Article III forum, and providing that compensation “claims are made by private individuals against the government in connection with the performance of a historical and constitutional function of the legislative branch, namely, the control and payment of money

from the treasury”), *cert. denied*, 138 S. Ct. 1324 (2018).

The third reason a takings claim concerns a public right relates to the nature of the defendant. “It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.” *United States v. Mitchell*, 463 U.S. 206, 212 (1983). In other words, the United States must waive its sovereign immunity for suits against it to proceed. *Id.*

“[T]he Fifth Amendment does not provide a self-executing waiver of sovereign immunity” for takings claims. *Sammons v. United States*, 860 F.3d 296, 300 (5th Cir. 2017); *accord Brott v. United States*, No. 1:15-CV-38, 2016 WL 5922412, at \*4 (W.D. Mich. Mar. 28, 2016) (“Plaintiffs’ argument that the Fifth Amendment’s guarantee of just compensation is ‘self-executing’ and not dependent on a congressional waiver of sovereign immunity is contrary to long-standing clear precedent, by which this Court is bound.”), *aff’d*, 858 F.3d at 425. Indeed, the self-executing character of the Takings Clause relates to the right it provides, not the means to enforce that right.<sup>19</sup>

---

<sup>19</sup> Mr. Sammons relied on footnote nine in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), to argue that the principle of sovereign immunity is inapplicable to claims brought under the “self-executing” Takings Clause. The Supreme Court’s comments in this footnote, however, merely reinforce the understanding that the Takings Clause is self-executing in providing a right to a remedy. *See id.* at 316 n.9 (“[I]t is the Constitution that dictates the *remedy* for interference with property rights amounting to a taking.” (emphasis added)).

The suits [on appeal] were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States.

*Jacobs v. United States*, 290 U.S. 13, 16 (1933); *accord First English*, 482 U.S. 315 (“[A] landowner is entitled to bring an action in inverse condemnation as a result of “the self-executing character of the constitutional provision with respect to compensation . . . .” (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980))). In other words, the Takings Clause is self-executing in providing a remedy, but is not self-executing in providing a means to enforce that remedy. *See Lynch v. United States*, 292 U.S. 571, 581 (1934) (“The sovereign’s immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, and to those arising from some violation of rights conferred upon the citizen by the Constitution. The character of the cause of action . . . may be important in determining (as under the Tucker Act (24 Stat. 505)) whether

consent to sue was given. Otherwise it is of no significance.” (citations omitted)); *see also Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) (“The doctrine of sovereign immunity . . . is a monument to the principle that some constitutional claims can go unheard. No one would suggest that, if Congress had not passed the Tucker Act, . . . courts would be able to order disbursements from the Treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation.”).

The Tucker Act provides a means to enforce the remedy set forth in the Takings Clause.<sup>20</sup> *See* 28 U.S.C. § 1491(a)(1). As noted above, the Tucker Act allows plaintiffs to bring monetary claims against the United States founded upon the Constitution, including Fifth Amendment takings claims. *See id.* (“The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution . . . .”); *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019) (“We have held that ‘[i]f there is a taking, the claim is “founded upon the Constitution” and within the jurisdiction of the Court of Claims to hear and determine.’” (quoting *United States v. Causby*, 328 U.S. 256, 267 (1946))). This allowance

---

<sup>20</sup> The remedy can also be enforced under the Little Tucker Act, which provides federal district courts with jurisdiction concurrent with that of the Court of Federal Claims for claims not exceeding \$10,000, 28 U.S.C. § 1346(a)(2), and the Indian Tucker Act, which provides the Court of Federal Claims with jurisdiction to adjudicate claims brought by American Indian tribes, bands, or groups, *id.* § 1505. Neither statute is applicable in this case.

constitutes a waiver of sovereign immunity. *See Mitchell*, 463 U.S. at 212 (“[B]y giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims.”). In short, because this waiver of sovereign immunity over takings claims is necessary for suits against the United States to proceed, such claims implicate public rights that can be adjudicated in a non-Article III forum.

This conclusion is confirmed by historical practice. Prior to 1855, persons seeking to enforce claims for money damages against the United States were not able to obtain judicial redress. *See United States v. Bormes*, 568 U.S. 6, 12 (2012) (describing “[t]he Tucker Act’s jurisdictional grant[] and accompanying immunity waiver” as a “missing ingredient for an action against the United States for the breach of monetary obligations not otherwise judicially enforceable”). Instead, “claimants routinely petitioned Congress for private bills to recover money owed.” *Id.* at 11. If the Fifth Amendment waives sovereign immunity, those claimants could have instead proceeded in Article III courts, even in the absence of any statutory authorization. Mr. Sammons did not identify, and the court has not located, any example of such a case being filed between 1791 and 1855.

In sum, a takings claim implicates a public right because such a claim consists of a dispute between a private party and the United States, involves Congress’s obligation to pay a debt, and requires the waiver of sovereign immunity. Accordingly, the Court

of Federal Claims constitutionally can adjudicate claims under the Takings Clause.<sup>21</sup>

**D. The court lacks jurisdiction over plaintiffs' claim that sounds in tort.**

**1. Plaintiffs' direct fiduciary duty claim sounds in tort.**

Turning back to the parties' contentions, defendant argues that the court lacks jurisdiction over plaintiffs' direct fiduciary duty claims because the United States does not owe to each Enterprise's shareholders a fiduciary duty that is grounded in a statute or contract.<sup>22</sup> Defendant asserts that such a fiduciary duty cannot be based on (1) HERA because, pursuant to the statute, the FHFA-C is only required to act in the government's and the Enterprises' best interests; or (2) the PSPAs because plaintiffs are not parties to those contracts. Plaintiffs counter that their claim is based on a fiduciary duty rooted in both HERA and

---

<sup>21</sup> Mr. Sammons did not argue that plaintiffs are entitled to a jury trial but, for the sake of completeness, the court notes that the Supreme Court has held that "when Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.'" *Oil States*, 138 S. Ct. at 1379 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53–54 (1989)). Therefore, the rejection of Mr. Sammons's Article III challenge would also resolve a Seventh Amendment challenge. *See id.*

<sup>22</sup> In its notice of arguments, defendant explains that it is arguing in its motion to dismiss for the dismissal of plaintiffs' direct and derivative fiduciary duty claims. After reviewing the motion, it is apparent that defendant only presented argument concerning the direct claim. The court, therefore, reserves judgment on whether it has jurisdiction over the derivative claims.



the PSPAs. As to HERA, plaintiffs assert that Congress made the FHFA-C a fiduciary by authorizing it to control the Enterprises, entrusting it with duties that are at the core of what it means to be a fiduciary, and using terminology—“conservator”—associated with a fiduciary. Additionally, plaintiffs contend that recognizing that Treasury owes a fiduciary duty to shareholders is the only way to give meaning to Congress’s mandate in HERA that Treasury protect taxpayers by considering, before purchasing securities, the need to maintain the Enterprises as privately owned entities. With respect to the PSPAs, plaintiffs argue that Treasury owes a fiduciary duty to the shareholders because it acquired control rights under the contract.<sup>23</sup>

The court, pursuant to the Tucker Act, lacks jurisdiction over tort claims. 28 U.S.C. § 1491(a)(1). A breach of fiduciary duty is generally classified as a tort. *Newby v. United States*, 57 Fed. Cl. 382, 294 (2003). A fiduciary duty claim, however, does not sound in tort for purposes of the Tucker Act when the fiduciary relationship is founded on a money-mandating statute or a contractual provision between the claimant and United States. *See Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (statute); *Cleveland Chair Co. v. United States*, 557 F.2d 244, 246 (Ct. Cl. 1977) (contract); *see also* 28 U.S.C. § 1491(a)(1) (providing jurisdiction over claims “founded upon . . . any Act of Congress . . . or contract with the United States”).

---

<sup>23</sup> Plaintiffs’ contention that Treasury owes them a fiduciary duty does not appear in the second amended complaint.

The initial issue is whether HERA establishes a fiduciary relationship between the FHFA-C and the Enterprises' shareholders. The court begins with the language of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). "If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect." *Rosete v. Office of Pers. Mgmt.*, 48 F.3d 514, 517 (Fed. Cir. 1995); *accord Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Congress provided in HERA that the FHFA-C is only required to act in the interests of itself or the Enterprises. 12 U.S.C. § 4617(b)(2)(J). That statement reflects a clear intent: the FHFA-C does not owe a fiduciary duty to shareholders because the conservator is not required to consider shareholders' interests.<sup>24</sup> *See id.*; *see also Collins*, 938 F.3d at 580 (noting that HERA "may permit" the FHFA-C to pursue actions that are "inconsistent with fiduciary duties"). The plain

---

<sup>24</sup> The court's interpretation of HERA's plain language is buttressed by the fact that Congress seemingly made a deliberate decision to exclude shareholder interests from the FHFA-C's considerations. Congress modeled HERA on the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). *Jacobs*, 908 F.3d at 893. Under FIRREA, Congress permitted the FDIC as conservator to consider the best interests of a bank, its depositors, or the FDIC. 12 U.S.C. § 1821(d)(2)(J)(ii). Although Congress permitted the FDIC to take into consideration the interests of its depositors, Congress omitted the analogue of depositors—shareholders—from the list of germane interests that the conservator can consider when acting pursuant to HERA. *Compare id.* (FIRREA), *with* 12 U.S.C. 4617(b)(2)(J) (HERA). The omission is telling.

language controls, and therefore the court does not consider the peripheral considerations urged by plaintiffs such as the implications of the word “conservator,” the FHFA-C’s control over the Enterprises, or the FHFA-C’s other powers. In sum, plaintiffs cannot establish jurisdiction for their direct fiduciary duty claim by relying on HERA.

The next issue is whether Treasury owes a fiduciary duty to shareholders because it purchased securities pursuant to HERA.<sup>25</sup> Plaintiffs contend that Treasury assumed such a duty when it agreed to the PSPAs because of the determinations that Congress required the Treasury Secretary to make prior to buying the securities. Before purchasing securities pursuant to HERA, the Secretary is required to determine that the purchase is necessary to protect taxpayers and evaluate various considerations in connection with protecting the taxpayers. 12 U.S.C. §§ 1455(l)(1)(B)–(C), 1719(g)(1)(B)–(C). One of those considerations is the need to maintain the Enterprises as privately owned companies. *Id.* §§ 1455(l)(1)(C), 1719(g)(1)(C).

---

<sup>25</sup> The gravamen of plaintiffs’ direct fiduciary duty claim is that the FHFA-C owed a fiduciary duty to plaintiffs. *See* 2d Am. Compl. ¶¶ 223–33. Indeed, plaintiffs state in their complaint that the “FHFA violated its fiduciary duty,” *id.* ¶¶ 233, and make no similar allegation with regard to Treasury. Although plaintiffs have not alleged that their direct fiduciary duty claim is premised on Treasury’s actions, the court nonetheless considers the parties’ arguments on whether such a claim would be within the court’s jurisdiction for two reasons. First, the parties have fully briefed the issue without noting the discrepancy between plaintiffs’ arguments and the allegations in their complaint. Second, the court’s resolution of the issue is immaterial to the ultimate outcome because, as discussed below, plaintiffs lack standing to pursue their direct claims.

At no point, however, did Congress direct (or even suggest) that the Secretary must protect the shareholders. The court declines to stretch the statutory language to support a fiduciary relationship based on any incidental benefit shareholders may derive from the Secretary considering the need to keep the Enterprises privately owned in the context of protecting taxpayers. Simply stated, Treasury did not assume any fiduciary obligations to the Enterprises' shareholders by virtue of HERA.

Finally, the court turns to whether Treasury owed a fiduciary duty to the Enterprises' other shareholders because it acquired control rights by agreeing to the PSPAs. Plaintiffs' argument is premised on the state-law principle (which they term "general corporate law") that a controlling shareholder owes a fiduciary duty to the minority shareholders. The court is not convinced. First, plaintiffs' allegation of a fiduciary relationship is not founded on a contract within the meaning of the Tucker Act. Plaintiffs are not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs. They invoke the contracts solely to establish that Treasury is a controlling shareholder and rely on that conclusion to argue that it has a fiduciary duty based on state law. The contract, otherwise stated, is one step removed from the purported genesis of the fiduciary duty—the application of state-law principles. That gap is too much in light of the court's obligation to narrowly construe the Tucker Act's waiver of sovereign immunity. *See Smith*, 855 F.2d at 1552 (noting that the Tucker Act is narrowly construed); *see also Perry II*, 864 F.3d at 619–20 (rejecting the legal theory that the Enterprises' shareholders' need to reference the

PSPAs for their fiduciary duty claim was enough to conclude that the claim was rooted in a contract for purposes of the Tucker Act).

Second, plaintiffs fail to demonstrate the applicability of the state-law principles underlying their theory for why Treasury assumed fiduciary duties. Federal law governs the obligations Treasury incurred by entering into the PSPAs. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 519 (1988) (“The proposition that federal common law continues to govern the ‘obligations to and rights of the United States under its contracts’ is nearly as old as *Erie* [*v. Tompkins*, 304 U.S. 64 (1938),] itself.”). Although courts may shape federal law by drawing from state-law principles, plaintiffs do not explain why doing so is appropriate in this instance.

Third, plaintiffs do not prevail even if their fiduciary duty claim could be founded on a contract and federal common law incorporates the state-law principles regarding controlling shareholders’ fiduciary obligations. Under Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders. *See Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1344 (Del. 1987); *Parsch v. Massey*, 79 Va. Cir. 446 (2009); *see also Quadrant Structured Prod. Co. v. Vertin*, 102 A.3d 155, 183 (Del. Ch. 2014) (acknowledging that those “who effectively control a corporation” owe a fiduciary duty to others).<sup>26</sup> To have the requisite level of control,

---

<sup>26</sup> The court refers to Delaware and Virginia law because Fannie is a Delaware corporation, and Freddie is a Virginia corporation. When evaluating Virginia law, the court also looks to Delaware state court decisions because Virginia courts do so to resolve unsettled issues in the Commonwealth. *E.g.*, *U.S.*

the controlling shareholder must (1) be able to exercise a majority of the corporation's voting power or (2) direct the corporation without owning a majority of stock. *Kahn v. Lynch Commc'n Sys.*, 638 A.2d 1110, 1113 (Del. 1994). The latter, effective exercise of control, "is not an easy test to satisfy; the individual or group must be, "as a practical matter, . . . no differently situated than if they had majority voting control." *In re PNB Holding Co. S'holders Litig.*, No. CIV.A. 28-N, 2006 WL 2403999, at \*9 (Del. Ch. Aug. 18, 2006). Plaintiffs have not established that Treasury meets either control test. First, plaintiffs do not allege that Treasury owns any of the Enterprises' voting stock. Treasury purchased preferred stock and acquired the right to buy common (i.e., voting) stock, but there is no indication that Treasury exercised its warrants or otherwise acquired common stock.<sup>27</sup> Second, plaintiffs do not demonstrate that Treasury exercised effective control over the Enterprises. Although Treasury acquired the right to preclude the Enterprises from taking certain actions, Treasury did not control the Enterprises because it could not direct any action—it could only respond to certain requests made by the Enterprises. As a practical matter,

---

*Inspect Inc. v. McGreevy*, No. 160966, 2000 WL 33232337, at \*4 (Va. Cir. Ct. Nov. 27, 2000).

<sup>27</sup> Even if Treasury had exercised its option to buy a majority of the voting stock, it would not be a controlling shareholder because the FHFA-C succeeded to all of the shareholders' rights. See 12 U.S.C. § 4617(b)(2)(A) (noting that the FHFA-C, by operation of law, succeeds to all rights and powers of any Enterprise shareholder). Treasury, therefore, would have no voting power.

therefore, Treasury is situated differently than if it had majority voting power.

In sum, plaintiffs' direct fiduciary duty claim is a tort claim because plaintiffs have not established that the FHFA-C or Treasury owed shareholders a fiduciary duty based on a statute or contract. The court, therefore, dismisses count VII—breach of fiduciary duty—because it lacks jurisdiction over tort claims.

## **2. Plaintiffs' takings and illegal-exaction claims do not sound in tort.**

Defendant also argues that plaintiffs' Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the FHFA-C. Plaintiffs counter that they have pleaded the predicates for takings and illegal-exaction claims, which means that it is irrelevant whether they also alleged facts that are germane to tortious actions.

When a party pleads the predicates for a takings claim or illegal-exaction claim, the court possesses jurisdiction to entertain such claims. *See Hansen v. United States*, 65 Fed. Cl. 76, 80–81 (2005) (“[S]o long as there is some material evidence in the record that establishes the predicates for a [claim covered by the Tucker Act,] . . . a plaintiff succeeds in demonstrating subject matter jurisdiction in this court . . .”). Those claims, at a basic level, are contentions that the government expropriated private property lawfully (takings) or unlawfully (illegal exaction). *See Orient Overseas Container Line (UK) Ltd. v. United States*, 48 Fed. Cl. 284, 289 (2000) (“Takings claims arise because of a deprivation of property that is authorized

by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation.” (citation omitted)). If a party alleges the necessary predicates for these claims, the court is not deprived of jurisdiction even if the complaint contains allegations that could support a tort claim. *See El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1353 (Fed. Cir. 2004) (“That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims.”); *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that this court has jurisdiction over a takings claim “even if the government’s action was subject to legal challenge on some other ground”). Here, plaintiffs plead the predicates for takings and illegal-exaction claims by alleging, in essence, that they were forced to give their property to the government because of lawful or unlawful government conduct. Therefore, it is of no import to the court’s jurisdiction whether plaintiffs have alleged facts that would also support a tort claim.

**E. The court lacks jurisdiction over plaintiffs’ direct implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract.**

Defendant argues next that the court lacks jurisdiction to entertain plaintiffs’ direct implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract.<sup>28</sup> Specifically,

---

<sup>28</sup> In its notice of arguments, defendant explains that it is arguing in its motion to dismiss that plaintiffs’ direct and



defendant asserts that plaintiffs have not established that they are intended beneficiaries independent of their status as shareholders and that any benefit that is related to their status as shareholders is insufficient for jurisdiction. Plaintiffs counter that they are intended third-party beneficiaries of implied contracts, between the FHFA and each Enterprise's board, in which the boards consented to the conservatorships in exchange for the FHFA-C operating the Enterprises as a fiduciary and returning them to sound condition. Specifically, plaintiffs assert that the intent to benefit the shareholders is evident from (1) the boards' consent to the conservatorships because shareholders would benefit from a conservator focused on returning the Enterprises to a better condition, and (2) the government acknowledging that the Enterprises' stock would remain outstanding while the Enterprises were in conservatorship.

The court's jurisdiction over contract claims is limited by the Tucker Act. *Ransom v. United States*, 900 F.2d 242, 244 (Fed. Cir. 1990). Of particular import here, ordinarily, a plaintiff must be in privity of contract with the United States to invoke this court's jurisdiction over a contract claim against the government. *Fid. & Guar. Ins. Underwriters, Inc. v. United States*, 805 F.3d 1082, 1087 (Fed. Cir. 2015). But privity is not required if "the plaintiff can demonstrate that it was an intended third-party

---

derivative contract claims should be dismissed. But, after a review of that motion, it is apparent that defendant limited its argument to plaintiffs' direct contract claim, count X. The court, therefore, only considers that issue and reserves judgment on whether it has jurisdiction over the derivative contract claims.

beneficiary under the contract.” *Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1361 (Fed. Cir. 2016).

“Third party beneficiary status is an ‘exceptional privilege.’” *Glass v. United States*, 258 F. 3d 1349, 1354 (Fed. Cir. 2001) (quoting *German All. Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912)). The conditions for attaining such status are “stringent.” *Anderson v. United States*, 344 F.3d 1343, 1352 (Fed. Cir. 2003). “[S]hareholders seeking status to sue as third-party beneficiaries of an allegedly breached contract must ‘demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party *directly*.’” *Castle v. United States*, 301 F.3d 1328, 1338 (Fed. Cir. 2002) (quoting *Glass*, 258 F.3d at 1354). Specifically, “the contract must express the intent of the promisor to benefit the shareholder personally, independently of his or her status as shareholder.” *Glass*, 258 F.3d at 1353–54. As a practical matter, the shareholder does not personally benefit independent of its status as a shareholder when the contractual promises pertain only to the treatment of the company. *See FDIC v. United States*, 342 F.3d 1313, 1320 (Fed. Cir. 2003) (noting that the broken promises concerned the treatment of the company such that the plaintiffs did not benefit independent of their status as shareholders); *accord Maher v. United States*, 314 F.3d 600, 605 (Fed. Cir. 2002) (concluding that the plaintiffs were not third-party beneficiaries when they failed to “establish[] that the government took on any obligations in the merger agreement for [the plaintiffs’] personal benefit, or even that the merger

agreement contains any provisions pertaining to [the plaintiffs] personally”).

As plaintiffs are not parties to the alleged implied contracts between the FHFA and the Enterprises, the relevant issue is whether plaintiffs are third-party beneficiaries of those agreements. They are not. First, it is of no import that the Enterprises, as plaintiffs argue, purportedly agreed to the conservatorships because that would serve the interests of shareholders. Indeed, “every action of a corporation is supposed to benefit its shareholders,” but the “law has not viewed this general benefit as making every shareholder a third-party beneficiary.” *Suess v. United States*, 33 Fed. Cl. 89, 94 (1995). Second, plaintiffs’ allegations reflect that they only benefit from the alleged implied contracts by virtue of their shareholder status. The relevant promises concerned how the FHFA-C would operate the Enterprises; the crux of the purported agreements was the FHFA-C promising to operate the Enterprises as a fiduciary to preserve their assets and return them to sound condition. Because the promises in the alleged implied contracts were directed at the Enterprises, plaintiffs cannot be third-party beneficiaries of the alleged contract. *See FDIC*, 342 F.3d at 1320. Third, plaintiffs have not demonstrated that the FHFA intended that plaintiffs benefit independently of their status as shareholders even if they did so benefit. Plaintiffs rely on the FHFA’s statements that private stock would remain outstanding and shareholders would continue to hold an economic interests in their stock. Those factual statements, however, do not reflect that the FHFA intended to confer any specific benefit on plaintiffs

independent of their role as shareholders. Because plaintiffs have not alleged facts reflecting that the FHFA intended to confer a personal benefit on them, they are not third-party beneficiaries. *See Glass*, 258 F.3d at 1353–54. In sum, the court lacks jurisdiction to entertain plaintiffs’ direct implied-contract claim because plaintiffs are neither parties to a contract with the government nor third-party beneficiaries of any such agreement. Therefore, the court dismisses count X.

## V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiffs’ claims, defendant challenges plaintiffs’ standing to pursue their claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. *Starr Int’l Co. v. United States*, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is “assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties.” *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that control. *See Allen v. Wright*, 468 U.S. 737, 752 (1984) (“[T]he standing inquiry requires careful examination of a complaint’s allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted.”), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Thus, in a suit brought by shareholders, it is the substance of the allegations and not the label assigned to the allegations—i.e., direct or derivative—that matters. *See Starr*, 856 F.3d at 966–67; *see also In re*

*Sunrise Sec. Litig.*, 916 F.2d 874, 882 (3d Cir. 1990) (“Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties.”). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based on the rights of the company. *See Starr*, 856 F.3d at 966–67; *see also Weir v. Stagg*, No. 09-21745-CIV, 2011 WL 13174531, at \*9 (S.D. Fla. Feb. 7, 2011) (“Shareholders do not have standing to bring a direct action for injuries suffered by a corporation, but rather, must bring a derivative action.”). A shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the corporation’s injuries—to have standing to litigate those claims. *See Starr*, 856 F.3d at 966–67.

The parties disagree on whether plaintiffs have standing to litigate any of their claims. Defendant argues that plaintiffs who purchased stock after the PSPA Amendments lack standing to litigate their Fifth Amendment takings claims, all plaintiffs lack standing to litigate what they assert as direct claims because the underlying rights belong to the Enterprises, and Mr. Barrett lacks standing for his derivative claims because the right to bring such claims was transferred to the FHFA-C. The court addresses each argument in turn.

**A. Plaintiffs who purchased stock after the  
PSPA Amendments lack standing to litigate  
their direct takings claim.**

Defendant first argues that plaintiffs who did not own stock in the Enterprises at the time of the PSPA Amendments lack standing to pursue direct or derivative takings claims.<sup>29</sup> Plaintiffs counter that the court does not need to resolve the standing issue now because a case can proceed if one of the claimants has standing, and some of the plaintiffs indisputably have standing by virtue of buying stock before the execution of the PSPA Amendments. Plaintiffs also argue that they all have standing regardless of when they bought the shares. Relying on *Bailey v. United States*, 78 Fed. Cl. 239 (2007), plaintiffs contend that postamendment purchasers have standing because the government effectuated a permanent regulatory

---

<sup>29</sup> Defendant also purports to argue that plaintiffs lack standing to pursue illegal-exaction and breach-of-contract claims if they did not own stock in the Enterprises at the time of the PSPA Amendments. But defendant presents no argument with respect to the illegal-exaction claims and fails to substantively develop an argument as to the breach-of-contract claims. Indeed, defendant merely asserts with respect to the contract claim that a plaintiff cannot bring such a claim until it is a party to a contract. This single sentence in defendant's motion to dismiss, coupled with its failure to address the issue in its reply, is not enough to form a substantive argument given that plaintiffs allege that they are parties to a contract. Simply stated, defendant fails to develop any argument as to why plaintiffs who acquired stock after the PSPA Amendments lack standing to pursue illegal-exaction or breach-of-contract claims. The court, therefore, declines to consider the nominal arguments. See *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 & n.9 (Fed. Cir. 2006) (noting that the court has discretion on whether to consider undeveloped arguments).

taking that it can transform into a temporary taking by changing the terms of the PSPAs. Plaintiffs also assert that they have standing regardless of the stock purchase date because each payment under the PSPA Amendments constitutes a new taking. In its reply, defendant asserts that the court should address standing now to conserve judicial resources, read *Bailey* as limited to regulatory takings of real property, and conclude that the only potential taking occurred on the date of the PSPA Amendments.

As an initial matter, it is appropriate to address at this time whether plaintiffs who purchased stock after the PSPA Amendments have standing even if those who purchased stock before the PSPA Amendments have standing. Although courts occasionally reserve judgment on standing issues when at least one claimant has standing, they only do so when each plaintiff is seeking the same relief. *See, e.g., Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 & n.2 (2006) (seeking invalidation of a statute); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (same); *Doe v. Bolton*, 410 U.S. 179, 189 (1973) (same); *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1118 n. 1 (9th Cir. 2001) (holding that the question of a husband's standing to sue based on his community property interest was irrelevant because his wife "unquestionably has standing to sue, and [his] presence as a plaintiff has no effect on the relief available"). Otherwise stated, the existence of one party with standing is sufficient when the standing of the other parties has no effect on the merits of the claims. *See Ry. Labor Executives' Ass'n v. United States*, 987 F.2d 806, 810 (D.C. Cir. 1993) ("[T]he Supreme Court has repeatedly held that if one party

has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case.”). Here, a determination of standing affects the merits of plaintiffs’ claims because each plaintiff is seeking its own monetary relief, and a plaintiff is not entitled to such relief if it lacks standing. Therefore, the court will address the standing dispute.

The court begins with the derivative takings claims. A derivative claim, as noted above, is a claim that is brought on behalf of the corporation. It is of no import, therefore, when a shareholder asserting a derivative claim bought the stock so long as the real party in interest—the corporation—had a property interest at the time of the alleged taking. Thus, in this case, so long as the Enterprises had a property interest in their net worth on the date of the PSPA Amendments (and there is no suggestion they did not), then any shareholder could have standing to pursue a derivative claim. Moreover, plaintiffs have alleged that Mr. Barrett—the plaintiff asserting the derivative claims—owned stock at the time of the alleged taking.

The court next turns to plaintiffs’ direct takings claim. Assuming that plaintiffs have properly asserted a direct takings claim, the issue is whether those plaintiffs who acquired stock after the date of the alleged taking have standing to pursue a takings claim. Plaintiffs acknowledge that a claimant must ordinarily own the property at the time of a taking to have standing. They assert, however, that the court should follow the conclusion in *Bailey* that a different standard applies in the context of a regulatory taking. Plaintiffs’ reliance on *Bailey*, a decision issued by



another judge on this court, is ill-considered. The Federal Circuit, when presented, post-*Bailey*, with an alleged regulatory taking, explained that “[i]t is axiomatic that only persons with a valid property interest *at the time of the taking* are entitled to compensation.” *Reoforce, Inc. v. United States*, 853 F.3d 1249, 1263 (Fed. Cir. 2017) (quoting *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001)); *accord id.* (“[P]recedent requires that the property owner prove its ownership at the time of the alleged taking . . . .”); *Wyatt*, 271 F.3d at 1096 (addressing regulatory takings). It follows that a “plaintiff [who] own[s] no shares of the subject stock on the date of taking . . . maintains no standing to sue.” *Maniere v. United States*, 31 Fed. Cl. 410, 421 (1994); *cf. Reoforce*, 853 F.3d at 1263 (concluding that the plaintiff had standing for a takings claim despite relinquishing property owned on the date of the purported taking before filing the lawsuit). Applying that principle, the court concludes that any plaintiff who did not own stock at the time of the alleged taking lacks standing to assert a direct takings claim.<sup>30</sup>

Having concluded that plaintiffs only have standing to pursue a direct takings claim if they owned stock at the time of the purported taking, the next issue is determining when the taking occurred. Plaintiffs contend that a new takings claim accrues with each

---

<sup>30</sup> Plaintiffs’ approach would provide them with a windfall: They would acquire the stock at a price that reflects a discount for the property taken by the government and then obtain compensation from the government for the diminishment in value of their stock. That result is incompatible with the notion of just compensation that underlies the Fifth Amendment’s Takings Clause.

payment under the PSPA Amendments, and defendant counters that a takings claim accrued only when the FHFA-C agreed to the PSPA Amendments.<sup>31</sup> The court agrees with defendant. There is only one taking when a “single governmental action causes a series of deleterious effects, even though those effects may extend long after the initial governmental [action].”<sup>32</sup> *Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000). Here, there is one event that caused all of plaintiffs’ purported losses: the execution of the PSPA Amendments. It is of no import to the accrual of plaintiffs’ direct takings claim that, based on the PSPA Amendments, the Enterprises make regular payments to Treasury because those payments are just the consequences of the PSPA Amendments. Simply stated, plaintiffs’ direct takings claim accrued on the date of the PSPA Amendments—August 17, 2012—and new claims do not accrue for each payment under those agreements.

---

<sup>31</sup> Although plaintiffs argue in response to defendant’s motion to dismiss that each payment under the PSPA Amendments constitutes a taking, their allegations in the second amended complaint reflect a theory of taking premised on the execution of the PSPA Amendments. See 2d Am. Compl. ¶¶ 166–74. Nonetheless, the court considers their argument for standing as if they did allege that each payment constitutes a taking.

<sup>32</sup> For example, in *Fallini v. United States*, landowners asserted a taking based on a statute that required them to allow wild horses to drink water that was kept on their property. 56 F.3d 1378, 1383 (Fed. Cir. 1995). The landowners argued that each drink taken by a horse on their property amounted to a new taking. *Id.* The Federal Circuit disagreed; it held that the takings claim accrued once, when the relevant statute was enacted. *Id.*

In sum, Mr. Barrett's standing to litigate his derivative taking claim is not affected by when he first purchased stock in the Enterprises, and plaintiffs who did not own stock in the Enterprises on August 17, 2012, lack standing to litigate their direct takings claim. The parties, however, have not provided the court with sufficient information for it to determine which plaintiffs did not own stock in the Enterprises as of that date. Ordinarily, the court would seek additional information from the parties to resolve that issue. But the court does not do so here because, for the reasons stated below, each plaintiff's direct takings claim is subject to dismissal for another reason.

**B. Plaintiffs lack standing to litigate their nominally direct claims because those claims are substantively derivative in nature.**

Defendant further argues that plaintiffs lack standing to litigate the claims they styled as direct claims because, notwithstanding the labels, the claims are actually derivative in nature. Defendant contends that plaintiffs' "direct" claims are actually derivative because, to prevail, plaintiffs would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises. Plaintiffs counter that they assert direct claims because the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises' capital structure to plaintiffs' detriment, which renders the claims for such conduct both direct and derivative under the dual-nature exception.<sup>33</sup>

---

<sup>33</sup> Plaintiffs also assert that their claims must be construed as direct claims to vindicate important federal policies if

Defendant replies that the Federal Circuit rejected the notion that a plaintiff states a direct claim by alleging it was targeted by the challenged action. Defendant also contends that the dual-nature exception is not applicable because Treasury was not a controlling shareholder, the Enterprises did not issue new shares, and the PSPA Amendments did not involve the reallocation of power.

Plaintiffs do not satisfy their burden of establishing standing for the claims that they are pursuing on their own behalf (their “direct” claims). Neither theory they advance for why those claims are substantively direct, rather than derivative, is persuasive. First, it is of no import whether the government targeted shareholders with the PSPA Amendments. *See Starr*, 856 F.3d at 973 (noting that plaintiffs did not “sufficiently explain why the Government’s subjective motivations are relevant to the inquiry into direct standing”). The direct-versus-derivative inquiry “turns on the plaintiff’s injury, not the defendant’s motive.” *Pagan v. Calderon*, 448 F.3d 16, 30 (1st Cir. 2006). Second, plaintiffs have not asserted claims that qualify as both direct and derivative based on the dual-nature exception. The Federal Circuit explained that, pursuant to this exception, shareholder claims may be both direct and derivative “when a ‘reduction in [the] economic value and voting power affected the minority stockholders uniquely . . . .’” *Starr*, 856 F.3d at 968 (quoting *Gentile v. Rossette*, 906 A.2d 91, 99

---

shareholders cannot assert derivative claims because of HERA. The court does not consider this argument because, as explained below, plaintiffs can assert derivative claims.

(Del. 2006)). Specifically, shareholder claims are both direct and derivative if

“(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.”

*Id.* (quoting *Gentile*, 906 A.2d at 100). The exception does not apply here because Treasury was not a controlling shareholder at the time the PSPA Amendments were executed,<sup>34</sup> the PSPA Amendments did not involve the issuance of new shares, and shareholder voting power was not reallocated under the PSPA Amendments. It is not enough, contrary to plaintiffs’ contention, that the government allegedly exacted economic value from the other shareholders by rearranging the corporate structure. See *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016) (applying *Gentile* and holding a plaintiff does not state a direct claim under the dual-nature exception by pleading the “extraction of solely economic value from the minority by a controlling stockholder”). Because plaintiffs have not established that their “direct” claims are substantively direct in nature, they cannot demonstrate that they have standing to litigate those claims.

---

<sup>34</sup> Treasury is not a controlling shareholder for the reasons set forth in Section IV.D.1, *supra*.

Plaintiffs fare no better if the court moves beyond their arguments for why their “direct” claims are substantively direct in nature. Federal law governs whether plaintiffs’ claims are direct or derivative. See *Starr*, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. *Id.*; see also *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 (1991) (noting the “presumption that state law should be incorporated into federal common law”). Under Delaware law, the test for whether a shareholder’s claim is derivative or direct depends on the answers to two questions: “(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?” *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (en banc). “Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow.” *Gentile*, 906 A.2d at 99, *discussed in Starr*, 856 F.3d at 965. Such claims are derivative even “though the overpayment may diminish the value of the corporation’s stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend.” *Protas v. Cavanagh*, No. CIV.A. 6555-VCG, 2012 WL 1580969, at \*6 (Del. Ch. May 4, 2012); see also *Hometown Fin. Inc. v. United States*, 56 Fed. Cl. 477, 486 (2003) (“[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses

from the alleged injury to the corporation amount to nothing more than a diminution in stock value or a loss of dividends.”).

In their complaint, plaintiffs focus on the expropriation of the Enterprises’ assets via compulsory payments of all profits. The gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury. Regardless of plaintiffs’ label (direct or derivative) or theory (taking, illegal exaction, breach of fiduciary duty, or breach of implied contract) for their claims, the claims are substantively derivative in nature because they are premised on allegations of overpayment.<sup>35</sup> *See Gentile*, 906 A.2d at 99; *see also Roberts*, 889 F.3d at 409 (explaining that the plaintiffs asserted “classic derivative claims” when they alleged that “the [PSPA Amendments] illegally dissipated corporate assets by transferring them to Treasury”).

---

<sup>35</sup> Plaintiffs would remain unsuccessful if their allegations of waste and mismanagement (styled as self dealing, overreach, or abuse of discretion) were construed to be indicative of some action other than overpayment. Any claims premised on waste and mismanagement are derivative in nature. *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) (noting that “mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature”). Plaintiffs’ claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. *See Hometown*, 56 Fed. Cl. at 486 (stock prices); *In re Straight Path Commc’ns Inc. Consol. S’holder Litig.*, No. CV 2017-0486-SG, 2017 WL 5565264, at \*4 (Del. Ch. Nov. 20, 2017) (“Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . .”).

Plaintiffs cannot transform their substantively derivative claims into direct claims by merely alleging that, as a result of overpayments, they were deprived of their stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiffs' purported "harms are 'merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.'" *Protas*, 2012 WL 1580969, at \*6 (quoting *Gentile*, 906 A.2d at 99); see also *Agostino v. Hicks*, 845 A.2d 1110, 1122 (Del. Ch. 2004) ("[T]he inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation."). Because plaintiffs' claims are derivative in nature, plaintiffs lack standing to pursue those claims on their own behalf.

In sum, plaintiffs have not established that they have standing to litigate the claims they label as direct because they do not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court dismisses plaintiffs' nominally direct claims on standing grounds to the extent that it has subject-matter jurisdiction over those claims.<sup>36</sup>

---

<sup>36</sup> As explained above, the court lacks jurisdiction over plaintiffs' self-styled direct claims for breach of fiduciary duty and breach of implied contract. See *supra* Sections IV.D.1 (fiduciary duty), IV.E (contract).



**C. Mr. Barrett has standing to litigate derivative claims.**

**1. Mr. Barrett is not collaterally estopped from litigating whether he has standing to litigate derivative claims.**

Defendant also argues that Mr. Barrett, the lone plaintiff asserting derivative claims, is collaterally estopped from litigating whether shareholders have standing to bring derivative claims because shareholders of each Enterprise previously litigated and lost that issue in *Perry I*.<sup>37</sup> Plaintiffs disagree. First, plaintiffs assert that the issue here is different than the issue in *Perry I* because Mr. Barrett is asserting constitutional claims (which were not pleaded in *Perry I*), and the district court was not bound by this jurisdiction's binding precedent. Second, plaintiffs contend that Mr. Barrett lacks privity with the *Perry I* plaintiffs because the district court concluded those litigants lacked capacity to sue on behalf of the Enterprises. Third, plaintiffs assert that two exceptions to collateral estoppel apply: The standing issue is a matter of general interest that has not been resolved by the Supreme Court, and there is no preclusion if the prior decision conflicts with binding precedent.

A party can be collaterally estopped from litigating “an issue if an identical issue was actually litigated and necessarily decided in a prior case where the interests of the party to be precluded were fully

---

<sup>37</sup> The court uses “collateral estoppel” and “issue preclusion” to refer to the same principle. See *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1366 (Fed. Cir. 2000) (noting that the terms are used interchangeably).

represented.” *Simmons v. Small Bus. Admin.*, 475 F.3d 1372, 1374 (Fed. Cir. 2007); *see also In re Freeman*, 30 F.3d 1459, 1467 (Fed. Cir. 1994) (acknowledging that a court may decline to apply issue preclusion when doing so would be unfair). “The party asserting issue preclusion bears the burden to establish each of these elements.” *Jones v. United States*, 846 F.3d 1343, 1361 (Fed. Cir. 2017). As germane to the instant case, a shareholder’s interests are fully represented by another shareholder litigating a derivative suit on behalf of the corporation because the corporation is the real party in interest. *See, e.g., Arduini v. Hart*, 774 F.3d 622, 634 (9th Cir. 2014) (“Shareholders bringing derivative suits are in privity for the purposes of issue preclusion.”). A shareholder’s interests, however, are not fully represented by the litigant in the earlier case if that litigant lacked capacity to sue on the corporation’s behalf.<sup>38</sup> *See* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1840 (3d. ed. 2019) (“[A]ny dismissal or judgment that is not on the merits but that relates to the representative’s capacity to bring the suit . . . will not bar other stockholders from bringing a derivative action.”); *see*

---

<sup>38</sup> Defendant challenges this framing of the law by relying on decisions in which courts addressed the preclusive effect of dismissals in derivative suits for litigants’ failure to satisfy the requirement for demand futility. *See, e.g., In re Sonus Networks, Inc, S’holder Derivative Litig.*, 499 F.3d 47, 64 (1st Cir. 2007). But those decisions involved litigants who, notwithstanding their failure to comply with the specific procedural requirements, had the capacity to sue. *See generally id.* at 47–71. In contrast, the district court in *Perry I* concluded that the shareholders in that case lacked the capacity to bring the derivative claims they asserted. 70 F. Supp. 3d at 233.

also *Sonus Networks*, 499 F.3d at 64 (allowing preclusion “[i]f the shareholder can sue on the corporation’s behalf”).

In *Perry I*, shareholders of both Enterprises asserted derivative, nonconstitutional claims on behalf of the Enterprises. 70 F. Supp. 3d at 229. The district court explained that Congress, via HERA, transferred shareholders’ rights to bring derivative suits to the FHFA-C and an exception to the bar on shareholders bringing such suits would contravene the plain language of the statute. *Id.* at 230–32. Therefore, the district court concluded that the *Perry I* plaintiffs lacked capacity to pursue derivative claims on behalf of the Enterprises and dismissed those claims. *Id.* at 233.

Defendant is correct that Mr. Barrett is attempting to litigate the same issue that was actually litigated and necessarily decided in *Perry I*. First, the issue here is the same as the one presented in *Perry I*: whether, in light of HERA, shareholders of an Enterprise can litigate a derivative a claim on an Enterprise’s behalf. It is of no import that *Perry I* concerned nonconstitutional claims, while Mr. Barrett asserts both constitutional and nonconstitutional claims. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (noting that preclusion applies “even if the issue recurs in the context of a different claim”). Plaintiffs fare no better by arguing that the issue is different because the district court was not bound by the same precedent that applies in this court. This exception, if accepted, would swallow the rule by limiting preclusion to courts within the same circuit. Such a limitation runs contrary to the goals of collateral estoppel: “protect[ing parties] from the

expense and vexation attending multiple lawsuits, conserving judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Montana v. United States*, 440 U.S. 147, 153–54 (1979). Second, the issue here was actually decided in *Perry I*. See 70 F. Supp. 3d at 230–33. Third, the resolution of a shareholder’s capacity to sue was a necessary part of that decision because defendant had moved to dismiss for lack of standing. *Id.* at 219.

Although defendant has established the first three elements of issue preclusion, it has not established the fourth element: whether Mr. Barrett’s interests were adequately represented in the prior case.<sup>39</sup> As noted above, shareholders’ interests are adequately represented by other shareholders litigating a derivative claim when the litigating shareholders can and do sue on behalf of the company. Such litigation did not occur in *Perry I*; the district court concluded that the shareholders lacked capacity to litigate derivative claims on behalf of the Enterprises. Because the *Perry I* plaintiffs lacked capacity to represent the Enterprises, the decision affecting those litigants has no bearing on the Enterprises or the

---

<sup>39</sup> The court’s conclusion is buttressed by the fact that, following *Perry I*, other courts have adjudicated derivative claims brought by Fannie and Freddie shareholders without relying on issue preclusion. See, e.g., *Saxton v. Fed. Hous. Fin. Agency*, 245 F. Supp. 3d 1063, 1075 (N.D. Iowa 2017) (determining whether the plaintiffs had standing after rejecting defendant’s argument to apply issue preclusion), *aff’d*, 901 F.3d at 954; cf. *Roberts v. Fed. Hous. Fin. Agency*, 243 F. Supp. 3d 950, 957–58 (N.D. Ill. 2017) (addressing the merits of plaintiffs’ claims despite defendant’s argument that plaintiffs lacked standing), *aff’d*, 889 F.3d at 397.

rights of the other shareholders who were not parties to that suit. Therefore, Mr. Barrett is not collaterally estopped from litigating standing in this case by the decision in *Perry I.*<sup>40</sup>

**2. Mr. Barrett has standing to litigate derivative claims because the FHFA-C has a conflict of interest.**

Independent of any issue preclusion, defendant argues that Mr. Barrett lacks standing to litigate derivative claims because Congress transferred to the FHFA-C the right to bring derivative claims on behalf of the Enterprises. Defendant asserts that Congress stripped the shareholders of the right to bring derivative suits by including in HERA a succession clause—a provision stating that the FHFA-C succeeds to all shareholder rights with respect to the Enterprises. Defendant further contends that the court should not recognize an exception to that rule when the FHFA-C has a conflict of interest because an exception is not supported by HERA’s language and would frustrate Congress’s intent to insulate the conservator from judicial scrutiny by allowing shareholders to challenge the FHFA-C’s decisions. Defendant avers that the Federal Circuit’s decision in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1282 (Fed. Cir. 1999), which recognized a conflict-of-interest exception in a similar statute, is inapplicable because the Federal Circuit limited its ruling to receiverships and claims that predated the receivership.

---

<sup>40</sup> Because defendant did not establish every element of issue preclusion, there is no need to address plaintiffs’ arguments that an exception to the doctrine is applicable.

Plaintiffs counter that Mr. Barrett can maintain derivative claims on behalf of the Enterprises despite the apparent prohibition in HERA. They argue that the court cannot interpret HERA to preclude Mr. Barrett's derivative takings and illegal-exaction claims because eliminating a remedy for constitutional transgressions violates due process. They also argue, relying on *First Hartford*, that Mr. Barrett can assert derivative claims because the FHFA-C has a manifest conflict of interest. Plaintiffs assert that *First Hartford* is controlling because the Federal Circuit recognized the conflict exception in the context of a succession clause identical to the one in HERA. Plaintiffs also contend that *First Hartford* is not limited to (1) receivers because the Federal Circuit did not rely on any particular aspect of receivership or (2) preredeivership claims because the court's focus was on the receiver's conflict of interest.

The initial consideration here—the import of HERA's succession clause—is matter of statutory interpretation. As noted above, the court begins with the language of the statute, and if the statutory language is clear, the court's inquiry is complete. *Hughes Aircraft*, 525 U.S. at 438. In the succession clause, Congress provided that the FHFA-C “immediately succeed[s] to” every shareholder's “rights, titles, powers and privileges . . . with respect to the [Enterprise] and the assets of the [Enterprise].” 12 U.S.C. § 4617(b)(2)(A). One of the shareholders' rights with respect to an Enterprise is the right to bring a derivative suit. *See Perry II*, 864 F.3d at 624; *see also* RCFC 23.1 (limiting derivative suits to shareholders). Therefore, it is apparent that HERA contains a prohibition on shareholder derivative suits

because the right to assert such claims is transferred to the FHFA-C. Indeed, other courts considering the issue have concluded that there is such a prohibition. *E.g.*, *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012) (concluding that Congress “plainly transfer[red] shareholders’ ability to bring derivative suits . . . to FHFA”); *La. Mun. Police Emps. Ret. Sys. v. Fed. Hous. Fin. Agency*, 434 F. App’x 188, 191 (4th Cir. 2011) (per curiam) (same). If the court were writing on a blank slate, it would also conclude that Congress foreclosed shareholders from asserting derivative claims while the Enterprises are in conservatorship.

The court, however, is not writing on a blank slate. Rather, it must render a decision in light of existing precedent—specifically, *First Hartford*. In *First Hartford*, the FDIC was serving as the receiver for Dollar Dry Dock Bank of New York (“Dollar”), and a Dollar shareholder filed a derivative claim on the bank’s behalf asserting that the FDIC breached a contract with Dollar before the receivership. 194 F.3d at 1282. A judge on this court dismissed the claim for lack of standing after explaining that the FDIC was the only entity that could bring derivative claims for Dollar because, under the relevant statute, the FDIC as receiver succeeded to all shareholder rights. *Id.* at 1294. The Federal Circuit disagreed. *Id.* It acknowledged “that, as a general proposition, the FDIC’s statutory receivership authority includes the right to control the prosecution of legal claims on behalf of the [bank] now in its receivership.” *Id.* at 1295. But the Federal Circuit, without addressing the statutory language, focused on the purpose of derivative suits: “permit[ting] shareholders to file suit on behalf of a corporation when the managers or

directors of the corporation, perhaps due a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation.” *Id.* The Federal Circuit reasoned that the plaintiff had standing because, “most significantly,” of “the conflict of interest faced by the FDIC in determining whether to bring suit.” *Id.* Indeed, “the FDIC was asked to decide on behalf of [Dollar] whether [the FDIC] should sue the federal government based upon a breach of contract, which if proven was caused by the FDIC itself.” *Id.* Simply stated, the Federal Circuit held that a shareholder of a company could bring a derivative claim, notwithstanding a succession clause, if the company was controlled by an entity with a conflict of interest. *Id.* at 1283.

*First Hartford* is instructive because the Federal Circuit was addressing the same issue that is present in this case: whether shareholders can assert a derivative claim when there is a succession clause transferring shareholders’ rights to another entity. *See id.* at 1294–95. *First Hartford* is also informative because Congress, after that case was decided, included in HERA the same succession clause that was at issue in the Federal Circuit’s decision, *compare* 12 U.S.C. § 1821(d)(2)(A)(i) (1994) (succession clause at issue in *First Hartford*), *with* 12 U.S.C. § 4617(b)(2)(A)(i) (succession clause promulgated in HERA), and “when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, Congress’ intent to



incorporate such interpretations as well,”<sup>41</sup> *Bragdon v. Abbott*, 524 U.S. 624, 626 (1998). *But see Perry II*, 864 F.3d at 625 (declining to conclude that Congress intended *sub silentio* to incorporate into HERA the conflict-of-interest exception recognized by two appellate courts).

The court is not swayed by defendant’s arguments that *First Hartford* is distinguishable because it involved a receiver or claims predating the receivership. The Federal Circuit did not premise its decision on the unique attributes of receiverships or the timing of the claims; it concluded that the plaintiffs had standing “only . . . because of the FDIC’s conflict of interest.” *Id.* at 1283; *accord id.* at 1295 (explaining that it held that the plaintiffs had standing based on the FDIC’s refusal to sue and, “most significantly, upon the conflict of interest faced by the FDIC”). Defendant fares no better with its argument that *First Hartford* is not instructive because the Federal Circuit limited its holding “to the situation . . . in which a government contractor with a putative claim of breach by a federal agency is being operated by that very same agency.” *Id.* at 1295. Read in context, the Federal Circuit merely acknowledged that it was “neither infer[ring] nor express[ing] an opinion” on what other circumstances would involve the necessary conflict for a shareholder to acquire standing when there is a succession clause. *Id.* The

---

<sup>41</sup> Before Congress enacted HERA, at least one other appellate court recognized a conflict-of-interest exception to the limitation on derivative suits resulting from a succession clause identical to the one that Congress ultimately incorporated into HERA. *See Delta Sav. Bank v. United States*, 265 F.3d 1017, 1022–23 (9th Cir. 2001).

Federal Circuit was not stating that the conflict-of-interest exception does not apply in other situations. Indeed, the court recognized that the exception would apply outside of the circumstance presented in *First Hartford*. *See id.* (“We stress that such standing could only occur in a narrow range of circumstances.”). The court, therefore, is guided by *First Hartford* insofar as the necessary conflict of interest exists.

The court, having identified the relevant framework, returns its focus to Mr. Barrett’s derivative claims. Those claims are premised, at least in part, on the FHFA-C’s purported conduct. Similar to *First Hartford*, the FHFA-C would need to decide on behalf of the Enterprises whether it should sue the federal government based on claims, which, if proven, are rooted in the FHFA-C’s actions. *See* 194 F.3d at 1295. That decision presents a conflict of interest for the FHFA-C such that Mr. Barrett has standing to litigate his derivative claims on behalf of the Enterprises.

## VI. MERITS

In addition to seeking the dismissal of plaintiffs’ claims for lack of subject-matter jurisdiction and standing, defendant also moves to dismiss plaintiffs’ claims for failure to state a claim on which relief can be granted. Most of those arguments, however, only concern plaintiffs’ direct claims. *See, e.g.*, Def.’s Am. Omnibus Mot. to Dismiss 51 (disputing that shareholders’ economic interest in their stock is a cognizable property right); 55 (contending that the government did not take shareholders’ rights under their stock certificates); 59 (arguing that there was no taking because plaintiffs still own the stock at issue);

70 (asserting that the government did not illegally exact funds because shareholders did not bear any costs that the government would otherwise be obligated to pay); 72 (disagreeing with plaintiffs' theory that the FHFA owed a fiduciary duty to shareholders). But those claims are no longer at issue; the only claims that remain for adjudication are plaintiffs' derivative claims. Thus, the court limits its consideration to defendant's three contentions concerning plaintiffs' derivative claims.<sup>42</sup>

**A. Plaintiffs' allegations of illegal conduct do not defeat their derivative takings claims.**

Defendant first argues that plaintiffs fail to state plausible takings claims because they allege that the FHFA-C acted illegally. Specifically, defendant asserts that the claims fail because unauthorized government conduct cannot effect a taking. Plaintiffs counter that they merely pleaded in the alternative by alleging that the government is either liable for a taking (because its actions were lawful) or an illegal exaction (because it acted illegally). Notably, defendant did not return to this argument in its reply.

The court is not swayed by defendant's argument. When the government expropriates property, a plaintiff can obtain relief under either a takings theory or an illegal-exaction theory. *See Orient*

---

<sup>42</sup> As discussed in Part II, *supra*, defendant filed an omnibus motion to dismiss the claims raised by plaintiffs in this case and those raised by other plaintiffs in the related cases. The plaintiffs in the related cases raised some claims that plaintiffs in this case did not assert in their complaint. Thus, the court does not address defendant's arguments concerning those claims that are only asserted in the related cases.

*Overseas Container Line*, 48 Fed. Cl. at 289. Not both. *Figueroa v. United States*, 57 Fed. Cl. 488, 496 (2003), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006). The winning claim depends on the facts established; a takings claim requires lawful conduct, while an illegal-exaction claim is premised on unauthorized conduct. *Id.* Although those claims are mutually exclusive, a plaintiff can assert both and proceed past the pleading stage because a complaint can contain inconsistent claims. *Id.*; accord RCFC 8(d)(3) (“A party may state as many separate claims . . . as it has, regardless of consistency.”). Having asserted both derivative takings and illegal-exaction claims, plaintiffs’ allegations of unlawful conduct are insufficient to defeat their derivative takings claims at this stage.<sup>43</sup>

---

<sup>43</sup> The court finds further support for its conclusion in the fact that plaintiffs labeled their illegal-exaction claims as “alternative” claims in the complaint. Although plaintiffs did not state in their complaint what the claims are “alternative” to, the “pleading must be construed so as to do justice.” RCFC 8(e). The court affords justice here by reading the illegal-exaction claims as an alternative to the takings claims, which appears to be plaintiffs’ intended result given that they asserted the illegal-exaction claims immediately after the takings claims. *Cf. Figueroa*, 57 Fed. Cl. at 496 (construing a takings and illegal-exaction claim as being pleaded in the alternative even though the plaintiff “did not expressly delineate its taking claim as being advanced ‘in the alternative’”). That is to say, plaintiffs’ decision to assert both takings claims and illegal-exaction claims is a textbook example of pleading inconsistent claims—a strategy that is explicitly contemplated by the court’s rules.

**B. Plaintiffs' derivative illegal-exaction claims survive because defendant does not address each theory plaintiffs proffer for why the PSPA Amendments were not authorized.**

Next, defendant frames plaintiffs' illegal-exaction claims as premised on a violation of HERA and argues that plaintiffs have not alleged any unauthorized conduct because the FHFA-C and Treasury acted within their authority under HERA when they approved the PSPA Amendments. Plaintiffs counter that they identified three reasons why the revisions to the PSPAs were illegal. Specifically, plaintiffs argue that they allege that (1) the FHFA-C and Treasury exceeded their authority under HERA, (2) the FHFA-C violated its own regulations, and (3) the FHFA-C's approval of the PSPA Amendments was unconstitutional because the FHFA is structured in a manner that violates separation-of-powers principles. Plaintiffs also note that defendant failed to even address the allegations of unconstitutional conduct. Defendant uses its reply brief to double down on its argument that the FHFA-C and Treasury acted within their statutory authority and to add a contention that the FHFA-C did not violate the applicable regulations. Notably, however, defendant remains silent on the alleged constitutional violation.

An illegal-exaction claim is a demand for "money that was 'improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.'" *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)). Defendant takes aim at a core tenant of such a claim: the requirement for an unauthorized

action. But defendant presses no argument on why plaintiffs' allegations that the FHFA is unconstitutionally structured are insufficient to sustain their illegal-exaction claims. Defendant also does not present any argument recognized by the court on why the FHFA-C's purported violation of its own regulations is not sufficient to establish the necessary illegality for an illegal-exaction claim. Although defendant addresses that issue in its reply brief, it had already waived the argument by not addressing the purported regulatory violation in its motion to dismiss. *See United States v. Ford Motor Co.*, 463 F.3d 1267, 1277 (Fed. Cir. 2006) (explaining that "[a]rguments raised for the first time in a reply brief are not properly before this court"); *Ironclad/EEI v. United States*, 78 Fed. Cl. 351, 358 (2007) (noting that "under the law of this circuit, arguments not presented in a party's principal brief to the court are typically deemed to have been waived"). Thus, defendant has not met its burden of establishing that plaintiffs fail to state a plausible illegal-exaction claim for each Enterprise.

**C. Plaintiffs' derivative breach-of-implied-contract claims survive because defendant fails to establish that plaintiffs inadequately pleaded mutuality of intent to contract.**

Finally, defendant turns to plaintiffs' breach-of-implied-contract claims, which are premised on the FHFA-C purportedly agreeing to operate the Enterprises for the benefit of the shareholders in exchange for the Enterprises' boards consenting to conservatorship. A party alleging an implied-in-fact contract with the government must plead four elements: "(1) 'mutuality of intent to contract,' (2)

‘consideration,’ (3) ‘lack of ambiguity in offer and acceptance,’ and (4) ‘actual authority’ of the government representative whose conduct is relied upon to bind the government.” *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1329 (Fed. Cir. 2018) (quoting *Lewis v. United States*, 70 F.3d 597, 600 (Fed. Cir. 1995)), *cert. granted*, 139 S. Ct. 2743 (2019). Defendant focuses both of its arguments on the first element, mutuality of intent to contract.<sup>44</sup>

Defendant first argues that plaintiffs fail to adequately allege that the FHFA intended to contract because the FHFA had authority to place the Enterprises into conservatorship without their consent. This argument is grounded in the principle that “[a]n agency’s performance of its regulatory or sovereign functions does not create contractual obligations.” *D & N Bank v. United States*, 331 F.3d 1374, 1378–79 (Fed. Cir. 2003). For a contract to exist, “[s]omething more is necessary” than just the agency exercising its powers. *Id.* at 1379. Of particular import here, the FHFA Director could appoint the agency as conservator if the Enterprises

---

<sup>44</sup> Defendant nominally presents a third argument for why plaintiffs have not adequately alleged mutuality of intent. In that argument, between an introductory sentence and a summation sentence, defendant highlights that Congress insulated directors from liability for consenting to the conservatorship and recounts plaintiffs’ allegation that the Enterprises’ boards faced a Hobson’s choice. Defendant, however, proffers no analysis as to why those considerations reflect that the FHFA and the boards lacked the requisite intent to contract. The court, therefore, deems waived any contentions defendant intended to raise in its third argument. See *SmithKline Beecham*, 439 F.3d at 1320 (declining to consider undeveloped arguments).

consented or if other conditions were satisfied. 12 U.S.C. § 4617(a)(3). Although the FHFA had the authority to place the Enterprises into conservatorship without their consent, plaintiffs allege that the FHFA did not rely on that authority but instead sought to bargain for the Enterprises' boards' consent to place the Enterprises into conservatorship.<sup>45</sup> This alleged bargaining for consent is the "something more" that can support the existence of a contract. *See Mola Dev. Corp. v. United States*, 516 F.3d 1370, 1378 (Fed. Cir. 2008) (explaining that evidence of negotiations supports the existence of an agency intending to contract rather than exercising regulatory powers). That is to say, the fact that the FHFA had statutory authority to impose a conservatorship without the boards' consent is of no import at this juncture.

Defendant also argues that the FHFA's intent to contract cannot be inferred from plaintiffs' allegations that the FHFA encouraged or convinced the Enterprises' boards to consent. Defendant's contention is premised on the principle espoused in *Suess v. United States* that a government agency encouraging another entity to act is not enough to establish intent to contract. 535 F.3d 1348, 1364 (Fed. Cir. 2008). Defendant, however, proffers no analysis for why that principle concerning encouragement should be extended to an agency convincing another

---

<sup>45</sup> Plaintiffs do not explain why the FHFA decided to seek the Enterprises' boards' consent, but the FHFA had a strong incentive to pursue consent because that method was less likely to lead to litigation concerning the appointment of the conservator. *See* 12 U.S.C. § 4617(a)(5) (permitting an Enterprise to litigate the imposition of a conservatorship).



to act. The court, therefore, limits its inquiry to the issue of encouragement. The thrust of plaintiffs' complaint, however, is not that the FHFA encouraged the boards to consent but rather that the FHFA bargained for the boards' consent. The focus on bargaining is important because, as the Federal Circuit suggested in *Suess*, an agency negotiating with another entity is evidence of an intent to contract. *See id.*; *see also Mola*, 516 F.3d at 1378. Simply stated, defendant's contention is unpersuasive because it is not grounded in the relevant allegations. Accordingly, the court declines to dismiss plaintiffs' derivative breach-of-implied-contract claims.

## VII. CONCLUSION

For the reasons stated above, the court dismisses plaintiffs' direct claims: the court lacks jurisdiction to entertain the direct fiduciary duty and direct implied-in-fact contract claims, and plaintiffs lack standing to pursue any of their direct claims. Further, the court declines to dismiss plaintiffs' derivative claims. The court therefore **GRANTS IN PART** defendant's motion to dismiss with respect to the claims plaintiffs label as direct (counts I, IV, VII, and X), and **DENIES IN PART** the motion with respect to the derivative claims (counts II, III, V, VI, VIII, IX, XI, XII). By no later than **Friday, January 10, 2020**, the parties shall file a joint status report proposing further proceedings and, if appropriate, a schedule for such proceedings.

The court has filed this ruling under seal. The parties shall confer to determine proposed redactions to which all the parties agree. Then, **by no later than Monday, December 16, 2019**, the parties shall

file a joint status report indicating their agreement with the proposed redactions, **attaching a copy of those pages of the court's ruling containing proposed redactions, with all proposed redactions clearly indicated.**

### **VIII. CERTIFICATION FOR INTERLOCUTORY APPEAL**

On March 6, 2020, the court granted the parties' motions to certify this opinion for interlocutory appeal. As stated in that order, the court is appending the following language to this opinion:

The court finds that this opinion involves the following controlling questions of law with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from the opinion may materially advance the ultimate termination of the litigation:

- (1) Whether the court lacks subject-matter jurisdiction over plaintiffs' direct claims for breach of fiduciary duty and breach of implied-in-fact contracts.
- (2) Whether plaintiffs who purchased stock in Fannie and Freddie after the PSPA Amendments lack standing to pursue their direct takings claims.
- (3) Whether plaintiffs lack standing to pursue their self-styled direct claims because those claims are substantively derivative in nature.
- (4) Whether plaintiffs have standing to assert derivative claims notwithstanding HERA's succession clause.

- (5) Whether the FHFA-C's actions are attributable to the United States such that the court possesses subject-matter jurisdiction to entertain plaintiffs' derivative takings and illegal exaction claims.
- (6) Whether plaintiffs' allegations that the FHFA entered into an implied-in-fact contract with the Enterprises to operate the conservatorships for shareholder benefit fail as a matter of law.

**IT IS SO ORDERED.**

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

---

APPENDIX C

---

**In the United States Court of Federal Claims**

No. 18-281C

(Filed: June 8, 2020)

\*\*\*\*\*

OWL CREEK ASIA I, L.P. et al., Plaintiffs, v. THE UNITED STATES, Defendant.	* Motion to Dismiss; * RCFC 12(b)(1); * RCFC 12(b)(6); * Jurisdiction; * Standing; Direct * Claims; * Instrumentalities; * Coercion; Agent; * Conservators; * Conflict of Interest; * Third-Party * Beneficiaries; Stock; * Shareholders; * Fannie; Freddie; * FHFA
--	---

\*\*\*\*\*

*Lawrence D. Rosenberg*, Washington, DC, for plaintiffs.

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

**OPINION AND ORDER****SWEENEY, Chief Judge**

Plaintiffs in this case challenge the actions of the United States during the conservatorships of the Federal National Mortgage Association (“Fannie”) and the Federal Home Loan Mortgage Corporation (“Freddie”). Specifically, plaintiffs take issue with the conservator for Fannie and Freddie (collectively, the “Enterprises”) amending a funding agreement between the Enterprises and the United States Department of the Treasury (“Treasury”). Based on the revisions to that agreement, plaintiffs seek the return of money illegally exacted, damages for breach of contract and breach of fiduciary duty, and compensation for a taking pursuant to the Fifth Amendment to the United States Constitution (“Constitution”). Defendant moves to dismiss plaintiffs’ amended complaint, arguing that the court lacks subject-matter jurisdiction over plaintiffs’ claims, plaintiffs lack standing to pursue their claims, and plaintiffs fail to state a claim upon which relief may be granted. For the reasons stated below, the court grants defendant’s motion to dismiss.

**I. BACKGROUND****A. The Enterprises are private companies that are under the control of a conservator.****1. The Enterprises operated independently before the financial crisis.**

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities that

are sold to investors.<sup>1</sup> 1st Am. Compl. ¶¶ 23–24; *Fairholme II*, 147 Fed. Cl. at 15. Congress chartered Fannie in 1938 and established Freddie in 1970. 1st Am. Compl. ¶¶ 23–24. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. *Id.* Freddie is organized under Virginia law, and Fannie is organized under Delaware law. *Id.* The Enterprises issued their own common and preferred stock. *Id.* ¶ 26. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. *Fairholme II*, 147 Fed. Cl. at 15. Those owning preferred stock, including plaintiffs in this suit, acquired the right to receive dividends and a liquidation preference. 1st Am. Compl. ¶ 26.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. *Id.* ¶ 27. Although the Enterprises began recording losses in 2007, they were stable and adequately capitalized. *Id.* ¶¶ 29–30. Otherwise stated, the Enterprises were not in financial distress or otherwise at risk of insolvency. *Id.*

---

<sup>1</sup> This background section is a less comprehensive version of the court’s recitation of facts in a related case, *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1 (2019) (“*Fairholme I*”), *motion to certify interlocutory appeal granted*, 147 Fed. Cl. 126 (2020).

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

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (“HERA”), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency (“FHFA”) and provided it with supervisory and regulatory authority over the Enterprises. *See* 12 U.S.C. § 4511(a)–(b) (2018).<sup>2</sup> Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator (“FHFA-C”) for each Enterprise to reorganize, rehabilitate, or wind up its affairs.<sup>3</sup> *Id.* § 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its obligations. *Id.* § 4617(a)(3).<sup>4</sup> The conservator, once appointed, functions independently; it is not “subject to the direction or supervision of any other agency of the United States or any State in the

---

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

<sup>3</sup> To avoid any ambiguity, the court reiterates that it is using “FHFA” to refer to the agency acting in its regulatory role and “FHFA-C” when discussing the agency acting as a conservator.

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

exercise of [its] rights, powers, and privileges . . .” *Id.* § 4617(a)(7).

Congress also delineated the scope of the FHFA-C’s powers in HERA. *See generally id.* § 4617. As soon as it is appointed, the FHFA-C “immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . .” *Id.* § 4617(b)(2)(A). Congress also conferred on the conservator the power to “[o]perate the [Enterprise].” *Id.* § 4617(b)(2)(B). Pursuant to that power, the conservator “may,” among other things, “perform all functions of the [Enterprise],” “preserve and conserve the assets and property of the [Enterprise],” and “provide by contract for assistance in fulfilling any function . . . of the [conservator].” *Id.* The conservator “may” also “take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise].” *Id.* § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator “may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]” and “take any action authorized by [12 U.S.C. § 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA].” *Id.* § 4617(b)(2)(J). By describing the FHFA-C’s role primarily in terms of what powers it “may” exercise, *see generally id.* § 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its powers, *see United States v. Rodgers*, 461 U.S. 677,



706 (1983) (“The word ‘may,’ when used in a statute, usually implies some degree of discretion.”). Simply stated, the FHFA has “extraordinarily broad flexibility to carry out its role as conservator.” *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 606 (D.C. Cir. 2017) (“*Perry II*”), *cert. denied*, 138 S. Ct. 978 (2018).

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

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(*g*) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. *Id.* §§ 1455(*l*)(4), 1719(*g*)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the availability of mortgage finance, and protect taxpayers. *Id.* §§ 1455(*l*)(1)(B), 1719(*g*)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

- (i) The need for preferences or priorities regarding payments to the Government.
- (ii) Limits on maturity or disposition of obligations or securities to be purchased.
- (iii) The [Enterprise’s] plan for the orderly resumption of private market funding or capital market access.
- (iv) The probability of the [Enterprise] fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the [Enterprise's] status as a private shareholder-owned company.

(vi) Restrictions on the use of [Enterprise] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

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

#### **4. The FHFA became the conservator for each Enterprise.**

Around the beginning of September 2008, the FHFA and Treasury sought to persuade each Enterprise's board of directors to consent to conservatorship. 1st Am. Compl. ¶ 40. The FHFA told each Enterprise's board that conservatorship would further the interests of the shareholders. *Id.* Around the same time, the FHFA made an offer to each board: consent to a conservatorship in exchange for the FHFA-C aiming to preserve and conserve the Enterprises' assets, attempting to restore the Enterprises to sound and solvent condition, and terminating the conservatorships when those goals were achieved. *Id.* ¶¶ 5, 7; *Fairholme II*, 147 Fed. Cl. at 17. Each Enterprise's board accepted that offer and consented to a conservatorship on September 6, 2008, with an understanding that the FHFA-C would operate in the aforementioned limited ways. *Fairholme II*, 147 Fed. Cl. at 17.

The conservatorships became effective on September 6, 2008, upon each Enterprise's board's consent. 1st Am. Compl. ¶¶ 40–41; *see also* 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when “[t]he [Enterprise], by

resolution of its board of directors or its shareholders or members, consents to the appointment”).

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

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement (“PSPA”) with Treasury for each Enterprise. 1st Am. Compl. ¶ 6. Treasury entered into the agreements pursuant to its authority under HERA to buy the Enterprises’ securities. *Id.* ¶¶ 6, 42. Under the PSPAs, Treasury committed to provide up to \$100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. *Id.* ¶ 42. If an Enterprise’s liabilities exceeded its assets, then the Enterprise could draw on Treasury’s funding commitment in an amount equal to the difference between the Enterprise’s liabilities and assets. *Fairholme II*, 147 Fed. Cl. at 17.

In return for Treasury’s funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their respective common stock at a nominal price. 1st Am. Compl. ¶ 42. Treasury’s preferred stock had an initial liquidation preference of \$1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury’s funding commitment. *Id.* In the event of a liquidation, Treasury was entitled to recover the full liquidation value of its shares before any other shareholder would receive compensation. *Id.* Second, Treasury bargained for the right to a quarterly cash dividend

that would be equal, per annum, to 10% of its liquidation preference. *Id.* An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. *Id.* Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. *Id.* ¶¶ 42, 48. Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. *Id.* ¶ 43.

The FHFA-C and Treasury amended each Enterprise's PSPA on May 6, 2009, to increase Treasury's funding commitment to each Enterprise from \$100 billion to \$200 billion. *Id.* ¶ 50. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed \$200 billion. *Id.* ¶ 51.

#### **6. The Enterprises' finances improved during their conservatorships.**

In the early stages of the conservatorships, each Enterprise's net worth decreased as it reported losses. *Fairholme II*, 147 Fed. Cl. at 18. Some of the losses resulted from the FHFA-C writing down the value of

deferred tax assets.<sup>5</sup> *Id.* Notwithstanding those on-paper losses, as of late 2009, Fannie had drawn only \$60 billion from Treasury, and Freddie had only drawn \$51 billion. 1st Am. Compl. ¶ 52.

By 2011 and into 2012, the Enterprises' financial outlooks were promising. In addition to an improvement in the housing market, the Enterprises had improved their financial performance. *Id.* ¶ 57. They were positioned to further improve their financial condition by revising their valuations of deferred tax assets because of growing profits, and by increasing their earnings due to reduced credit losses. *Id.* The FHFA-C and Treasury were aware of those forthcoming changes and the Enterprises' improving outlooks. *Id.* ¶ 8. In August 2012, Treasury and FHFA-C knew that the Enterprises would soon experience improved profitability and received projections reflecting that the Enterprises would have positive comprehensive income in 2012. *Id.* ¶¶ 58–59. Otherwise stated, the FHFA-C and Treasury knew, by early August 2012, that the Enterprises were poised to generate profits in excess of their respective dividend obligations to Treasury. *Id.* ¶ 57.

### **7. Treasury and the FHFA-C agreed to a third amendment to the PSPAs.**

At an unspecified time prior to August 2012, Treasury and the FHFA-C began considering a third

---

<sup>5</sup> A deferred tax asset is an asset that may be used to offset future tax liability. *Fairholme II*, 147 Fed. Cl. at 18 n.4. A company must write down the value of that deferred asset if it is unlikely to be used to offset future taxable profits. *Id.* This write down occurs, for example, if a company predicts it will not be profitable in the future. *Id.*

amendment to each PSPA. Treasury was the driving force behind the initiative to amend the PSPAs' terms. *Id.* ¶¶ 63, 75. Indeed, an FHFA official reported in early August 2012 that Treasury was making a “renewed push” to implement a new amendment. *Id.* ¶ 71 (quoting the FHFA official). The FHFA-C learned of the proposed changes before the Enterprises; Treasury informed the Enterprises that the new terms were forthcoming and announced the changes to the Enterprises. *Id.* ¶ 73. Treasury officials who were involved with the process do not recall Treasury making any backup or contingency plans in the event that the FHFA-C rejected the proposed terms. *Fairholme II*, 147 Fed. Cl. at 19. The FHFA-C accepted the changes without advocating for different terms. *Id.*

Treasury and the FHFA-C decided to announce the changed terms in mid-August 2012 because, according to Treasury, the Enterprises would be reporting earnings exceeding their dividend obligation at the beginning of that month. *Id.* On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA (“PSPA Amendment”). 1st Am. Compl. ¶¶ 2, 9, 60. A key component of the amended PSPAs is the requirement—referred to here as the “Net Worth Sweep”—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise’s net worth (except for a small capital reserve amount) rather than a dividend based on a set percentage of the liquidation preference.<sup>6</sup> *Id.* ¶ 60.

---

<sup>6</sup> The capital reserve for each Enterprise started at \$3 billion and was set to decrease to \$0 by January 2018, but the

Additionally, under the amended PSPAs, the Enterprises are not obligated to pay a periodic commitment fee. *Id.* ¶ 71.

**a. Treasury wanted to ensure that it benefited from the new terms.**

With the PSPAs, Treasury sought to secure a more beneficial arrangement for itself, as a representative for taxpayers. During the lead-up to the PSPA Amendments, a Treasury official acknowledged in an internal communication that the government had resolved to “ensure existing common equity holders will not have access to any positive earnings from the [Enterprises] in the future.” *Id.* ¶ 63 (emphasis removed) (quoting the document). Treasury recognized its goal of obtaining all of the Enterprises’ profits by executing the PSPA Amendments; it intended to take “every dollar of earnings that [the Enterprises] generate[] . . . to benefit taxpayers.” *Id.* ¶ 10 (quoting a Treasury announcement).

**b. The FHFA-C agreed to changes that benefit Treasury.**

For its part, the FHFA-C was operating under the belief that Treasury would benefit from the PSPA Amendments. The FHFA-C prioritized Treasury’s interests over the fate of the Enterprises and the interests of their shareholders. *Id.* ¶ 83. Mel Watt—a former FHFA Director—commented at the time that he did not “lay awake at night worrying what’s fair to the shareholders.” *Id.* (quoting an interview).

---

Enterprises and Treasury agreed in December 2017 to reset the capital reserve amount to \$3 billion in the first quarter of 2018. 1st Am. Compl. ¶ 60; *Fairholme II*, 147 Fed. Cl. at 19 n.5.

**c. Treasury and the FHFA understood that the PSPA Amendments would not facilitate the Enterprises exiting conservatorship.**

Treasury was aware that the new terms of the PSPAs were not conducive to the Enterprises exiting conservatorship. Treasury acknowledged that its goal was to facilitate the “wind down” of the Enterprises. *Id.* ¶ 63 (quoting a Treasury report). At the time of the PSPA Amendments, Treasury explained that the new deal would ensure that the Enterprises “will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form.” *Id.* ¶ 76 (emphasis removed) (quoting Treasury press release).

The FHFA shared a similar sentiment. The FHFA’s former Acting Director, Edward DeMarco, testified before the United States Senate that the PSPA Amendments “reinforce the notion that the [Enterprises] will not be building capital as a potential step to regaining their former corporate status.” *Id.* ¶ 83 (emphasis removed) (quoting the testimony). Indeed, the FHFA explained to Congress that its vision for the future included a housing industry without Fannie and Freddie. *Fairholme II*, 147 Fed. Cl. at 20.

**d. Treasury has benefited from the PSPA Amendments at the expense of the Enterprises and other shareholders.**

There are four significant effects that flowed from the PSPA Amendments. First, plaintiffs lost their economic interests in the Enterprises because, under the new terms, private shareholders can never receive dividends or liquidation distributions. 1st Am.



Compl. ¶¶ 2, 9, 95–96. Second, Treasury acquired plaintiffs’ economic interests in the Enterprises because Treasury now possesses “the entire value” of the Enterprises. *Id.* ¶ 100. Third, Treasury reaped a windfall of \$128.9 billion in comparison to what it would have received absent changes to the PSPAs. *Id.* ¶¶ 92–93 (alleging that the Enterprises paid Treasury \$223.6 billion under the PSPA Amendments but would have only paid Treasury \$94.7 billion under the previous terms). Fourth, the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink of insolvency. *Id.* ¶¶ 61, 94.

**8. Treasury and the FHFA are committed to ending the conservatorships.**

On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the Treasury Secretary to develop, “as soon as practicable,” a plan for “[e]nding the conservatorships of the [Enterprises] upon the completion of specified reforms . . . .”<sup>7</sup> Memorandum on Federal Housing

---

<sup>7</sup> The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source, the Federal Register. *See Murakami v. United States*, 46 Fed. Cl. 731, 739 (2000) (noting that the court may take judicial notice of government documents), *aff’d*, 398 F.3d 1342, 1354–55 (Fed. Cir. 2005); *see also Democracy Forward Found. v. White House Office of Am. Innovation*, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) (“[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum.”). *See generally* Fed. R. Evid. 201 (discussing judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the

Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must include proposals for “[s]etting the conditions necessary for the termination of the conservatorships” and outlined some of those conditions. *Id.* at 12,480. Subsequently, Treasury issued a plan in which it advocated for “begin[ning] the process of ending the [Enterprises’] conservatorships.”<sup>8</sup> U.S. Dep’t of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), <https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf> [<https://perma.cc/RGH8-N385>]; *accord id.* at 26 (“It is, after 11 years, time to bring the conservatorships to an end.”). As part of the plan to end the conservatorships, Treasury proposed that it and the FHFA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. *Id.* at 26–27.

The FHFA shares Treasury’s goals with respect to the conservatorships. Mark Calabria, the current FHFA Director, testified during his confirmation

---

court may consider facts derived from sources subject to judicial notice without converting the motion into one for summary judgment. *Sebastian v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

<sup>8</sup> The court takes judicial notice of Treasury’s reform plan because it is a government record available from a reliable source, Treasury’s website. *See supra* note 7.

hearing that he wanted to end the conservatorships.<sup>9</sup> 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony). *See generally* *Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 116th Cong. 10–40, 74–75, 148–85 (2019) [hereinafter *Calabria Testimony*] (documenting Mr. Calabria’s testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that each Enterprise retains. *Calabria Testimony, supra*, at 150; *see also id.* at 25 (“I support the idea of having significantly more capital at the [Enterprises].”).

#### **B. Plaintiffs own Fannie and Freddie stock.**

There are eight plaintiffs in this case: Owl Creek Asia I, L.P.; Owl Creek Asia II, L.P.; Owl Creek I, L.P.; Owl Creek II, L.P.; Owl Creek Asia Master Fund, Ltd.; Owl Creek Credit Opportunities Master Fund, L.P.; Owl Creek Overseas Master Fund, Ltd.; and Owl Creek SRI Master Fund, Ltd. (collectively, “Owl Creek”). The first four plaintiffs listed in the amended complaint are Delaware limited partnerships; the fifth, seventh, and eighth plaintiffs are Cayman Islands exempted companies; and the sixth plaintiff is a Cayman Islands limited partnership. 1st Am. Compl. ¶¶ 13–20. Each plaintiff owned Fannie preferred stock and Freddie preferred stock at the

---

<sup>9</sup> The court takes judicial notice of the relevant testimony because the statements are recorded in government documents. *See supra* note 7.

time of the Net Worth Sweep. *Id.* The shares owned by these plaintiffs were primarily purchased after the conservatorships were established in 2008. Pls.’ Corrected Combined Opp’n to Def.’s Omnibus Mot. to Dismiss 1.

## II. PROCEDURAL HISTORY

Plaintiffs filed their complaint on February 23, 2018. This case was coordinated with similar, related cases assigned to the undersigned judge.<sup>10</sup> Plaintiffs filed their first amended complaint in this case on August 16, 2018. In their amended complaint, plaintiffs present four claims. Plaintiffs first assert that the Net Worth Sweep constitutes a Fifth Amendment taking (count I) of their economic interests in their stock. Plaintiffs next assert, in the alternative, that the Net Worth Sweep constitutes an illegal exaction (count II) of those same economic interests because the (1) FHFA was operating unconstitutionally and (2) FHFA-C and Treasury exceeded their statutory authority when they approved the PSPA Amendments. Plaintiffs also plead a breach-of-fiduciary-duty claim (“fiduciary duty claim”) (count III) premised on the Net Worth Sweep being unreasonable, arbitrary, and contrary to the duty owed to the Owl Creek shareholders. Additionally, plaintiffs assert a breach-of-implied-contract claim (count IV) based on a purported agreement by which the Enterprises consented to the conservatorship in exchange for the FHFA agreeing to preserve the Enterprises’ assets with the goal of making them safe and solvent. Specifically, plaintiffs

---

<sup>10</sup> A fuller recitation of the procedural history of this case and related cases is provided in *Fairholme II*, 147 Fed. Cl. at 21–23.

assert that each dividend payment under the Net Worth Sweep constitutes a breach because it depletes the Enterprises' assets in a manner that undermines the goals of conservatorship.

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case and eleven related cases before the undersigned.<sup>11</sup> The plaintiffs in each of the twelve cases filed a response brief on their respective dockets; some of the plaintiffs relied on a joint brief filed in six of the cases, others, as is the case here, filed a joint brief for five of the cases in which the plaintiffs are all represented by the same counsel. Defendant filed its omnibus reply brief in each of the cases on May 6, 2019. The parties have fully briefed defendant's motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiffs in this case have adopted the favorable arguments made by the plaintiffs in the related cases to the extent that such arguments are

---

<sup>11</sup> The eleven related cases are *Fairholme Funds, Inc. v. United States*, No. 13-465C; *Washington Federal v. United States*, No. 13-385C; *Cacciapalle v. United States*, No. 13-466C; *Fisher v. United States*, No. 13-608C; *Arrowood Indemnity Company v. United States*, No. 13-698C; *Reid v. United States*, No. 14-152C; *Rafter v. United States*, No. 14-740C; *Akanthos Opportunity Master Fund, L.P. v. United States*, No. 18-369C; *Appaloosa Investment Limited Partnership I v. United States*, No. 18-370C; *CSS, LLC v. United States*, No. 18-371C; and *Mason Capital L.P. v. United States*, No. 18-529C.

relevant.<sup>12</sup> Defendant’s motion to dismiss is now ripe for adjudication.

### III. STANDARD OF REVIEW

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

A claim that survives a jurisdictional challenge remains subject to dismissal under RCFC 12(b)(6) if it

---

<sup>12</sup> The court addresses in this opinion some arguments that were made primarily by the plaintiffs in the related cases to provide context for the resolution of defendant’s motion to dismiss. In addition, to the extent that any of plaintiffs’ less-developed arguments are not discussed in this opinion, the court found such arguments to be unpersuasive.

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

#### IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a “threshold matter.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998). Subject-matter jurisdiction cannot be waived or forfeited because it “involves a court’s power to hear a case.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Ex parte McCardle*, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it is “an inflexible matter that must be considered before proceeding to evaluate the merits of a case.” *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006); *accord K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1004–05 (Fed. Cir. 2015). Either party, or the court *sua sponte*, may

challenge the court's subject-matter jurisdiction at any time. *Arbaugh*, 546 U.S. at 506; *see also Jeun v. United States*, 128 Fed. Cl. 203, 209–10 (2016) (collecting cases).

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

Defendant challenges the court's jurisdiction to entertain plaintiffs' claims on a number of bases.



Specifically, defendant argues that plaintiffs have not asserted claims against the United States and that the court lacks jurisdiction over the subject matter of certain claims. The court addresses these contentions in turn.<sup>13</sup>

**A. Plaintiffs have asserted claims against the United States.**

The court first considers whether plaintiffs have asserted claims against the United States, a necessary element of jurisdiction in the Court of Federal Claims. As set forth in their amended complaint, all of plaintiffs' claims are premised on actions taken by the FHFA-C and Treasury. Defendant argues that the court lacks jurisdiction to consider any claims premised on the FHFA-C's or Treasury's conduct. In response, plaintiffs contend that they have asserted claims against the government because (1) Treasury was involved in the challenged conduct, (2) the FHFA-C was coerced by the government, (3) the FHFA-C was the government's agent, and (4) the FHFA-C, in collaboration with Treasury, is a government actor. The court addresses each contention in turn.

---

<sup>13</sup> In *Fairholme II*, the court addressed additional jurisdictional concerns that were not raised or are not implicated in this case. *See generally* 147 Fed. Cl. at 24–25 (rejecting defendant's contention that the claims of the *Fairholme* plaintiffs were barred by 28 U.S.C. § 1500), 34–37 (rejecting the contention of a putative intervenor that the Court of Federal Claims lacks jurisdiction to entertain Fifth Amendment takings claims).

**1. The court cannot exercise jurisdiction based on allegations of Treasury's involvement.**

Plaintiffs initially argue that the court has jurisdiction over their Fifth Amendment takings and illegal-exaction claims because they have alleged the involvement of Treasury—indisputably a part of the federal government—in the action underlying these claims, i.e., the Net Worth Sweep. Defendant counters that Treasury alone could not have implemented the PSPA Amendments, and Treasury's role as a counterparty to the voluntary agreement with the Enterprises is not sufficient to establish jurisdiction over plaintiffs' takings claim. Defendant further asserts that the court's order allowing jurisdictional discovery reflects that plaintiffs' allegations concerning Treasury alone are insufficient to confer jurisdiction.

The parties' dispute on the import of allegations concerning Treasury is ultimately immaterial in light of the court's determination, explained below, that the FHFA-C—the other party involved in the PSPA Amendments—is the United States. Nonetheless, the court notes, as defendant asserts, that it implicitly acknowledged in its February 26, 2014 discovery order, issued in *Fairholme* and related cases, that the allegations concerning Treasury alone were insufficient to support jurisdiction. In that order, the court permitted the plaintiffs in those related cases to conduct fact discovery on whether the FHFA-C was “the ‘United States’ for purposes of the Tucker Act.” *Fairholme Funds, Inc. v. United States*, 114 Fed. Cl. 718, 721 (2014). The aforementioned discovery would have been unnecessary (and unwarranted) if, as plaintiffs assert here, the court has jurisdiction over

plaintiffs' claims based on their allegations concerning Treasury.

**2. The FHFA-C was not coerced into approving the PSPA Amendments.**

Plaintiffs also argue that the FHFA-C is the United States because the FHFA-C was coerced into approving the PSPA Amendments by Treasury. Defendant counters that the FHFA-C was not coerced by Treasury because the FHFA-C had a choice of whether to accept or reject the PSPA Amendments. Defendant asserts that there is no coercion if a party has a choice, regardless of how difficult refusal of a particular option may be. Indeed, defendant contends that plaintiffs fail to proffer any allegations that Treasury required the FHFA-C to enter into the agreements against its will. Defendant further asserts that other courts have declined to conclude that the FHFA-C felt compelled to follow Treasury based on allegations that Treasury invented the amendment concept or led the process.

**a. The court has jurisdiction over claims based on actions that resulted from government coercion.**

The court has jurisdiction over claims premised on the FHFA-C's actions if Treasury's "influence over the" FHFA-C "was coercive rather than merely persuasive." *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154 (Fed. Cir. 2014). The line between coercion and persuasion "is highly fact-specific." *Id.* Precedent from the United States Court of Appeals for the Federal Circuit ("Federal Circuit") frames the contours of the inquiry. In *Langenegger v. United States*, the plaintiffs pleaded that the United

States coerced El Salvador by threatening to withhold financial and military assistance unless El Salvador passed legislation expropriating private property. 756 F.2d 1565, 1567 (Fed. Cir. 1985). The Federal Circuit disagreed with the plaintiffs' characterization of the threats because "[d]iplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of [coercion], however difficult refusal may be as a practical matter." *Id.* at 1572. Similarly, the Federal Circuit concluded in *B & G Enterprises, Ltd. v. United States* that California was not coerced into enacting restrictions on smoking, notwithstanding the federal government conditioning grants on states enacting such limits. 220 F.3d 1318, 1321, 1325 (Fed. Cir. 2000); *see also A & D Auto*, 748 F.3d at 1155 (explaining that "coercion was not established" in *B & G*). The court explained that "it was California's decision to create [the] restrictions[;] . . . Congress may have provided the bait, but California decided to bite." *B & G*, 220 F.3d at 1325. In *A & D Auto*, the Federal Circuit addressed coercion in the context of the government allegedly conditioning vital financial assistance to bankrupt automobile companies on those companies terminating some of their franchise agreements. 748 F.3d at 1145. Unable to resolve the issue due to gaps in the record, the court noted in dicta that a relevant consideration was "whether the government financing was essential to the companies." *Id.*

A common thread runs through the Federal Circuit's decisions: the importance of choice. A nonfederal actor is not coerced when it can choose to go against the wishes of the United States, even if

doing so will cause significant hardships, *Langenegger*, 756 F.2d at 1567, or result in a loss of prospective benefits, *id.*; *B & G*, 220 F.3d at 1325. But there is no choice, in any meaningful sense, when there is only one realistic option. *A & D Auto*, 748 F.3d at 1145 (noting the importance of considering whether the companies could survive without accepting the government's offer); *cf. Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) (noting that, with respect to Congress's spending powers, "the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions"). Put differently, the nonfederal actor must make a voluntary decision, which it cannot do if there is only one realistic option. *See BMR Gold Corp. v. United States*, 41 Fed. Cl. 277, 282 (1998) (finding that the "the necessary element of coerciveness" for a taking was missing because the plaintiff granted the military permission to cross his land); *accord Henn v. Nat'l Geographic Soc.*, 819 F.2d 824, 826 (7th Cir. 1987) (noting that hard choices remain voluntary when they are not akin to "Don Corleone's '[m]ake him an offer he can't refuse'"). In sum, the FHFA-C was not coerced if it voluntarily chose to enter into the PSPA Amendments.

**b. Plaintiffs have not established that  
Treasury coerced the FHFA-C into  
approving the PSPA Amendments.**

In support of their contention that Treasury coerced the FHFA-C into approving the PSPA Amendments, plaintiffs allege that Treasury proposed the terms of the amendments and used its influence over the

FHFA-C to ensure compliance with Treasury's wishes. Those allegations are not enough to establish coercion. First, given the Enterprises' improving financial condition and Treasury's existing funding commitment, the FHFA-C's decision to execute the PSPA Amendments was voluntary because it could reject the deals without imperiling the Enterprises. The facts here, therefore, are diametrically opposed to the circumstances in *A & D Auto* that the Federal Circuit suggested may support coercion because the automobile dealers faced insolvency if they did not accede to the financing terms. *See* 748 F.3d at 1145. Second, the FHFA-C's lack of protestation is informative. "[T]he very fact that FHFA[-C] itself [did] not br[ing] suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA[-C] was an independent, willing participant in its negotiations with the Treasury." *Robinson v. Fed. Hous. Fin. Agency*, 223 F. Supp. 3d 659, 668 (E.D. Ky. 2016), *aff'd*, 876 F.3d 220 (6th Cir. 2017). The court's conclusion is bolstered by the fact that another court has held that materially similar allegations to those at issue here did not "come close to a reasonable inference that [the] FHFA[-C] considered itself bound to do whatever Treasury ordered." *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) ("*Perry I*"), *aff'd in part, rev'd in part sub nom. Perry II*, 864 F.3d at 591. This court agrees with the reasoning in *Perry I*: the PSPA Amendments were executed by sophisticated parties, and many agreements arise from a party's proposal being accepted by the other party. *Id.* Plaintiffs have not established that the FHFA-C was coerced into approving the PSPA Amendments by Treasury.

### 3. The FHFA-C is not Treasury's agent.

Plaintiffs further argue that the FHFA-C's actions are attributable to the United States because the FHFA-C is Treasury's agent. Defendant counters that plaintiffs have not pleaded an agency relationship because Treasury does not control the FHFA-C's operations. Indeed, defendant notes that Treasury is statutorily barred from exercising such control.

The United States is subject to claims in this court for the actions of a third party "if [that] party is acting as the government's agent . . . ." *A & D Auto*, 748 F.3d at 1154. "An essential element of agency is the principal's right to control the agent's actions." *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01 cmt. f (Am. Law. Inst. 2005)); accord *O'Neill v. Dep't of Hous. & Urban Dev.*, 220 F.3d 1354, 1360 (Fed. Cir. 2000) (acknowledging that the common-law meaning of agency requires, among other things, that the principal has the right to control the agent's conduct); see also *Preseault v. United States*, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (concluding that a state's actions were attributable to the United States when the state acted pursuant to the Interstate Commerce Commission's order); *Hendler v. United States*, 952 F.2d 1364, 1378–79 (Fed. Cir. 1991) (attributing a state's actions to the United States when the state acted under authority flowing from an Environmental Protection Agency order). The facts, as alleged, do not reflect that Treasury controlled the FHFA-C's actions because Congress explicitly precluded the FHFA-C from being subservient to another agency, 12 U.S.C. § 4617(a)(7) (providing that the FHFA-C cannot be subject to the "direction or supervision" of any other

agency), and plaintiffs have not alleged facts indicating that Treasury exercised such control notwithstanding the statutory bar. Although the FHFA-C was required by the PSPAs to obtain Treasury's approval for certain actions (e.g., issuing dividends), the PSPAs did not provide Treasury with the right to unilaterally order amendments. Moreover, plaintiffs describe an FHFA-C that made decisions independently: Treasury sought to influence the opinions of the FHFA-C's senior officials; Treasury "push[ed]" for the PSPA Amendments; and the FHFA-C agreed to the PSPA Amendments. 1st Am. Compl. ¶¶ 2, 69, 71. Simply stated, plaintiffs have not alleged facts establishing that Treasury exercised the control over the FHFA-C that is necessary for an agency relationship.

**4. The FHFA-C is the United States because the FHFA-C retains the FHFA's governmental character.**

In addition, plaintiffs contend that the FHFA-C is itself a government actor.<sup>14</sup> Defendant disagrees. First, relying on *O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 412 U.S. 79 (1994), defendant argues that the FHFA-C is not the United States because the FHFA-C stands in the Enterprises' shoes. Specifically, defendant asserts that Congress's decision to have the FHFA-C succeed to the Enterprises' rights reflects that Congress intended

---

<sup>14</sup> To determine whether this action is against the United States, the court need not reach plaintiffs' argument that Treasury and the FHFA-C formed a "control group." See Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 22–26.



that the FHFA-C step into the Enterprises' private shoes and shed its government character. Second, defendant argues that the FHFA-C's exercise of nontraditional conservatorship powers is immaterial because Congress can expand the conservator's role without transforming it into a government actor. Third, defendant argues that the Enterprises are not government instrumentalities—which means that the FHFA did not step into the shoes of a government actor when it became the Enterprises' conservator—because the government does not retain permanent authority to appoint the Enterprises' directors. Defendant contends that the government only has temporary, albeit indefinite, control over the Enterprises because the conservatorships are not permanent.

In response, plaintiffs dispute the premise of defendant's argument that, pursuant to *O'Melveny*, the FHFA becomes the Enterprises when acting as conservator. Plaintiffs assert that *O'Melveny* does not concern whether an entity is the United States or, if the decision can be read as addressing that issue, is distinguishable because it concerns receivers or is limited to conservators exercising traditional conservator powers. Second, plaintiffs argue that the FHFA has not shed its government status, even if it has stepped into the Enterprises' shoes, when it acts as conservator. Specifically, plaintiffs assert that the FHFA-C retains the FHFA's government status because (1) the FHFA-C has acted beyond the traditional conservator powers and (2) Congress expressed its intention for that result by precluding the conservator from being subject to the supervision of "any *other* agency." 12 U.S.C. § 4617 (emphasis

added). Third, plaintiffs argue that their claims are against the United States, even if the FHFA-C steps into the shoes of the Enterprises, because the Enterprises are government instrumentalities.

In short, the parties disagree over the government status of the FHFA-C. The FHFA is indisputably the United States, *see id.* § 4511(a) (establishing the FHFA as an “independent agency of the Federal Government”), and so the only question is whether the FHFA sheds that status when it acts as conservator. In other jurisdictions, courts have held (with near unanimity) that the FHFA loses its government status pursuant to *O’Melveny*. In *O’Melveny*, the United States Supreme Court (“Supreme Court”) explained that the Federal Deposit Insurance Corporation (“FDIC”) “steps into [the] shoes” of a private company when acting as receiver and sheds its government character because the FDIC “succeed[s] to . . . all rights, titles, powers, and privileges of the [entity in receivership] . . .” 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); *see also AG Route Seven P’ship v. United States*, 57 Fed. Cl. 521, 534 (2003) (citing *O’Melveny* for the proposition that the FDIC as receiver is a “private party, and not the government *per se*” because it “is merely standing in the shoes . . . of the defunct thrift”). The courts drawing from *O’Melveny* have concluded that the FHFA steps into the shoes of the Enterprises and sheds its government character when acting as conservator because Congress provided that the FHFA-C exercises the same rights with respect to the Enterprises as Congress granted to the FDIC as receiver. *See, e.g., Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017); *cf. Ameristar Fin. Servicing Co. v. United*

*States*, 75 Fed. Cl. 807, 811 (2007) (concluding, with respect to the FDIC, that the step-into-the-shoes principle set forth in *O'Melveny* also applies in the conservator context).

**a. The FHFA-C is not the United States if the FHFA steps into the Enterprises' shoes when acting as conservator.**

Plaintiffs initially contend that defendant's reliance on *O'Melveny* is erroneous because, assuming that *O'Melveny* applies, the FHFA-C is the United States even though it steps into the Enterprises' shoes. Specifically, plaintiffs assert that the FHFA-C is the United States under the facts alleged because (1) the FHFA-C exercises nontraditional conservator powers, (2) Congress intended that the FHFA-C retain the FHFA's government status, and (3) the FHFA-C steps into the shoes of a government instrumentality. The court addresses each assertion in turn.

First, the FHFA-C did not become a government actor by exercising powers beyond those traditionally afforded to a conservator. As a threshold matter, plaintiffs have not alleged facts reflecting that the FHFA-C used such powers; the execution of the PSPA Amendments was a "quintessential conservatorship" function. *Perry II*, 864 F.3d at 607. More importantly, however, plaintiffs would not prevail even if the FHFA-C exercised nontraditional conservatorship powers in agreeing to the PSPA Amendments. When this argument was pressed in other jurisdictions, it was rejected:

It may well be true that FHFA's actions would not be allowed under traditional principles of corporate or conservatorship law, but it does not

follow that those actions are therefore governmental. Legislatures can expand conservatorship and similar powers without transforming conservators into agents of the government. *Cf. Pegram v. Herdrich*, 530 U.S. 211, 225–26 (2000) (explaining that the Employee Retirement Income Security Act altered the common law of trusts to permit certain actions that would otherwise violate the trustee’s fiduciary duties).

*Bhatti v. Fed. Hous. Fin. Agency*, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (footnote omitted). The court agrees with that reasoning, and plaintiffs provide no authority that supports a contrary result. Although plaintiffs state that the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) decision in *Waterview Management Co. v. FDIC*, 105 F.3d 696 (D.C. Cir. 1997), supports their position, they are mistaken. *Waterview* is not on point because the D.C. Circuit did not hold that a conservator is *per se* the United States when acting pursuant to a congressional grant of broad powers. Rather, it held that, as a matter of statutory interpretation, the existence of a receivership did not preempt a prereceivership contract. *Id.* at 699–702.

Second, Congress’s instruction that the FHFA-C is not subject to the supervision of any other agency does not reflect congressional intent for the FHFA to retain its government status when acting as conservator even if it steps into the shoes of the Enterprises. Because the court only reaches this issue by assuming that *O’Melveny* is instructive, the statutory language concerning supervision of the FHFA-C does not support a finding of jurisdiction because the same

language is present in the statute that the Supreme Court addressed in *O'Melveny*. See 512 U.S. at 85–86 (discussing 12 U.S.C. § 1821). Compare 12 U.S.C. § 1821(c)(3)(C) (“When acting as conservator or receiver . . . , [the FDIC] shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC’s] rights, powers, and privileges.”), with *id.* § 4617(a)(7) (“When acting as conservator or receiver, the [FHFA] 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 [FHFA].”).

The third argument advanced by plaintiffs—that the FHFA-C is the United States because it steps into the shoes of a government instrumentality—also is not meritorious. A government instrumentality’s actions are attributable to the United States for purposes of the Tucker Act. See *Corr v. Metro. Wash. Airports Auth.*, 702 F.3d 1334, 1336 (Fed. Cir. 2012) (noting that a claim against a government instrumentality is a claim against the United States for purposes of the Little Tucker Act, 28 U.S.C. § 1346(a)(2)). The Supreme Court established in *Lebron v. National Railroad Passenger Corp.* that a company is a government instrumentality when (1) it is created by “special law,” (2) it is established “for the furtherance of governmental objectives,” and (3) the federal government “retains for itself permanent authority to appoint a majority of the [company’s] directors . . . .” 513 U.S. 374, 400 (1995). After *Lebron*, the Supreme Court clarified that, for purposes of the instrumentality test, “the practical reality of federal

control and supervision prevails over Congress' disclaimer of the [the entity's] governmental status." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1233 (2015).

There is no dispute that the Enterprises satisfy the first two prongs of the *Lebron* test; Congress created the Enterprises by special law to achieve governmental objectives related to the housing market. See 12 U.S.C. § 4501; see also *Herron*, 861 F.3d at 167 (addressing claims involving Fannie and noting that "[t]his case satisfies the first two *Lebron* criteria"); *Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1406–07 (9th Cir. 1996) (reaching same conclusion for Freddie). The status of the Enterprises, therefore, turns on the third prong: whether the government retains permanent authority to appoint a majority of the Enterprises' directors.

The Federal Circuit has not addressed the government-control prong with respect to the Enterprises, but courts in other jurisdictions have done so. Those decisions provide a starting point for the court. It appears that every court to consider the issue, with the exception of one district court, has held that the government does not exercise permanent control over the Enterprises. *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 279 (D.R.I. 2018) (concluding that the government retains permanent authority to control the Enterprises after noting that "[t]he non-controlling precedent to date" has reached the opposite conclusion). Most of the courts that concluded that the government lacks permanent control over the Enterprises issued their decisions before the Supreme Court in *Association of American*

*Railroads* emphasized the importance of evaluating the practical reality over nomenclature, and the other courts focused on the statutory purpose for the conservatorships rather than the Enterprises' actual situation. *E.g.*, *Herron*, 861 F.3d at 169 (relying on the notion that a conservatorship is fundamentally temporary). In other words, the courts adopting the prevailing view considered the issue of control without regard for the Supreme Court's instruction to focus on the practical reality. The court, therefore, does not find those decisions persuasive.

The crux of the inquiry, as the Supreme Court mandates, is on the practical reality of the government's control over the Enterprises. *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1233. It is of no import that Congress nominally authorized a facially temporary conservatorship, *see* 12 U.S.C. § 4617(a) (permitting the FHFA to act as conservator to "reorganiz[e]" or "rehabilitat[e]" the Enterprises), because Congress's disclaimers are no substitute for the court's obligation to assess the government's actual control, *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1233. The court focuses on the length of the conservatorship because the FHFA-C wields complete control over the Enterprises so long as they are in conservatorship. *See generally* 12 U.S.C. § 4617.

Plaintiffs allege that the Enterprises will remain undercapitalized—and thus subject to conservatorship pursuant to 12 U.S.C. § 4617(a)(3)(J)—until the PSPAs, in their current form, are changed because the Enterprises cannot accumulate any capital under the existing terms of the PSPAs. Although the PSPAs could be further amended, plaintiffs' allegations reflect that Treasury

and the FHFA-C will not do so because the purpose of the PSPA Amendments is to prevent the Enterprises from accumulating the necessary capital to become independent companies. Plaintiffs, in short, have alleged that the government intended, and has taken steps to ensure, that the conservatorships never end. Those facts, viewed in isolation, would support a conclusion that the practical reality is that the Enterprises are under permanent government control. The court's inquiry, however, is not limited to plaintiffs' allegations because it has taken judicial notice of relevant facts reflecting that the status quo has changed: The Treasury Secretary and the FHFA Director are now both committed to ending the conservatorships. Moreover, the idea that the Enterprises are permanently subject to government control because they can never accumulate the capital needed to exit the conservatorships is undermined by recent developments. Indeed, Treasury proposed amending the Net Worth Sweep to allow the Enterprises to retain more capital, and the FHFA Director testified during his confirmation hearing that, if confirmed, he would seek to increase the amount of capital that the Enterprises retain. Simply stated, the practical reality is that the Enterprises are not subject to permanent government control because the relevant parties are working to terminate the conservatorships.<sup>15</sup>

---

<sup>15</sup> Plaintiffs may disagree with the court's conclusion that events occurring after the PSPA Amendments are relevant to determining whether the Enterprises were under permanent government control during the events discussed in plaintiffs' complaint. Even if the court agreed that events occurring after



In sum, the FHFA-C does not become the United States if the FHFA steps into the Enterprises' shoes when serving as conservator.

**b. The FHFA-C retains the FHFA's government character because the FHFA-C does not step into the Enterprises' shoes.**

The key inquiry, therefore, is whether the FHFA steps into the shoes of the Enterprises when acting as conservator. Defendant argues that the FHFA-C sheds its government character and assumes the identity of the Enterprises based on the reasoning in *O'Melveny*. Defendant's reliance on *O'Melveny* is misplaced. *O'Melveny* concerns a receiver stepping into the shoes of a failed bank. 512 U.S. at 86. The roles of a conservator and receiver are meaningfully different. In a recent decision, the United States District Court for the District of Rhode Island artfully explained the differences and their import for assessing whether the FHFA-C is the government:

The *O'Melveny* Court held that FDIC, when acting as a receiver for a private entity, steps into the shoes of that private entity for state law claims. This holding makes sense given the purpose of receivership: "to preserve a company's

---

the PSPA Amendments are not germane, plaintiffs still would not prevail because they allege that the conservatorships began as temporary measures. See 1st Am. Compl. ¶ 7 (noting the temporary nature of the conservatorships and quoting an FHFA publication stating that the conservatorships would be terminated once the Enterprises had been restored "to a safe and solvent condition"); *id.* (noting that the FHFA reassured the market that the Enterprises would return to normal business operations). Thus, the Enterprises were not under permanent government control before the PSPA Amendments.

assets, for the benefit of creditors, in the face of bankruptcy.” When FDIC is appointed receiver, it must dispose of the received entity’s assets, resolving obligations and claims made against the entity. Notably, “[i]n receivership, the receiver owes fiduciary duties to the creditors, which the corporation would otherwise owe to creditors during a period of insolvency.” It logically follows, then, that the receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity.

Conservatorship, in contrast, serves a different function. FHFA has described the purpose of conservatorship is “to establish control and oversight of a company to put it in a sound and solvent condition.” Conservators, unlike receivers, have a fiduciary duty running to the corporation itself.

This is “critically distinct” from the fiduciary duties owed as a receiver—the receiver does indeed “step into the shoes” of the entity by assuming the fiduciary duties *of* the entity, but the conservator does not: it remains distinct, and rather owes a duty *to* the entity. Given the difference in fiduciary duties, *O’Melveny’s* “steps into the shoes” holding makes sense in the context of receivership, but not in the context of conservatorship.

*Sisti*, 324 F. Supp. 3d at 282–83 (citations and footnotes omitted). *See generally* Brian Taylor Goldman, *The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State-Action*, 17 J. Bus. & Sec. L. 11, 23–30 (2016). The district court, relying on

the above analysis, declined to treat the FHFA-C as a private actor. *Sisti*, 324 F. Supp. 3d at 284. This court agrees with the reasoning and conclusion in *Sisti*: the FHFA does not shed its government character when acting as conservator because it does not step into the shoes of the Enterprises. Otherwise stated, the FHFA-C is the United States because it retains the FHFA's government character. Plaintiffs' claims, therefore, are against the United States for purposes of the Tucker Act.

**B. The court lacks jurisdiction over plaintiffs' claim that sounds in tort.**

**1. Plaintiffs' fiduciary duty claim sounds in tort.**

Defendant next argues that the court lacks jurisdiction over plaintiffs' fiduciary duty claim because the United States does not owe to each Enterprise's shareholders a fiduciary duty that is grounded in a statute or contract. Defendant asserts that such a fiduciary duty cannot be based on (1) HERA because, pursuant to the statute, the FHFA-C is only required to act in the government's and the Enterprises' best interests; or (2) the PSPAs because plaintiffs are not parties to those contracts. Plaintiffs, in their opposition to defendant's motion to dismiss, counter that their claim is based on a fiduciary duty rooted in both HERA and the PSPAs. As to HERA, plaintiffs assert that Congress made the FHFA-C a fiduciary by authorizing it to control the Enterprises, entrusting it with duties that are at the core of what it means to be a fiduciary, and using terminology—"conservator"—associated with a fiduciary. With respect to the PSPAs, plaintiffs argue

that Treasury owes a fiduciary duty to the shareholders because it, acting with the FHFA-C, acquired control rights under the contract.

The court, pursuant to the Tucker Act, lacks jurisdiction over tort claims. 28 U.S.C. § 1491(a)(1). A breach of fiduciary duty is generally classified as a tort. *Newby v. United States*, 57 Fed. Cl. 382, 294 (2003). A fiduciary duty claim, however, does not sound in tort for purposes of the Tucker Act when the fiduciary relationship is founded on a money-mandating statute or a contractual provision between the claimant and United States. *See Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (statute); *Cleveland Chair Co. v. United States*, 557 F.2d 244, 246 (Ct. Cl. 1977) (contract); *see also* 28 U.S.C. § 1491(a)(1) (providing jurisdiction over claims “founded upon . . . any Act of Congress . . . or contract with the United States”).

The initial issue is whether HERA establishes a fiduciary relationship between the FHFA-C and the Enterprises’ shareholders. The court begins with the language of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). “If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect.” *Rosete v. Office of Pers. Mgmt.*, 48 F.3d 514, 517 (Fed. Cir. 1995); *accord Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”). Congress provided in HERA that the FHFA-C is only required to act in the interests of itself or the Enterprises. 12 U.S.C. § 4617(b)(2)(J). That statement reflects a clear intent: the FHFA-C does not owe a fiduciary duty to

shareholders because the conservator is not required to consider shareholders' interests.<sup>16</sup> *See id.*; *see also Collins v. Mnuchin*, 938 F.3d 553, 580 (5th Cir. 2019) (en banc) (noting that HERA “may permit” the FHFA-C to pursue actions that are “inconsistent with fiduciary duties”), *petitions for cert. filed*, 88 U.S.L.W. 3114 (U.S. Sept. 25, 2019) (No. 19-422), 88 U.S.L.W. 3146 (U.S. Oct. 25, 2019) (No. 19-563). The plain language controls, and therefore the court does not consider the peripheral considerations urged by plaintiffs such as the implications of the word “conservator,” the FHFA-C’s control over the Enterprises, or the FHFA-C’s other powers. In sum, plaintiffs cannot establish jurisdiction for their fiduciary duty claim by relying on HERA.

Next, the court turns to whether Treasury, acting together with the FHFA-C, owed a fiduciary duty to the Enterprises’ other shareholders because it acquired control rights by agreeing to the PSPAs. Plaintiffs’ argument is premised on the state-law

---

<sup>16</sup> The court’s interpretation of HERA’s plain language is buttressed by the fact that Congress seemingly made a deliberate decision to exclude shareholder interests from the FHFA-C’s considerations. Congress modeled HERA on the Financial Institutions Reform, Recovery, and Enforcement Act (“FIRREA”). *Jacobs v. Fed. Hous. Fin. Agency*, 908 F.3d 884, 893 (3d Cir. 2018). Under FIRREA, Congress permitted the FDIC as conservator to consider the best interests of a bank, its depositors, or the FDIC. 12 U.S.C. § 1821(d)(2)(J)(ii). Although Congress permitted the FDIC to take into consideration the interests of its depositors, Congress omitted the analogue of depositors—shareholders—from the list of germane interests that the conservator can consider when acting pursuant to HERA. *Compare id.* (FIRREA), *with* 12 U.S.C. § 4617(b)(2)(J) (HERA). The omission is telling.

principle (which they term “general corporate law”) that a controlling shareholder owes a fiduciary duty to the minority shareholders. The court is not convinced. First, plaintiffs’ allegation of a fiduciary relationship is not founded on a contract within the meaning of the Tucker Act. Plaintiffs are not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs. They invoke the contracts solely to establish that Treasury, with the assistance of the FHFA-C, is a controlling shareholder and rely on that conclusion to argue that it has a fiduciary duty based on state law. The contract, otherwise stated, is one step removed from the purported genesis of the fiduciary duty—the application of state-law principles. That gap is too much in light of the court’s obligation to narrowly construe the Tucker Act’s waiver of sovereign immunity. *See Smith*, 855 F.2d at 1552 (noting that the Tucker Act is narrowly construed); *see also Perry II*, 864 F.3d at 619–20 (rejecting the legal theory that the Enterprises’ shareholders’ need to reference the PSPAs for their fiduciary duty claim was enough to conclude that the claim was rooted in a contract for purposes of the Tucker Act).

Second, plaintiffs fail to demonstrate the applicability of the state-law principles underlying their theory for why Treasury assumed fiduciary duties. Federal law governs the obligations Treasury incurred by entering into the PSPAs. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 519 (1988) (“The proposition that federal common law continues to govern the ‘obligations to and rights of the United States under its contracts’ is nearly as old as *Erie [v. Tompkins]*, 304 U.S. 64 (1938),] itself.”). Although

courts may shape federal law by drawing from state-law principles, plaintiffs do not explain why doing so is appropriate in this instance.

Third, plaintiffs do not prevail even if their fiduciary duty claim could be founded on a contract and federal common law incorporates the state-law principles regarding controlling shareholders' fiduciary obligations. Under Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders. *See Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1344 (Del. 1987); *Parsch v. Massey*, 79 Va. Cir. 446 (2009); *see also Quadrant Structured Prod. Co. v. Vertin*, 102 A.3d 155, 183 (Del. Ch. 2014) (acknowledging that those "who effectively control a corporation" owe a fiduciary duty to others).<sup>17</sup> To have the requisite level of control, the controlling shareholder must (1) be able to exercise a majority of the corporation's voting power or (2) direct the corporation without owning a majority of stock. *Kahn v. Lynch Commc'n Sys.*, 638 A.2d 1110, 1113 (Del. 1994). The latter, effective exercise of control, "is not an easy test to satisfy"; the individual or group must be, "as a practical matter, . . . no differently situated than if they had majority voting control." *In re PNB Holding Co. S'holders Litig.*, No. CIV.A. 28-N, 2006 WL 2403999, at \*9 (Del. Ch. Aug. 18, 2006).

---

<sup>17</sup> The court refers to Delaware and Virginia law because Fannie is a Delaware corporation, and Freddie is a Virginia corporation. When evaluating Virginia law, the court also looks to Delaware state court decisions because Virginia courts do so to resolve unsettled issues in the Commonwealth. *E.g.*, *U.S. Inspect Inc. v. McGreevy*, No. 160966, 2000 WL 33232337, at \*4 (Va. Cir. Ct. Nov. 27, 2000).

Plaintiffs have not established that Treasury meets either control test. First, plaintiffs do not allege that Treasury owns any of the Enterprises' voting stock. Treasury purchased preferred stock and acquired the right to buy common (i.e., voting) stock, but there is no indication that Treasury exercised its warrants or otherwise acquired common stock.<sup>18</sup> Second, plaintiffs do not demonstrate that Treasury exercised effective control over the Enterprises or was, in plaintiffs' terms, a "dominant shareholder." Pls.' Corrected Combined Opp'n to Def's Omnibus Mot. to Dismiss 29 (quoting *Sisti*, 324 F. Supp. 3d at 283 n.9). Although Treasury acquired the right to preclude the Enterprises from taking certain actions, Treasury did not control the Enterprises because it could not direct any action—it could only respond to certain requests made by the Enterprises. As a practical matter, therefore, Treasury is situated differently than if it had majority voting power.

Having rejected the contentions advanced by plaintiffs in their opposition brief, the court turns to an argument that appears for the first time in plaintiffs' supplemental brief, which was filed at the court's request after the initial round of briefing on defendant's omnibus motion to dismiss was complete, *Fairholme II* was decided, and the court held a status conference regarding further proceedings in the

---

<sup>18</sup> Even if Treasury had exercised its option to buy a majority of the voting stock, it would not be a controlling shareholder because the FHFA-C succeeded to all of the shareholders' rights. See 12 U.S.C. § 4617(b)(2)(A) (noting that the FHFA-C, by operation of law, succeeds to all rights and powers of any Enterprise shareholder). Treasury, therefore, would have no voting power.



related cases.<sup>19</sup> In their supplemental brief, plaintiffs contend that their fiduciary duty claim was founded on a contention that Treasury and the FHFA-C acted as a “control group,” that this contention was set forth in their opposition brief in the section addressing the court’s jurisdiction over their fiduciary duty claim, and that the court did not, in *Fairholme II*, consider this contention. But no such contention was made in plaintiffs’ opposition brief.

In their opposition brief, plaintiffs explained that under state law, multiple shareholders who are legally connected can form a “control group” and be “deemed a single, majority shareholder,” and then asserted that Treasury and the FHFA-C were such a control group, acting in concert as the United States. *See* Pls.’ Corrected Combined Opp’n to Def’s Omnibus Mot. to Dismiss 22–26. In other words, plaintiffs advanced their control group contention solely to establish that their suit was against the United States. In the portion of their opposition devoted to countering defendant’s jurisdictional attack on their fiduciary duty claim, plaintiffs asserted only two bases for a fiduciary duty; each one was treated separately as governing the conduct of either Treasury or the FHFA-C. They did not argue that the fiduciary duty arose from Treasury and the FHFA-C acting as a control group. Accordingly, the court did not consider plaintiffs’ control group allegation as a foundation for any fiduciary duty claim in *Fairholme*

---

<sup>19</sup> As defendant notes, the court did not invite plaintiffs, after the status conference held March 5, 2020, to relitigate issues already decided in *Fairholme II*.

*II*, among the arguments raised by the plaintiffs in these related cases.

Because plaintiffs' control group contention was not raised in their opposition brief in support of their fiduciary duty claim, it is waived. *See United States v. Ford Motor Co.*, 463 F.3d 1267, 1277 (Fed. Cir. 2006) (explaining that "[a]rguments raised for the first time in a reply brief are not properly before this court"); *Ironclad/EEI v. United States*, 78 Fed. Cl. 351, 358 (2007) (noting that "under the law of this circuit, arguments not presented in a party's principal brief to the court are typically deemed to have been waived"). But even if plaintiffs' argument were not waived, it is not persuasive. In *Fairholme II*, the court explained why neither Treasury nor the FHFA-C owed a fiduciary duty to the shareholders of Fannie and Freddie. 147 Fed. Cl. at 37–40. The court is not persuaded that a control group composed of two entities, neither of which was bound by the fiduciary duty posited by plaintiffs, would be bound by a fiduciary duty simply because the entities are alleged to have worked in concert against the interests of the other shareholders of the Enterprises. Plaintiffs' attempt to graft a state law concept of a control group of shareholders onto a Tucker Act jurisdictional inquiry is not anchored in binding or even persuasive precedent, as explained in *Fairholme II. Id.* at 39–40. Having considered the allegations in plaintiffs' amended complaint, the timely arguments set forth in plaintiffs' opposition brief, and the untimely argument raised in plaintiffs' supplemental brief, the court concludes that it lacks jurisdiction over plaintiffs' fiduciary duty claim because it sounds in

tort. Therefore, it dismisses count III of their amended complaint.

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

Defendant also argues that plaintiffs' Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the FHFA-C. Plaintiffs counter that they have pleaded the predicates for takings and illegal-exaction claims, which means that it is irrelevant whether they also alleged facts that are germane to tortious actions.

When a party pleads the predicates for a takings claim or illegal-exaction claim, the court possesses jurisdiction to entertain such claims. *See Hansen v. United States*, 65 Fed. Cl. 76, 80–81 (2005) (“[S]o long as there is some material evidence in the record that establishes the predicates for a [claim covered by the Tucker Act,] . . . a plaintiff succeeds in demonstrating subject matter jurisdiction in this court . . .”). Those claims, at a basic level, are contentions that the government expropriated private property lawfully (takings) or unlawfully (illegal exaction). *See Orient Overseas Container Line (UK) Ltd. v. United States*, 48 Fed. Cl. 284, 289 (2000) (“Takings claims arise because of a deprivation of property that is authorized by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation.” (citing *Dureiko v. United States*, 209 F.3d 1345, 1359 (Fed. Cir. 2000); *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007–08 (Ct. Cl. 1967))). If a party alleges the necessary predicates for these claims, the court is not deprived

of jurisdiction even if the complaint contains allegations that could support a tort claim. *See El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1353 (Fed. Cir. 2004) (“That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims.”); *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that this court has jurisdiction over a takings claim “even if the government’s action was subject to legal challenge on some other ground”). Here, plaintiffs plead the predicates for takings and illegal-exaction claims by alleging, in essence, that they were forced to give their property to the government because of lawful or unlawful government conduct. Therefore, it is of no import to the court’s jurisdiction whether plaintiffs have alleged facts that would also support a tort claim.

**C. The court lacks jurisdiction over  
plaintiffs’ implied-in-fact-contract claim  
because plaintiffs are not third-party  
beneficiaries of such a contract.**

Defendant argues next that the court lacks jurisdiction to entertain plaintiffs’ implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract. Specifically, defendant asserts that plaintiffs have not established that they are intended beneficiaries independent of their status as shareholders and that any benefit that is related to their status as shareholders is insufficient for jurisdiction. Plaintiffs counter that they are intended third-party beneficiaries of implied contracts, between the FHFA and each Enterprise’s

board, in which the boards consented to the conservatorships in exchange for the FHFA-C operating the Enterprises as a fiduciary and returning them to sound condition. Specifically, plaintiffs assert that the intent to benefit the shareholders is evident from (1) the boards' consent to the conservatorships because shareholders would benefit from a conservator focused on returning the Enterprises to a better condition, and (2) the government acknowledging that the Enterprises' stock would remain outstanding while the Enterprises were in conservatorship.

The court's jurisdiction over contract claims is limited by the Tucker Act. *Ransom v. United States*, 900 F.2d 242, 244 (Fed. Cir. 1990). Of particular import here, ordinarily, a plaintiff must be in privity of contract with the United States to invoke this court's jurisdiction over a contract claim against the government. *Fid. & Guar. Ins. Underwriters, Inc. v. United States*, 805 F.3d 1082, 1087 (Fed. Cir. 2015). But privity is not required if "the plaintiff can demonstrate that it was an intended third-party beneficiary under the contract." *Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1361 (Fed. Cir. 2016).

"Third party beneficiary status is an 'exceptional privilege.'" *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (quoting *German All. Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912)). The conditions for attaining such status are "stringent." *Anderson v. United States*, 344 F.3d 1343, 1352 (Fed. Cir. 2003). "[S]hareholders seeking status to sue as third-party beneficiaries of an allegedly breached contract must 'demonstrate that the contract not only reflects the express or implied intention to benefit the

party, but that it reflects an intention to benefit the party *directly*.” *Castle v. United States*, 301 F.3d 1328, 1338 (Fed. Cir. 2002) (quoting *Glass*, 258 F.3d at 1354). Specifically, “the contract must express the intent of the promissor to benefit the shareholder personally, independently of his or her status as shareholder.” *Glass*, 258 F.3d at 1353–54. As a practical matter, the shareholder does not personally benefit independent of its status as a shareholder when the contractual promises pertain only to the treatment of the company. See *FDIC v. United States*, 342 F.3d 1313, 1320 (Fed. Cir. 2003) (noting that the broken promises concerned the treatment of the company such that the plaintiffs did not benefit independent of their status as shareholders); *accord Maher v. United States*, 314 F.3d 600, 605 (Fed. Cir. 2002) (concluding that the plaintiffs were not third-party beneficiaries when they failed to “establish[] that the government took on any obligations in the merger agreement for [the plaintiffs’] personal benefit, or even that the merger agreement contains any provisions pertaining to [the plaintiffs] personally”).

As plaintiffs are not parties to the alleged implied contracts between the FHFA and the Enterprises, the relevant issue is whether plaintiffs are third-party beneficiaries of those agreements. They are not. First, it is of no import that the Enterprises, as plaintiffs argue, purportedly agreed to the conservatorships because that would serve the interests of shareholders. Indeed, “every action of a corporation is supposed to benefit its shareholders,” but the “law has not viewed this general benefit as making every shareholder a third-party beneficiary.”

*Suess v. United States*, 33 Fed. Cl. 89, 94 (1995). Second, plaintiffs' allegations reflect that they only benefit from the alleged implied contracts by virtue of their shareholder status. The relevant promises concerned how the FHFA-C would operate the Enterprises; the crux of the purported agreements was the FHFA-C promising to operate the Enterprises as a fiduciary to preserve their assets and return them to sound condition. Because the promises in the alleged implied contracts were directed at the Enterprises, plaintiffs cannot be third-party beneficiaries of the alleged contract. *See FDIC*, 342 F.3d at 1320. Third, plaintiffs have not demonstrated that the FHFA intended that plaintiffs would benefit independently of their status as shareholders even if they did so benefit. Plaintiffs rely on the FHFA's statements that private stock would remain outstanding and shareholders would continue to hold an economic interest in their stock. Those factual statements, however, do not reflect that the FHFA intended to confer any specific benefit on plaintiffs independent of their role as shareholders. Because plaintiffs have not alleged facts reflecting that the FHFA intended to confer a personal benefit on them, they are not third-party beneficiaries. *See Glass*, 258 F.3d at 1353–54. In sum, the court lacks jurisdiction to entertain plaintiffs' implied-in-fact-contract claim because plaintiffs are neither parties to a contract with the government nor third-party beneficiaries of any such agreement. Therefore, the court dismisses count IV of their amended complaint.

## V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiffs' claims,

defendant challenges plaintiffs' standing to pursue their claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. *Starr Int'l Co. v. United States*, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is "assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that controls. *See Allen v. Wright*, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted."), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Thus, in a suit brought by shareholders, it is the substance of the allegations and not the label assigned to the allegations—i.e., direct or derivative—that matters. *See Starr*, 856 F.3d at 966–67; *see also In re Sunrise Sec. Litig.*, 916 F.2d 874, 882 (3d Cir. 1990) ("Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties."). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based on the rights of the company. *See Starr*, 856 F.3d at 966–67; *see also Weir v. Stagg*, No. 09-21745-CIV, 2011 WL 13174531, at \*9 (S.D. Fla. Feb. 7, 2011) ("Shareholders do not have standing to bring a direct action for injuries suffered by a corporation, but rather, must bring a derivative action."). A



shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the corporation’s injuries—to have standing to litigate those claims. *See Starr*, 856 F.3d at 966–67.

Defendant argues that plaintiffs lack standing because their claims, pled as direct claims, actually belong to the Enterprises and are therefore derivative in nature. The parties in this case and the related cases fully briefed and argued this issue prior to the court issuing the *Fairholme II* decision. The court concluded in *Fairholme II* that Fannie and Freddie shareholders lack standing to pursue direct claims that are derivative in nature. Thereafter, the court solicited short supplemental briefs from plaintiffs and defendant regarding the applicability of the holdings in *Fairholme II* to this case. In their supplemental brief, plaintiffs suggest that their allegations are materially different from those asserted in *Fairholme* for purposes of standing, while defendant contends in its supplemental brief that there are no material differences. All of the parties’ arguments are addressed below.

**A. Plaintiffs’ allegations are not materially different from the allegations in *Fairholme*.**

As an initial matter, plaintiffs contend that their allegations are materially different from those advanced in *Fairholme* in two respects, such that the standing inquiry would be affected. Plaintiffs first argue that the type of harm they have suffered and the type of relief they have requested distinguish their claims from the direct claims in *Fairholme*. In essence, plaintiffs attempt to distinguish what they

characterize as the *Fairholme* plaintiffs' allegation of the expropriation of the Enterprises' assets from their allegation of the expropriation of their economic interests. As defendant points out, however, the direct claims in *Fairholme* and the claims in this case are virtually indistinguishable in nature. All four counts of the amended complaint in this case mirror, in every essential way, the direct takings, illegal-exaction, fiduciary duty, and breach-of-implied-contract claims in *Fairholme*. Expropriation of the shareholders' economic interests was alleged in *Fairholme*, just as it is alleged in the first amended complaint in this case. Compare *Fairholme II*, 147 Fed. Cl. at 20, 46–47, with 1st Am. Compl. ¶¶ 95, 112–114. Thus, the standing analysis in *Fairholme II* is fully applicable to the claims presented here.

Plaintiffs next invoke their reliance on the allegation of the existence of a “control group,” formed by Treasury and the FHFA-C, that dominated the Enterprises and injured them. In their view, this factual distinction in their amended complaint is significant because it was not discussed in *Fairholme II*. Plaintiffs fail to explain, however, how this factual distinction gives them standing to bring their claims. Plaintiffs apparently infer a logical connection between a control group of shareholders and a controlling shareholder, but the connection is not explained in a way that is helpful to the court. Indeed, in their supplemental brief plaintiffs cite primarily to a section of their opposition brief that does not address the topic of standing at all. If plaintiffs wished to advance a standing argument that specifically relied on the state law concept of a control group of shareholders and cases discussing such a

phenomenon, no such argument was made in their opposition brief. Thus, any such standing argument that plaintiffs may be attempting to make in their supplemental brief, to the extent that one could be discerned, is waived as untimely.<sup>20</sup> *See Ironclad/EEI*, 78 Fed. Cl. at 358.

**B. Plaintiffs' claims actually belong to the Enterprises.**

Having determined that plaintiffs' allegations do not differ materially from those advanced in *Fairholme*, the court turns to defendant's contention that plaintiffs lack standing to litigate their claims. Defendant's standing argument is premised on its assertion that plaintiffs' claims actually belong to the Enterprises—and are therefore derivative in nature—because, to prevail, plaintiffs would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises. Plaintiffs counter that they assert direct claims because the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises' capital structure to plaintiffs' detriment, which renders the claims for such conduct both direct and derivative under the dual-nature exception.<sup>21</sup>

---

<sup>20</sup> Even if this argument were not waived, the court agrees with defendant that the control group scenario alleged by plaintiffs also fails to satisfy the criteria for dual-natured claims that might provide standing to a shareholder plaintiff asserting direct claims. *See* Section V.B, *infra* (discussing the criteria for dual-natured claims).

<sup>21</sup> The plaintiffs in the related cases also asserted that their claims must be construed as direct claims to vindicate important federal policies if shareholders cannot assert derivative claims

Defendant replies that the Federal Circuit rejected the notion that a plaintiff states a direct claim by alleging it was targeted by the challenged action. Defendant also contends that the dual-nature exception is not applicable because Treasury was not a controlling shareholder, the Enterprises did not issue new shares, and the PSPA Amendments did not involve the reallocation of power.

Neither theory plaintiffs advance for why their claims are substantively direct, rather than derivative, is persuasive. First, it is of no import whether the government targeted shareholders with the PSPA Amendments. *See Starr*, 856 F.3d at 973 (noting that the plaintiffs did not “sufficiently explain why the Government’s subjective motivations are relevant to the inquiry into direct standing”). The direct-versus-derivative inquiry “turns on the plaintiff’s injury, not the defendant’s motive.” *Pagan v. Calderon*, 448 F.3d 16, 30 (1st Cir. 2006). Second, plaintiffs have not asserted claims that qualify as both direct and derivative based on the dual-nature exception. The Federal Circuit explained that, pursuant to this exception, shareholder claims may be both direct and derivative “when a ‘reduction in [the] economic value and voting power affected the minority stockholders uniquely . . . .’” *Starr*, 856 F.3d at 968 (quoting *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006)). Specifically, shareholder claims are both direct and derivative if

---

because of HERA. But as this court held in *Fairholme II*, the shareholders of the Enterprises, notwithstanding HERA, have standing to assert derivative claims because of the FHFA-C’s conflict of interest. 147 Fed. Cl. at 49–51.

“(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.”

*Id.* (quoting *Gentile*, 906 A.2d at 100). The exception does not apply here because Treasury was not a controlling shareholder at the time the PSPA Amendments were executed,<sup>22</sup> the PSPA Amendments did not involve the issuance of new shares, and shareholder voting power was not reallocated under the PSPA Amendments. It is not enough, contrary to plaintiffs’ contention, that the government allegedly exacted economic value from the other shareholders by rearranging the corporate structure. See *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016) (applying *Gentile* and holding a plaintiff does not state a direct claim under the dual-nature exception by pleading the “extraction of solely economic value from the minority by a controlling stockholder”). Because plaintiffs have not established that their claims are substantively direct in nature, they cannot demonstrate that they have standing to litigate those claims.

Plaintiffs fare no better if the court moves beyond its arguments for why their claims are substantively

---

<sup>22</sup> Treasury is not a controlling shareholder for the reasons set forth in Section IV.B.1, *supra*.

direct in nature. Federal law governs whether plaintiffs' claims are direct or derivative. *See Starr*, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. *Id.*; *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 (1991) (noting the "presumption that state law should be incorporated into federal common law"). Under Delaware law, the test for whether a shareholder's claim is derivative or direct depends on the answers to two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (en banc). "Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow." *Gentile*, 906 A.2d at 99, *discussed in Starr*, 856 F.3d at 965. Such claims are derivative even "though the overpayment may diminish the value of the corporation's stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend." *Protas v. Cavanagh*, No. CIV.A. 6555-VCG, 2012 WL 1580969, at \*6 (Del. Ch. May 4, 2012); *see also Hometown Fin. Inc. v. United States*, 56 Fed. Cl. 477, 486 (2003) ("[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to

nothing more than a diminution in stock value or a loss of dividends.”).

Plaintiffs focus on the expropriation of the Enterprises’ assets via compulsory payments of all profits. The gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury. Regardless of plaintiffs’ label (direct) or theory (taking, illegal exaction, breach of fiduciary duty, or breach of implied contract) for their claims, the claims are substantively derivative in nature because they are premised on allegations of overpayment.<sup>23</sup> See *Gentile*, 906 A.2d at 99; see also *Roberts*, 889 F.3d at 409 (explaining that the plaintiffs asserted “classic derivative claims” when they alleged that “the [PSPA Amendments] illegally dissipated corporate assets by transferring them to Treasury”). Plaintiffs cannot transform their substantively derivative claims into direct claims by

---

<sup>23</sup> Plaintiffs would remain unsuccessful if their allegations of waste and mismanagement (styled as self dealing, overreach, or abuse of discretion) were construed to be indicative of some action other than overpayment. Any claims premised on waste and mismanagement are derivative in nature. *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) (noting that “mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature”). Plaintiffs’ claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. See *Hometown*, 56 Fed. Cl. at 486 (stock prices); *In re Straight Path Commc’ns Inc. Consol. S’holder Litig.*, No. CV 2017-0486-SG, 2017 WL 5565264, at \*4 (Del. Ch. Nov. 20, 2017) (“Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . .”).

merely alleging that, as a result of overpayments, they were deprived of their stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiffs' purported "harms are 'merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.'" *Protas*, 2012 WL 1580969, at \*6 (quoting *Gentile*, 906 A.2d at 99); *see also Agostino v. Hicks*, 845 A.2d 1110, 1122 (Del. Ch. 2004) ("[T]he inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation."). Because plaintiffs' claims are derivative in nature, plaintiffs lack standing to pursue those claims on their own behalf.

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

Plaintiffs, while acknowledging that they assert only direct claims,<sup>24</sup> attempt to avoid a dismissal of those claims for lack of standing by contending that "[e]ven if [their] direct claims were deemed derivative, they still may assert them, under circuit precedent, because the [FHFA-C] as conservator has a manifest

---

<sup>24</sup> Indeed, there is no dispute that the four claims plaintiffs assert in their amended complaint are direct claims. In each count plaintiffs emphasize that the harm to plaintiffs is direct. 1st Am. Compl. ¶¶ 115, 119, 125, 141. In addition, the relief requested by plaintiffs is for monetary relief payable to them, not to the Enterprises. *Id.* at 48; *see also* Pls.' Suppl. Br. on Outstanding Mot. to Dismiss 3–4 (arguing that payments to the Enterprises would be of no use to plaintiffs). Finally, the amended complaint contains a statement that plaintiffs' claims are direct in nature. *See* 1st Am. Compl. ¶ 109 ("[A]ny claim raised by Owl Creek that might be considered derivative on behalf of the Company is in fact direct, on behalf of Owl Creek itself.").



conflict of interest.” Pls.’ Corrected Combined Opp’n to Def.’s Omnibus Mot. to Dismiss 39. The precedent upon which plaintiffs rely is the Federal Circuit’s decision in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999).

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

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

As for plaintiffs’ suggestion that their direct claims could be deemed derivative, they identify no authority for that recharacterization of their claims, even though they had the opportunity to do so in their opposition brief and their supplemental brief. The court finds plaintiffs’ “direct claims deemed derivative” argument, Pls.’ Suppl. Br. on Outstanding

Mot. to Dismiss 5 (emphasis removed), to be unsupported by authority and unpersuasive for the purpose of establishing plaintiffs' standing to bring the claims in their amended complaint.<sup>25</sup>

**D. Plaintiffs' standing to bring direct claims  
is not established by another holding in  
*First Hartford*.**

Finally, the court addresses an assertion in plaintiffs' opposition brief that was not explicitly addressed in *Fairholme II*. Only one sentence of that sixty-page brief was devoted to the following contention included among plaintiffs' standing arguments: "[T]he Federal Circuit has repeatedly recognized a direct claim where a shareholder alleged deprivation of a contingent property interest in a bank." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 38 (citing *First Hartford*, 194 F.3d at 1296; *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 957 n.2 (Fed. Cir. 1992)). Defendant, in support of its challenge to plaintiffs' standing to bring their claims, clearly relied on more recent precedent, the Federal Circuit's decision in *Starr*, to argue that plaintiffs' claims were derivative claims, not direct claims. Plaintiffs, notwithstanding their citation to *First Hartford* and a footnote in a case discussed in *First Hartford*, did not attempt, in any meaningful way, to explain why *Starr* should not be applied and followed in this case. Because plaintiffs' reliance on *First Hartford* as support for a shareholder's standing to bring direct claims is

---

<sup>25</sup> As defendant notes, claims brought on behalf of the Enterprises are asserted in numerous shareholder derivative claims in these related cases.

cursory and undeveloped, the court is within its discretion to deem this argument waived. See *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (noting that the court has discretion on whether to consider undeveloped arguments).

Even if this argument were not waived, the Federal Circuit's *Starr* decision remains the binding precedent most on point. In *Starr*, the distinction between direct and derivative claims brought by shareholders is the focus of the Federal Circuit's standing analysis. 856 F.3d at 963–73. Just as here, the plaintiffs brought takings and illegal-exaction claims related to a government intervention, during a financial crisis, affecting the future of a corporation in which they owned shares. *Id.* at 958–61. *Starr* provides the test for determining whether such claims are direct or derivative in nature and requires that nominally direct claims—that are actually derivative claims—be dismissed for lack of standing. *Id.* at 973.

In the face of this binding precedent, the court cannot conclude that the holding in *First Hartford*, which concerns direct Fifth Amendment takings claims, is more relevant. It is true that in *First Hartford* shareholders of a bank in receivership could pursue their takings claims as direct claims against the United States. 194 F.3d at 1287. However, *First Hartford* does not address the distinction between direct and derivative claims. When faced with binding precedent that addresses a crucial distinction, such as *Starr*, and one that does not, such as *First Hartford*, the court follows the precedent most on point. Cf. *Union Elec. Co. v. United States*, 363 F.3d 1292, 1297 (Fed. Cir. 2004) (“[W]e have repeatedly

held that the disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue.” (citing *Boeing N. Am., Inc. v. Roche*, 298 F.3d 1274, 1282 (Fed. Cir. 2002))).

In sum, plaintiffs have not established that they have standing to litigate their claims because they do not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court dismisses plaintiffs’ claims on standing grounds to the extent that it has subject-matter jurisdiction over those claims.<sup>26</sup>

## VI. CONCLUSION

For the reasons stated above, the court **GRANTS** defendant’s motion to dismiss and **DISMISSES** plaintiffs’ complaint because the court lacks jurisdiction to entertain their breach of fiduciary duty and implied-in-fact-contract claims, and plaintiffs lack standing to pursue any of their claims. The clerk shall enter judgment accordingly. No costs.

Furthermore, because all of plaintiffs’ claims are dismissed and the parties have agreed that the court’s consideration of plaintiffs’ motion to amend the complaint should be deferred pending the resolution of any appeals, the court **DENIES** plaintiffs’ motion

---

<sup>26</sup> As explained above, the court lacks jurisdiction over plaintiffs’ claims for breach of fiduciary duty and breach of implied contract. *See supra* Sections IV.B.1 (fiduciary duty), IV.C (contract). In addition, because all of plaintiffs’ claims must be dismissed for lack of standing, the court need not reach defendant’s remaining arguments that these claims should be dismissed for failure to state a claim upon which relief can be granted.

for leave to amend their complaint to add a plaintiff, filed February 19, 2020, with leave to refile the motion should the court's ruling on defendant's motion be overturned.

In addition, the court's order of March 2, 2020, requiring the filing of a status report by the parties, is **SUPERSEDED**, as no status report is required in these circumstances

**IT IS SO ORDERED.**

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

---

APPENDIX D

---

In the United States Court of Federal Claims

No. 18-370C

(Filed: June 8, 2020)

\*\*\*\*\*

APPALOOSA	* Motion to Dismiss;
INVESTMENT LIMITED	* RCFC 12(b)(1);
PARTNERSHIP I et al.,	* RCFC 12(b)(6);
Plaintiffs,	* Jurisdiction;
v.	* Standing; Direct
THE UNITED STATES,	* Claims;
Defendant.	* Instrumentalities;
	* Coercion; Agent;
	* Conservators;
	* Conflict of Interest;
	* Third-Party
	* Beneficiaries; Stock;
	* Shareholders;
	* Fannie; Freddie;
	* FHFA

\*\*\*\*\*

*Lawrence D. Rosenberg*, Washington, DC, for  
plaintiffs.

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

**OPINION AND ORDER****SWEENEY, Chief Judge**

Plaintiffs in this case challenge the actions of the United States during the conservatorships of the Federal National Mortgage Association (“Fannie”) and the Federal Home Loan Mortgage Corporation (“Freddie”). Specifically, plaintiffs take issue with the conservator for Fannie and Freddie (collectively, the “Enterprises”) amending a funding agreement between the Enterprises and the United States Department of the Treasury (“Treasury”). Based on the revisions to that agreement, plaintiffs seek the return of money illegally exacted, damages for breach of contract and breach of fiduciary duty, and compensation for a taking pursuant to the Fifth Amendment to the United States Constitution (“Constitution”). Defendant moves to dismiss plaintiffs’ amended complaint, arguing that the court lacks subject-matter jurisdiction over plaintiffs’ claims, plaintiffs lack standing to pursue their claims, and plaintiffs fail to state a claim upon which relief may be granted. For the reasons stated below, the court grants defendant’s motion to dismiss.

**I. BACKGROUND****A. The Enterprises are private companies that are under the control of a conservator.****1. The Enterprises operated independently before the financial crisis.**

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities that

are sold to investors.<sup>1</sup> 2d Am. Compl. ¶¶ 19–20; *Fasirholme II*, 147 Fed. Cl. at 15. Congress chartered Fannie in 1938 and established Freddie in 1970. 2d Am. Compl. ¶¶ 19–20. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. *Id.* Freddie is organized under Virginia law, and Fannie is organized under Delaware law. *Id.* The Enterprises issued their own common and preferred stock. *Id.* ¶ 22. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. *Fairholme II*, 147 Fed. Cl. at 15. Those owning preferred stock, including plaintiffs in this suit, acquired the right to receive dividends and a liquidation preference. 2d Am. Compl. ¶ 22.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. *Id.* ¶ 23. Although the Enterprises began recording losses in 2007, they were stable and adequately capitalized. *Id.* ¶¶ 25–26. Otherwise stated, the Enterprises were not in financial distress or otherwise at risk of insolvency. *Id.*

---

<sup>1</sup> This background section is a less comprehensive version of the court’s recitation of facts in a related case, *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1 (2019) (“*Fairholme I*”), *motion to certify interlocutory appeal granted*, 147 Fed. Cl. 126 (2020).



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

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (“HERA”), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency (“FHFA”) and provided it with supervisory and regulatory authority over the Enterprises. *See* 12 U.S.C. § 4511(a)–(b) (2018).<sup>2</sup> Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator (“FHFA-C”) for each Enterprise to reorganize, rehabilitate, or wind up its affairs.<sup>3</sup> *Id.* § 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its obligations. *Id.* § 4617(a)(3).<sup>4</sup> The conservator, once appointed, functions independently; it is not “subject to the direction or supervision of any

---

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

<sup>3</sup> To avoid any ambiguity, the court reiterates that it is using “FHFA” to refer to the agency acting in its regulatory role and “FHFA-C” when discussing the agency acting as a conservator.

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

other agency of the United States or any State in the exercise of [its] rights, powers, and privileges . . . . *Id.* § 4617(a)(7).

Congress also delineated the scope of the FHFA-C's powers in HERA. *See generally id.* § 4617. As soon as it is appointed, the FHFA-C “immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . . .” *Id.* § 4617(b)(2)(A). Congress also conferred on the conservator the power to “[o]perate the [Enterprise].” *Id.* § 4617(b)(2)(B). Pursuant to that power, the conservator “may,” among other things, “perform all functions of the [Enterprise],” “preserve and conserve the assets and property of the [Enterprise],” and “provide by contract for assistance in fulfilling any function . . . of the [conservator].” *Id.* The conservator “may” also “take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise].” *Id.* § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator “may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]” and “take any action authorized by [12 U.S.C. § 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA].” *Id.* § 4617(b)(2)(J). By describing the FHFA-C's role primarily in terms of what powers it “may” exercise, *see generally id.* § 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its

powers, *see United States v. Rodgers*, 461 U.S. 677, 706 (1983) (“The word ‘may,’ when used in a statute, usually implies some degree of discretion.”). Simply stated, the FHFA has “extraordinarily broad flexibility to carry out its role as conservator.” *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 606 (D.C. Cir. 2017) (“*Perry II*”), *cert. denied*, 138 S. Ct. 978 (2018).

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

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(*g*) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. *Id.* §§ 1455(*l*)(4), 1719(*g*)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the availability of mortgage finance, and protect taxpayers. *Id.* §§ 1455(*l*)(1)(B), 1719(*g*)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

- (i) The need for preferences or priorities regarding payments to the Government.
- (ii) Limits on maturity or disposition of obligations or securities to be purchased.
- (iii) The [Enterprise’s] plan for the orderly resumption of private market funding or capital market access.

- (iv) The probability of the [Enterprise] fulfilling the terms of any such obligation or other security, including repayment.
- (v) The need to maintain the [Enterprise's] status as a private shareholder-owned company.
- (vi) Restrictions on the use of [Enterprise] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

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

#### **4. The FHFA became the conservator for each Enterprise.**

Around the beginning of September 2008, the FHFA and Treasury sought to persuade each Enterprise's board of directors to consent to conservatorship. 2d Am. Compl. ¶ 36. The FHFA told each Enterprise's board that conservatorship would further the interests of the shareholders. *Id.* Around the same time, the FHFA made an offer to each board: consent to a conservatorship in exchange for the FHFA-C aiming to preserve and conserve the Enterprises' assets, attempting to restore the Enterprises to sound and solvent condition, and terminating the conservatorships when those goals were achieved. *Id.* ¶¶ 5, 7; *Fairholme II*, 147 Fed. Cl. at 17. Each Enterprise's board accepted that offer and consented to a conservatorship on September 6, 2008, with an understanding that the FHFA-C would operate in the aforementioned limited ways. *Fairholme II*, 147 Fed. Cl. at 17.

The conservatorships became effective on September 6, 2008, upon each Enterprise's board's

consent. 2d Am. Compl. ¶¶ 36–37; *see also* 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when “[t]he [Enterprise], by resolution of its board of directors or its shareholders or members, consents to the appointment”).

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

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement (“PSPA”) with Treasury for each Enterprise. 2d Am. Compl. ¶ 6. Treasury entered into the agreements pursuant to its authority under HERA to buy the Enterprises’ securities. *Id.* ¶¶ 6, 38. Under the PSPAs, Treasury committed to provide up to \$100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. *Id.* ¶ 38. If an Enterprise’s liabilities exceeded its assets, then the Enterprise could draw on Treasury’s funding commitment in an amount equal to the difference between the Enterprise’s liabilities and assets. *Fairholme II*, 147 Fed. Cl. at 17.

In return for Treasury’s funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their respective common stock at a nominal price. 2d Am. Compl. ¶ 38. Treasury’s preferred stock had an initial liquidation preference of \$1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury’s funding commitment. *Id.* In the event of a liquidation, Treasury was entitled to recover the full liquidation

value of its shares before any other shareholder would receive compensation. *Id.* Second, Treasury bargained for the right to a quarterly cash dividend that would be equal, per annum, to 10% of its liquidation preference. *Id.* An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. *Id.* Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. *Id.* ¶¶ 38, 44. Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. *Id.* ¶ 39.

The FHFA-C and Treasury amended each Enterprise's PSPA on May 6, 2009, to increase Treasury's funding commitment to each Enterprise from \$100 billion to \$200 billion. *Id.* ¶ 46. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed \$200 billion. *Id.* ¶ 47.

## **6. The Enterprises' finances improved during their conservatorships.**

In the early stages of the conservatorships, each Enterprise's net worth decreased as it reported losses. *Fairholme II*, 147 Fed. Cl. at 18. Some of the losses resulted from the FHFA-C writing down the value of

deferred tax assets.<sup>5</sup> *Id.* Notwithstanding those on-paper losses, as of late 2009, Fannie had drawn only \$60 billion from Treasury, and Freddie had only drawn \$51 billion. 2d Am. Compl. ¶ 48.

By 2011 and into 2012, the Enterprises' financial outlooks were promising. In addition to an improvement in the housing market, the Enterprises had improved their financial performance. *Id.* ¶ 53. They were positioned to further improve their financial condition by revising their valuations of deferred tax assets because of growing profits, and by increasing their earnings due to reduced credit losses. *Id.* The FHFA-C and Treasury were aware of those forthcoming changes and the Enterprises' improving outlooks. *Id.* ¶ 8. In August 2012, Treasury and FHFA-C knew that the Enterprises would soon experience improved profitability and received projections reflecting that the Enterprises would have positive comprehensive income in 2012. *Id.* ¶¶ 54–55. Otherwise stated, the FHFA-C and Treasury knew, by early August 2012, that the Enterprises were poised to generate profits in excess of their respective dividend obligations to Treasury. *Id.* ¶ 53.

#### **7. Treasury and the FHFA-C agreed to a third amendment to the PSPAs.**

At an unspecified time prior to August 2012, Treasury and the FHFA-C began considering a third

---

<sup>5</sup> A deferred tax asset is an asset that may be used to offset future tax liability. *Fairholme II*, 147 Fed. Cl. at 18 n.4. A company must write down the value of that deferred asset if it is unlikely to be used to offset future taxable profits. *Id.* This write down occurs, for example, if a company predicts it will not be profitable in the future. *Id.*

amendment to each PSPA. Treasury was the driving force behind the initiative to amend the PSPAs' terms. *Id.* ¶¶ 59, 71. Indeed, an FHFA official reported in early August 2012 that Treasury was making a “renewed push” to implement a new amendment. *Id.* ¶ 67 (quoting the FHFA official). The FHFA-C learned of the proposed changes before the Enterprises; Treasury informed the Enterprises that the new terms were forthcoming and announced the changes to the Enterprises. *Id.* ¶ 69. Treasury officials who were involved with the process do not recall Treasury making any backup or contingency plans in the event that the FHFA-C rejected the proposed terms. *Fairholme II*, 147 Fed. Cl. at 19. The FHFA-C accepted the changes without advocating for different terms. *Id.*

Treasury and the FHFA-C decided to announce the changed terms in mid-August 2012 because, according to Treasury, the Enterprises would be reporting earnings exceeding their dividend obligation at the beginning of that month. *Id.* On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA (“PSPA Amendment”). 2d Am. Compl. ¶¶ 2, 9, 56. A key component of the amended PSPAs is the requirement—referred to here as the “Net Worth Sweep”—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise’s net worth (except for a small capital reserve amount) rather than a dividend based on a set percentage of the liquidation preference.<sup>6</sup> *Id.* ¶ 56.

---

<sup>6</sup> The capital reserve for each Enterprise started at \$3 billion and was set to decrease to \$0 by January 2018, but the Enterprises and Treasury agreed in December 2017 to reset the



Additionally, under the amended PSPAs, the Enterprises are not obligated to pay a periodic commitment fee. *Id.* ¶ 67.

**a. Treasury wanted to ensure that it benefited from the new terms.**

With the PSPAs, Treasury sought to secure a more beneficial arrangement for itself, as a representative for taxpayers. During the lead-up to the PSPA Amendments, a Treasury official acknowledged in an internal communication that the government had resolved to “ensure existing common equity holders will not have access to any positive earnings from the [Enterprises] in the future.” *Id.* ¶ 59 (emphasis removed) (quoting the document). Treasury recognized its goal of obtaining all of the Enterprises’ profits by executing the PSPA Amendments; it intended to take “every dollar of earnings that [the Enterprises] generate[] . . . to benefit taxpayers.” *Id.* ¶ 10 (quoting a Treasury announcement).

**b. The FHFA-C agreed to changes that benefit Treasury.**

For its part, the FHFA-C was operating under the belief that Treasury would benefit from the PSPA Amendments. The FHFA-C prioritized Treasury’s interests over the fate of the Enterprises and the interests of their shareholders. *Id.* ¶ 79. Mel Watt—a former FHFA Director—commented at the time that he did not “lay awake at night worrying what’s fair to the shareholders.” *Id.* (quoting an interview).

---

capital reserve amount to \$3 billion in the first quarter of 2018. 2d Am. Compl. ¶ 56; *Fairholme II*, 147 Fed. Cl. at 19 n.5.

**c. Treasury and the FHFA understood that the PSPA Amendments would not facilitate the Enterprises exiting conservatorship.**

Treasury was aware that the new terms of the PSPAs were not conducive to the Enterprises exiting conservatorship. Treasury acknowledged that its goal was to facilitate the “wind down” of the Enterprises. *Id.* ¶ 59 (quoting a Treasury report). At the time of the PSPA Amendments, Treasury explained that the new deal would ensure that the Enterprises “will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form.” *Id.* ¶ 72 (emphasis removed) (quoting Treasury press release).

The FHFA shared a similar sentiment. The FHFA’s former Acting Director, Edward DeMarco, testified before the United States Senate that the PSPA Amendments “reinforce the notion that the [Enterprises] will not be building capital as a potential step to regaining their former corporate status.” *Id.* ¶ 79 (emphasis removed) (quoting the testimony). Indeed, the FHFA explained to Congress that its vision for the future included a housing industry without Fannie and Freddie. *Fairholme II*, 147 Fed. Cl. at 20.

**d. Treasury has benefited from the PSPA Amendments at the expense of the Enterprises and other shareholders.**

There are four significant effects that flowed from the PSPA Amendments. First, plaintiffs lost their economic interests in the Enterprises because, under the new terms, private shareholders can never receive dividends or liquidation distributions. 2d Am. Compl.

¶¶ 2, 9, 91–92. Second, Treasury acquired plaintiffs’ economic interests in the Enterprises because Treasury now possesses “the entire value” of the Enterprises. *Id.* ¶ 96. Third, Treasury reaped a windfall of \$128.9 billion in comparison to what it would have received absent changes to the PSPAs. *Id.* ¶¶ 88–89 (alleging that the Enterprises paid Treasury \$223.6 billion under the PSPA Amendments but would have only paid Treasury \$94.7 billion under the previous terms). Fourth, the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink of insolvency. *Id.* ¶¶ 57, 90.

**8. Treasury and the FHFA are committed to ending the conservatorships.**

On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the Treasury Secretary to develop, “as soon as practicable,” a plan for “[e]nding the conservatorships of the [Enterprises] upon the completion of specified reforms . . . .”<sup>7</sup> Memorandum on Federal Housing

---

<sup>7</sup> The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source, the Federal Register. *See Murakami v. United States*, 46 Fed. Cl. 731, 739 (2000) (noting that the court may take judicial notice of government documents), *aff’d*, 398 F.3d 1342, 1354–55 (Fed. Cir. 2005); *see also Democracy Forward Found. v. White House Office of Am. Innovation*, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) (“[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum.”). *See generally* Fed. R. Evid. 201 (discussing judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the court may consider facts derived from sources subject to judicial

Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must include proposals for “[s]etting the conditions necessary for the termination of the conservatorships” and outlined some of those conditions. *Id.* at 12,480. Subsequently, Treasury issued a plan in which it advocated for “begin[ning] the process of ending the [Enterprises’] conservatorships.”<sup>8</sup> U.S. Dep’t of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), <https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf> [<https://perma.cc/RGH8-N385>]; *accord id.* at 26 (“It is, after 11 years, time to bring the conservatorships to an end.”). As part of the plan to end the conservatorships, Treasury proposed that it and the FHFA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. *Id.* at 26–27.

The FHFA shares Treasury’s goals with respect to the conservatorships. Mark Calabria, the current FHFA Director, testified during his confirmation hearing that he wanted to end the conservatorships.<sup>9</sup> 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony).

---

notice without converting the motion into one for summary judgment. *Sebastian v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

<sup>8</sup> The court takes judicial notice of Treasury’s reform plan because it is a government record available from a reliable source, Treasury’s website. *See supra* note 7.

<sup>9</sup> The court takes judicial notice of the relevant testimony because the statements are recorded in government documents. *See supra* note 7.

*See generally Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 116th Cong. 10–40, 74–75, 148–85 (2019) [hereinafter *Calabria Testimony*] (documenting Mr. Calabria’s testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that each Enterprise retains. *Calabria Testimony, supra*, at 150; *see also id.* at 25 (“I support the idea of having significantly more capital at the [Enterprises].”).

#### **B. Plaintiffs own Fannie and Freddie stock.**

There are four plaintiffs in this case: Appaloosa Investment L.P. I; Palomino Fund Ltd.; Palomino Master Ltd.; and Azteca Partners LLC (collectively, “Appaloosa”). The first plaintiff is a Delaware limited partnership; the second and third plaintiffs are British Virgin Islands companies; and the fourth plaintiff is a Delaware limited liability company. 2d Am. Compl. ¶¶ 13–16. Plaintiffs, or entities whose investment interests have passed to plaintiffs, owned Fannie preferred stock and Freddie preferred stock at the time of the Net Worth Sweep. *Id.* The shares owned by these plaintiffs or their predecessors in interest were primarily purchased after the conservatorships were established in 2008. Pls.’ Corrected Combined Opp’n to Def.’s Omnibus Mot. to Dismiss 1.

### **II. PROCEDURAL HISTORY**

Plaintiffs filed their complaint on March 8, 2018. This case was coordinated with similar, related cases

assigned to the undersigned judge.<sup>10</sup> Plaintiffs filed their second amended complaint in this case on August 16, 2018. In their amended complaint, plaintiffs present four claims. Plaintiffs first assert that the Net Worth Sweep constitutes a Fifth Amendment taking (count I) of their economic interests in their stock. Plaintiffs next assert, in the alternative, that the Net Worth Sweep constitutes an illegal exaction (count II) of those same economic interests because the (1) FHFA was operating unconstitutionally and (2) FHFA-C and Treasury exceeded their statutory authority when they approved the PSPA Amendments. Plaintiffs also plead a breach-of-fiduciary-duty claim (“fiduciary duty claim”) (count III) premised on the Net Worth Sweep being unreasonable, arbitrary, and contrary to the duty owed to the Appaloosa shareholders. Additionally, plaintiffs assert a breach-of-implied-contract claim (count IV) based on a purported agreement by which the Enterprises consented to the conservatorship in exchange for the FHFA agreeing to preserve the Enterprises’ assets with the goal of making them safe and solvent. Specifically, plaintiffs assert that each dividend payment under the Net Worth Sweep constitutes a breach because it depletes the Enterprises’ assets in a manner that undermines the goals of conservatorship.

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case

---

<sup>10</sup> A fuller recitation of the procedural history of this case and related cases is provided in *Fairholme II*, 147 Fed. Cl. at 21–23.

and eleven related cases before the undersigned.<sup>11</sup> The plaintiffs in each of the twelve cases filed a response brief on their respective dockets; some of the plaintiffs relied on a joint brief filed in six of the cases, others, as is the case here, filed a joint brief for five of the cases in which the plaintiffs are all represented by the same counsel. Defendant filed its omnibus reply brief in each of the cases on May 6, 2019. The parties have fully briefed defendant's motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiffs in this case have adopted the favorable arguments made by the plaintiffs in the related cases to the extent that such arguments are relevant.<sup>12</sup> Defendant's motion to dismiss is now ripe for adjudication.

---

<sup>11</sup> The eleven related cases are *Fairholme Funds, Inc. v. United States*, No. 13-465C; *Washington Federal v. United States*, No. 13-385C; *Cacciapalle v. United States*, No. 13-466C; *Fisher v. United States*, No. 13-608C; *Arrowood Indemnity Company v. United States*, No. 13-698C; *Reid v. United States*, No. 14-152C; *Rafter v. United States*, No. 14-740C; *Owl Creek Asia I, L.P. v. United States*, No. 18-281C; *Akanthos Opportunity Master Fund, L.P. v. United States*, No. 18-369C; *CSS, LLC v. United States*, No. 18-371C; and *Mason Capital L.P. v. United States*, No. 18-529C.

<sup>12</sup> The court addresses in this opinion some arguments that were made primarily by the plaintiffs in the related cases to provide context for the resolution of defendant's motion to dismiss. In addition, to the extent that any of plaintiffs' less-developed arguments are not discussed in this opinion, the court found such arguments to be unpersuasive.

### III. STANDARD OF REVIEW

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

A claim that survives a jurisdictional challenge remains subject to dismissal under RCFC 12(b)(6) if it does not provide a basis for the court to grant relief. *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002) (“A motion to dismiss . . . for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy.”). To survive a motion to dismiss under RCFC 12(b)(6), a plaintiff must include in the complaint “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*



*Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Indeed, “[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 814–19 (1982).

#### IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a “threshold matter.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998). Subject-matter jurisdiction cannot be waived or forfeited because it “involves a court’s power to hear a case.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Ex parte McCardle*, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it is “an inflexible matter that must be considered before proceeding to evaluate the merits of a case.” *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006); *accord K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1004–05 (Fed. Cir. 2015). Either party, or the court *sua sponte*, may challenge the court’s subject-matter jurisdiction at any time. *Arbaugh*, 546 U.S. at 506; *see also Jeun v. United States*, 128 Fed. Cl. 203, 209–10 (2016) (collecting cases).

The ability of the United States Court of Federal Claims (“Court of Federal Claims”) to entertain suits against the United States is limited. “The United States, as sovereign, is immune from suit save as it

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

Defendant challenges the court’s jurisdiction to entertain plaintiffs’ claims on a number of bases. Specifically, defendant argues that plaintiffs have not asserted claims against the United States and that the court lacks jurisdiction over the subject matter of certain claims. The court addresses these contentions in turn.<sup>13</sup>

---

<sup>13</sup> In *Fairholme II*, the court addressed additional jurisdictional concerns that were not raised or are not implicated

**A. Plaintiffs have asserted claims  
against the United States.**

The court first considers whether plaintiffs have asserted claims against the United States, a necessary element of jurisdiction in the Court of Federal Claims. As set forth in their amended complaint, all of plaintiffs' claims are premised on actions taken by the FHFA-C and Treasury. Defendant argues that the court lacks jurisdiction to consider any claims premised on the FHFA-C's or Treasury's conduct. In response, plaintiffs contend that they have asserted claims against the government because (1) Treasury was involved in the challenged conduct, (2) the FHFA-C was coerced by the government, (3) the FHFA-C was the government's agent, and (4) the FHFA-C, in collaboration with Treasury, is a government actor. The court addresses each contention in turn.

**1. The court cannot exercise jurisdiction based on allegations of Treasury's involvement.**

Plaintiffs initially argue that the court has jurisdiction over their Fifth Amendment takings and illegal-exaction claims because they have alleged the involvement of Treasury—indisputably a part of the federal government—in the action underlying these claims, i.e., the Net Worth Sweep. Defendant counters that Treasury alone could not have implemented the PSPA Amendments, and Treasury's

---

in this case. *See generally* 147 Fed. Cl. at 24–25 (rejecting defendant's contention that the claims of the *Fairholme* plaintiffs were barred by 28 U.S.C. § 1500), 34–37 (rejecting the contention of a putative intervenor that the Court of Federal Claims lacks jurisdiction to entertain Fifth Amendment takings claims).

role as a counterparty to the voluntary agreement with the Enterprises is not sufficient to establish jurisdiction over plaintiffs' takings claim. Defendant further asserts that the court's order allowing jurisdictional discovery reflects that plaintiffs' allegations concerning Treasury alone are insufficient to confer jurisdiction.

The parties' dispute on the import of allegations concerning Treasury is ultimately immaterial in light of the court's determination, explained below, that the FHFA-C—the other party involved in the PSPA Amendments—is the United States. Nonetheless, the court notes, as defendant asserts, that it implicitly acknowledged in its February 26, 2014 discovery order, issued in *Fairholme* and related cases, that the allegations concerning Treasury alone were insufficient to support jurisdiction. In that order, the court permitted the plaintiffs in those related cases to conduct fact discovery on whether the FHFA-C was “the ‘United States’ for purposes of the Tucker Act.” *Fairholme Funds, Inc. v. United States*, 114 Fed. Cl. 718, 721 (2014). The aforementioned discovery would have been unnecessary (and unwarranted) if, as plaintiffs assert here, the court has jurisdiction over plaintiffs' claims based on their allegations concerning Treasury.

## **2. The FHFA-C was not coerced into approving the PSPA Amendments.**

Plaintiffs also argue that the FHFA-C is the United States because the FHFA-C was coerced into approving the PSPA Amendments by Treasury. Defendant counters that the FHFA-C was not coerced by Treasury because the FHFA-C had a choice of

whether to accept or reject the PSPA Amendments. Defendant asserts that there is no coercion if a party has a choice, regardless of how difficult refusal of a particular option may be. Indeed, defendant contends that plaintiffs fail to proffer any allegations that Treasury required the FHFA-C to enter into the agreements against its will. Defendant further asserts that other courts have declined to conclude that the FHFA-C felt compelled to follow Treasury based on allegations that Treasury invented the amendment concept or led the process.

**a. The court has jurisdiction over claims based on actions that resulted from government coercion.**

The court has jurisdiction over claims premised on the FHFA-C's actions if Treasury's "influence over the" FHFA-C "was coercive rather than merely persuasive." *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154 (Fed. Cir. 2014). The line between coercion and persuasion "is highly fact-specific." *Id.* Precedent from the United States Court of Appeals for the Federal Circuit ("Federal Circuit") frames the contours of the inquiry. In *Langenegger v. United States*, the plaintiffs pleaded that the United States coerced El Salvador by threatening to withhold financial and military assistance unless El Salvador passed legislation expropriating private property. 756 F.2d 1565, 1567 (Fed. Cir. 1985). The Federal Circuit disagreed with the plaintiffs' characterization of the threats because "[d]iplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of [coercion], however difficult refusal may be as a practical matter." *Id.* at 1572. Similarly, the

Federal Circuit concluded in *B & G Enterprises, Ltd. v. United States* that California was not coerced into enacting restrictions on smoking, notwithstanding the federal government conditioning grants on states enacting such limits. 220 F.3d 1318, 1321, 1325 (Fed. Cir. 2000); *see also A & D Auto*, 748 F.3d at 1155 (explaining that “coercion was not established” in *B & G*). The court explained that “it was California’s decision to create [the] restrictions^] . . . Congress may have provided the bait, but California decided to bite.” *B & G*, 220 F.3d at 1325. In *A & D Auto*, the Federal Circuit addressed coercion in the context of the government allegedly conditioning vital financial assistance to bankrupt automobile companies on those companies terminating some of their franchise agreements. 748 F.3d at 1145. Unable to resolve the issue due to gaps in the record, the court noted in dicta that a relevant consideration was “whether the government financing was essential to the companies.” *Id.*

A common thread runs through the Federal Circuit’s decisions: the importance of choice. A nonfederal actor is not coerced when it can choose to go against the wishes of the United States, even if doing so will cause significant hardships, *Langenegger*, 756 F.2d at 1567, or result in a loss of prospective benefits, *id.*; *B & G*, 220 F.3d at 1325. But there is no choice, in any meaningful sense, when there is only one realistic option. *A & D Auto*, 748 F.3d at 1145 (noting the importance of considering whether the companies could survive without accepting the government’s offer); *cf. Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) (noting that, with respect to Congress’s spending powers, “the

federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions”). Put differently, the nonfederal actor must make a voluntary decision, which it cannot do if there is only one realistic option. *See BMR Gold Corp. v. United States*, 41 Fed. Cl. 277, 282 (1998) (finding that the “the necessary element of coerciveness” for a taking was missing because the plaintiff granted the military permission to cross his land); *accord Henn v. Nat’l Geographic Soc.*, 819 F.2d 824, 826 (7th Cir. 1987) (noting that hard choices remain voluntary when they are not akin to “Don Corleone’s ‘[m]ake him an offer he can’t refuse’”). In sum, the FHFA-C was not coerced if it voluntarily chose to enter into the PSPA Amendments.

**b. Plaintiffs have not established that  
Treasury coerced the FHFA-C into approving  
the PSPA Amendments.**

In support of their contention that Treasury coerced the FHFA-C into approving the PSPA Amendments, plaintiffs allege that Treasury proposed the terms of the amendments and used its influence over the FHFA-C to ensure compliance with Treasury’s wishes. Those allegations are not enough to establish coercion. First, given the Enterprises’ improving financial condition and Treasury’s existing funding commitment, the FHFA-C’s decision to execute the PSPA Amendments was voluntary because it could reject the deals without imperiling the Enterprises. The facts here, therefore, are diametrically opposed to the circumstances in *A & D Auto* that the Federal Circuit suggested may support coercion because the

automobile dealers faced insolvency if they did not accede to the financing terms. *See* 748 F.3d at 1145. Second, the FHFA-C's lack of protestation is informative. "[T]he very fact that FHFA[-C] itself [did] not br[ing] suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA[-C] was an independent, willing participant in its negotiations with the Treasury." *Robinson v. Fed. Hous. Fin. Agency*, 223 F. Supp. 3d 659, 668 (E.D. Ky. 2016), *aff'd*, 876 F.3d 220 (6th Cir. 2017). The court's conclusion is bolstered by the fact that another court has held that materially similar allegations to those at issue here did not "come close to a reasonable inference that [the] FHFA[-C] considered itself bound to do whatever Treasury ordered." *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) ("*Perry I*"), *aff'd in part, rev'd in part sub nom. Perry II*, 864 F.3d at 591. This court agrees with the reasoning in *Perry I*: the PSPA Amendments were executed by sophisticated parties, and many agreements arise from a party's proposal being accepted by the other party. *Id.* Plaintiffs have not established that the FHFA-C was coerced into approving the PSPA Amendments by Treasury.

### **3. The FHFA-C is not Treasury's agent.**

Plaintiffs further argue that the FHFA-C's actions are attributable to the United States because the FHFA-C is Treasury's agent. Defendant counters that plaintiffs have not pleaded an agency relationship because Treasury does not control the FHFA-C's operations. Indeed, defendant notes that Treasury is statutorily barred from exercising such control.



The United States is subject to claims in this court for the actions of a third party “if [that] party is acting as the government’s agent . . . .” *A & D Auto*, 748 F.3d at 1154. “An essential element of agency is the principal’s right to control the agent’s actions.” *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01 cmt. f (Am. Law. Inst. 2005)); accord *O’Neill v. Dep’t of Hous. & Urban Dev.*, 220 F.3d 1354, 1360 (Fed. Cir. 2000) (acknowledging that the common-law meaning of agency requires, among other things, that the principal has the right to control the agent’s conduct); see also *Preseault v. United States*, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (concluding that a state’s actions were attributable to the United States when the state acted pursuant to the Interstate Commerce Commission’s order); *Hendler v. United States*, 952 F.2d 1364, 1378–79 (Fed. Cir. 1991) (attributing a state’s actions to the United States when the state acted under authority flowing from an Environmental Protection Agency order). The facts, as alleged, do not reflect that Treasury controlled the FHFA-C’s actions because Congress explicitly precluded the FHFA-C from being subservient to another agency, 12 U.S.C. § 4617(a)(7) (providing that the FHFA-C cannot be subject to the “direction or supervision” of any other agency), and plaintiffs have not alleged facts indicating that Treasury exercised such control notwithstanding the statutory bar. Although the FHFA-C was required by the PSPAs to obtain Treasury’s approval for certain actions (e.g., issuing dividends), the PSPAs did not provide Treasury with the right to unilaterally order amendments. Moreover, plaintiffs describe an FHFA-C that made

decisions independently: Treasury sought to influence the opinions of the FHFA-C's senior officials; Treasury "push[ed]" for the PSPA Amendments; and the FHFA-C agreed to the PSPA Amendments. 2d Am. Compl. ¶¶ 2, 65, 67. Simply stated, plaintiffs have not alleged facts establishing that Treasury exercised the control over the FHFA-C that is necessary for an agency relationship.

**4. The FHFA-C is the United States because the FHFA-C retains the FHFA's governmental character.**

In addition, plaintiffs contend that the FHFA-C is itself a government actor.<sup>14</sup> Defendant disagrees. First, relying on *O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 412 U.S. 79 (1994), defendant argues that the FHFA-C is not the United States because the FHFA-C stands in the Enterprises' shoes. Specifically, defendant asserts that Congress's decision to have the FHFA-C succeed to the Enterprises' rights reflects that Congress intended that the FHFA-C step into the Enterprises' private shoes and shed its government character. Second, defendant argues that the FHFA-C's exercise of nontraditional conservatorship powers is immaterial because Congress can expand the conservator's role without transforming it into a government actor. Third, defendant argues that the Enterprises are not government instrumentalities—which means that the

---

<sup>14</sup> To determine whether this action is against the United States, the court need not reach plaintiffs' argument that Treasury and the FHFA-C formed a "control group." See Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 22–26.

FHFA did not step into the shoes of a government actor when it became the Enterprises' conservator—because the government does not retain permanent authority to appoint the Enterprises' directors. Defendant contends that the government only has temporary, albeit indefinite, control over the Enterprises because the conservatorships are not permanent.

In response, plaintiffs dispute the premise of defendant's argument that, pursuant to *O'Melveny*, the FHFA becomes the Enterprises when acting as conservator. Plaintiffs assert that *O'Melveny* does not concern whether an entity is the United States or, if the decision can be read as addressing that issue, is distinguishable because it concerns receivers or is limited to conservators exercising traditional conservator powers. Second, plaintiffs argue that the FHFA has not shed its government status, even if it has stepped into the Enterprises' shoes, when it acts as conservator. Specifically, plaintiffs assert that the FHFA-C retains the FHFA's government status because (1) the FHFA-C has acted beyond the traditional conservator powers and (2) Congress expressed its intention for that result by precluding the conservator from being subject to the supervision of "any *other* agency." 12 U.S.C. § 4617 (emphasis added). Third, plaintiffs argue that their claims are against the United States, even if the FHFA-C steps into the shoes of the Enterprises, because the Enterprises are government instrumentalities.

In short, the parties disagree over the government status of the FHFA-C. The FHFA is indisputably the United States, *see id.* § 4511(a) (establishing the FHFA as an "independent agency of the Federal

Government”), and so the only question is whether the FHFA sheds that status when it acts as conservator. In other jurisdictions, courts have held (with near unanimity) that the FHFA loses its government status pursuant to *O’Melveny*. In *O’Melveny*, the United States Supreme Court (“Supreme Court”) explained that the Federal Deposit Insurance Corporation (“FDIC”) “steps into [the] shoes” of a private company when acting as receiver and sheds its government character because the FDIC “succeed[s] to . . . all rights, titles, powers, and privileges of the [entity in receivership] . . . .” 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); *see also AG Route Seven P’ship v. United States*, 57 Fed. Cl. 521, 534 (2003) (citing *O’Melveny* for the proposition that the FDIC as receiver is a “private party, and not the government *per se*” because it “is merely standing in the shoes . . . of the defunct thrift”). The courts drawing from *O’Melveny* have concluded that the FHFA steps into the shoes of the Enterprises and sheds its government character when acting as conservator because Congress provided that the FHFA-C exercises the same rights with respect to the Enterprises as Congress granted to the FDIC as receiver. *See, e.g., Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017); *cf. Ameristar Fin. Servicing Co. v. United States*, 75 Fed. Cl. 807, 811 (2007) (concluding, with respect to the FDIC, that the step-into-the-shoes principle set forth in *O’Melveny* also applies in the conservator context).

**a. The FHFA-C is not the United States if the FHFA steps into the Enterprises' shoes when acting as conservator.**

Plaintiffs initially contend that defendant's reliance on *O'Melveny* is erroneous because, assuming that *O'Melveny* applies, the FHFA-C is the United States even though it steps into the Enterprises' shoes. Specifically, plaintiffs assert that the FHFA-C is the United States under the facts alleged because (1) the FHFA-C exercises nontraditional conservator powers, (2) Congress intended that the FHFA-C retain the FHFA's government status, and (3) the FHFA-C steps into the shoes of a government instrumentality. The court addresses each assertion in turn.

First, the FHFA-C did not become a government actor by exercising powers beyond those traditionally afforded to a conservator. As a threshold matter, plaintiffs have not alleged facts reflecting that the FHFA-C used such powers; the execution of the PSPA Amendments was a "quintessential conservatorship" function. *Perry II*, 864 F.3d at 607. More importantly, however, plaintiffs would not prevail even if the FHFA-C exercised nontraditional conservatorship powers in agreeing to the PSPA Amendments. When this argument was pressed in other jurisdictions, it was rejected:

It may well be true that FHFA's actions would not be allowed under traditional principles of corporate or conservatorship law, but it does not follow that those actions are therefore governmental. Legislatures can expand conservatorship and similar powers without transforming conservators into agents of the

government. *Cf. Pegram v. Herdrich*, 530 U.S. 211, 225–26 (2000) (explaining that the Employee Retirement Income Security Act altered the common law of trusts to permit certain actions that would otherwise violate the trustee’s fiduciary duties).

*Bhatti v. Fed. Hous. Fin. Agency*, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (footnote omitted). The court agrees with that reasoning, and plaintiffs provide no authority that supports a contrary result. Although plaintiffs state that the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) decision in *Waterview Management Co. v. FDIC*, 105 F.3d 696 (D.C. Cir. 1997), supports their position, they are mistaken. *Waterview* is not on point because the D.C. Circuit did not hold that a conservator is *per se* the United States when acting pursuant to a congressional grant of broad powers. Rather, it held that, as a matter of statutory interpretation, the existence of a receivership did not preempt a prereceivership contract. *Id.* at 699–702.

Second, Congress’s instruction that the FHFA-C is not subject to the supervision of any other agency does not reflect congressional intent for the FHFA to retain its government status when acting as conservator even if it steps into the shoes of the Enterprises. Because the court only reaches this issue by assuming that *O’Melveny* is instructive, the statutory language concerning supervision of the FHFA-C does not support a finding of jurisdiction because the same language is present in the statute that the Supreme Court addressed in *O’Melveny*. *See* 512 U.S. at 85–86 (discussing 12 U.S.C. § 1821). *Compare* 12 U.S.C. § 1821(c)(3)(C) (“When acting as conservator or

receiver . . . , [the FDIC] shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC's] rights, powers, and privileges.”), *with id.* § 4617(a)(7) (“When acting as conservator or receiver, the [FHFA] 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 [FHFA].”).

The third argument advanced by plaintiffs—that the FHFA-C is the United States because it steps into the shoes of a government instrumentality—also is not meritorious. A government instrumentality’s actions are attributable to the United States for purposes of the Tucker Act. *See Corr v. Metro. Wash. Airports Auth.*, 702 F.3d 1334, 1336 (Fed. Cir. 2012) (noting that a claim against a government instrumentality is a claim against the United States for purposes of the Little Tucker Act, 28 U.S.C. § 1346(a)(2)). The Supreme Court established in *Lebron v. National Railroad Passenger Corp.* that a company is a government instrumentality when (1) it is created by “special law,” (2) it is established “for the furtherance of governmental objectives,” and (3) the federal government “retains for itself permanent authority to appoint a majority of the [company’s] directors . . . .” 513 U.S. 374, 400 (1995). After *Lebron*, the Supreme Court clarified that, for purposes of the instrumentality test, “the practical reality of federal control and supervision prevails over Congress’ disclaimer of the [the entity’s] governmental status.” *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1233 (2015).

There is no dispute that the Enterprises satisfy the first two prongs of the *Lebron* test; Congress created the Enterprises by special law to achieve governmental objectives related to the housing market. See 12 U.S.C. § 4501; see also *Herron*, 861 F.3d at 167 (addressing claims involving Fannie and noting that “[t]his case satisfies the first two *Lebron* criteria”); *Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1406–07 (9th Cir. 1996) (reaching same conclusion for Freddie). The status of the Enterprises, therefore, turns on the third prong: whether the government retains permanent authority to appoint a majority of the Enterprises’ directors.

The Federal Circuit has not addressed the government-control prong with respect to the Enterprises, but courts in other jurisdictions have done so. Those decisions provide a starting point for the court. It appears that every court to consider the issue, with the exception of one district court, has held that the government does not exercise permanent control over the Enterprises. *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 279 (D.R.I. 2018) (concluding that the government retains permanent authority to control the Enterprises after noting that “[t]he non-controlling precedent to date” has reached the opposite conclusion). Most of the courts that concluded that the government lacks permanent control over the Enterprises issued their decisions before the Supreme Court in *Association of American Railroads* emphasized the importance of evaluating the practical reality over nomenclature, and the other courts focused on the statutory purpose for the conservatorships rather than the Enterprises’ actual



situation. *E.g.*, *Herron*, 861 F.3d at 169 (relying on the notion that a conservatorship is fundamentally temporary). In other words, the courts adopting the prevailing view considered the issue of control without regard for the Supreme Court’s instruction to focus on the practical reality. The court, therefore, does not find those decisions persuasive.

The crux of the inquiry, as the Supreme Court mandates, is on the practical reality of the government’s control over the Enterprises. *Ass’n of Am. R.Rs.*, 135 S. Ct. at 1233. It is of no import that Congress nominally authorized a facially temporary conservatorship, *see* 12 U.S.C. § 4617(a) (permitting the FHFA to act as conservator to “reorganiz[e]” or “rehabilitat[e]” the Enterprises), because Congress’s disclaimers are no substitute for the court’s obligation to assess the government’s actual control, *Ass’n of Am. R.Rs.*, 135 S. Ct. at 1233. The court focuses on the length of the conservatorship because the FHFA-C wields complete control over the Enterprises so long as they are in conservatorship. *See generally* 12 U.S.C. § 4617.

Plaintiffs allege that the Enterprises will remain undercapitalized—and thus subject to conservatorship pursuant to 12 U.S.C. § 4617(a)(3)(J)—until the PSPAs, in their current form, are changed because the Enterprises cannot accumulate any capital under the existing terms of the PSPAs. Although the PSPAs could be further amended, plaintiffs’ allegations reflect that Treasury and the FHFA-C will not do so because the purpose of the PSPA Amendments is to prevent the Enterprises from accumulating the necessary capital to become independent companies. Plaintiffs, in short, have

alleged that the government intended, and has taken steps to ensure, that the conservatorships never end. Those facts, viewed in isolation, would support a conclusion that the practical reality is that the Enterprises are under permanent government control. The court's inquiry, however, is not limited to plaintiffs' allegations because it has taken judicial notice of relevant facts reflecting that the status quo has changed: The Treasury Secretary and the FHFA Director are now both committed to ending the conservatorships. Moreover, the idea that the Enterprises are permanently subject to government control because they can never accumulate the capital needed to exit the conservatorships is undermined by recent developments. Indeed, Treasury proposed amending the Net Worth Sweep to allow the Enterprises to retain more capital, and the FHFA Director testified during his confirmation hearing that, if confirmed, he would seek to increase the amount of capital that the Enterprises retain. Simply stated, the practical reality is that the Enterprises are not subject to permanent government control because the relevant parties are working to terminate the conservatorships.<sup>15</sup>

---

<sup>15</sup> Plaintiffs may disagree with the court's conclusion that events occurring after the PSPA Amendments are relevant to determining whether the Enterprises were under permanent government control during the events discussed in plaintiffs' complaint. Even if the court agreed that events occurring after the PSPA Amendments are not germane, plaintiffs still would not prevail because they allege that the conservatorships began as temporary measures. *See* 2d Am. Compl. ¶¶ 7 (noting the temporary nature of the conservatorships and quoting an FHFA publication stating that the conservatorships would be terminated once the Enterprises had been restored "to a safe and

In sum, the FHFA-C does not become the United States if the FHFA steps into the Enterprises' shoes when serving as conservator.

**b. The FHFA-C retains the FHFA's government character because the FHFA-C does not step into the Enterprises' shoes.**

The key inquiry, therefore, is whether the FHFA steps into the shoes of the Enterprises when acting as conservator. Defendant argues that the FHFA-C sheds its government character and assumes the identity of the Enterprises based on the reasoning in *O'Melveny*. Defendant's reliance on *O'Melveny* is misplaced. *O'Melveny* concerns a receiver stepping into the shoes of a failed bank. 512 U.S. at 86. The roles of a conservator and receiver are meaningfully different. In a recent decision, the United States District Court for the District of Rhode Island artfully explained the differences and their import for assessing whether the FHFA-C is the government:

The *O'Melveny* Court held that FDIC, when acting as a receiver for a private entity, steps into the shoes of that private entity for state law claims. This holding makes sense given the purpose of receivership: "to preserve a company's assets, for the benefit of creditors, in the face of bankruptcy." When FDIC is appointed receiver, it must dispose of the received entity's assets, resolving obligations and claims made against the entity. Notably, "[i]n receivership, the

---

solvent condition"); *id.* (noting that the FHFA reassured the market that the Enterprises would return to normal business operations). Thus, the Enterprises were not under permanent government control before the PSPA Amendments.

receiver owes fiduciary duties to the creditors, which the corporation would otherwise owe to creditors during a period of insolvency.” It logically follows, then, that the receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity.

Conservatorship, in contrast, serves a different function. FHFA has described the purpose of conservatorship is “to establish control and oversight of a company to put it in a sound and solvent condition.” Conservators, unlike receivers, have a fiduciary duty running to the corporation itself.

This is “critically distinct” from the fiduciary duties owed as a receiver— the receiver does indeed “step into the shoes” of the entity by assuming the fiduciary duties *of* the entity, but the conservator does not: it remains distinct, and rather owes a duty *to* the entity. Given the difference in fiduciary duties, *O’Melveny’s* “steps into the shoes” holding makes sense in the context of receivership, but not in the context of conservatorship.

*Sisti*, 324 F. Supp. 3d at 282–83 (citations and footnotes omitted). *See generally* Brian Taylor Goldman, *The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State-Action*, 17 J. Bus. & Sec. L. 11, 23–30 (2016). The district court, relying on the above analysis, declined to treat the FHFA-C as a private actor. *Sisti*, 324 F. Supp. 3d at 284. This court agrees with the reasoning and conclusion in *Sisti*: the FHFA does not shed its government character when acting as conservator because it does not step into the

shoes of the Enterprises. Otherwise stated, the FHFA-C is the United States because it retains the FHFA's government character. Plaintiffs' claims, therefore, are against the United States for purposes of the Tucker Act.

**B. The court lacks jurisdiction over plaintiffs' claim that sounds in tort.**

**1. Plaintiffs' fiduciary duty claim sounds in tort.**

Defendant next argues that the court lacks jurisdiction over plaintiffs' fiduciary duty claim because the United States does not owe to each Enterprise's shareholders a fiduciary duty that is grounded in a statute or contract. Defendant asserts that such a fiduciary duty cannot be based on (1) HERA because, pursuant to the statute, the FHFA-C is only required to act in the government's and the Enterprises' best interests; or (2) the PSPAs because plaintiffs are not parties to those contracts. Plaintiffs, in their opposition to defendant's motion to dismiss, counter that their claim is based on a fiduciary duty rooted in both HERA and the PSPAs. As to HERA, plaintiffs assert that Congress made the FHFA-C a fiduciary by authorizing it to control the Enterprises, entrusting it with duties that are at the core of what it means to be a fiduciary, and using terminology—"conservator"—associated with a fiduciary. With respect to the PSPAs, plaintiffs argue that Treasury owes a fiduciary duty to the shareholders because it, acting with the FHFA-C, acquired control rights under the contract.

The court, pursuant to the Tucker Act, lacks jurisdiction over tort claims. 28 U.S.C. § 1491(a)(1).

A breach of fiduciary duty is generally classified as a tort. *Newby v. United States*, 57 Fed. Cl. 382, 294 (2003). A fiduciary duty claim, however, does not sound in tort for purposes of the Tucker Act when the fiduciary relationship is founded on a money-mandating statute or a contractual provision between the claimant and United States. *See Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (statute); *Cleveland Chair Co. v. United States*, 557 F.2d 244, 246 (Ct. Cl. 1977) (contract); *see also* 28 U.S.C. § 1491(a)(1) (providing jurisdiction over claims “founded upon . . . any Act of Congress . . . or contract with the United States”).

The initial issue is whether HERA establishes a fiduciary relationship between the FHFA-C and the Enterprises’ shareholders. The court begins with the language of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). “If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect.” *Rosete v. Office of Pers. Mgmt.*, 48 F.3d 514, 517 (Fed. Cir. 1995); *accord Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”). Congress provided in HERA that the FHFA-C is only required to act in the interests of itself or the Enterprises. 12 U.S.C. § 4617(b)(2)(J). That statement reflects a clear intent: the FHFA-C does not owe a fiduciary duty to shareholders because the conservator is not required to consider shareholders’ interests.<sup>16</sup> *See id.*; *see also*

---

<sup>16</sup> The court’s interpretation of HERA’s plain language is buttressed by the fact that Congress seemingly made a deliberate

*Collins v. Mnuchin*, 938 F.3d 553, 580 (5th Cir. 2019) (en banc) (noting that HERA “may permit” the FHFA-C to pursue actions that are “inconsistent with fiduciary duties”), *petitions for cert. filed*, 88 U.S.L.W. 3114 (U.S. Sept. 25, 2019) (No. 19-422), 88 U.S.L.W. 3146 (U.S. Oct. 25, 2019) (No. 19-563). The plain language controls, and therefore the court does not consider the peripheral considerations urged by plaintiffs such as the implications of the word “conservator,” the FHFA-C’s control over the Enterprises, or the FHFA-C’s other powers. In sum, plaintiffs cannot establish jurisdiction for their fiduciary duty claim by relying on HERA.

Next, the court turns to whether Treasury, acting together with the FHFA-C, owed a fiduciary duty to the Enterprises’ other shareholders because it acquired control rights by agreeing to the PSPAs. Plaintiffs’ argument is premised on the state-law principle (which they term “general corporate law”) that a controlling shareholder owes a fiduciary duty to the minority shareholders. The court is not convinced. First, plaintiffs’ allegation of a fiduciary

---

decision to exclude shareholder interests from the FHFA-C’s considerations. Congress modeled HERA on the Financial Institutions Reform, Recovery, and Enforcement Act (“FIRREA”). *Jacobs v. Fed. Hous. Fin. Agency*, 908 F.3d 884, 893 (3d Cir. 2018). Under FIRREA, Congress permitted the FDIC as conservator to consider the best interests of a bank, its depositors, or the FDIC. 12 U.S.C. § 1821(d)(2)(J)(ii). Although Congress permitted the FDIC to take into consideration the interests of its depositors, Congress omitted the analogue of depositors—shareholders—from the list of germane interests that the conservator can consider when acting pursuant to HERA. *Compare id.* (FIRREA), *with* 12 U.S.C. § 4617(b)(2)(J) (HERA). The omission is telling.

relationship is not founded on a contract within the meaning of the Tucker Act. Plaintiffs are not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs. They invoke the contracts solely to establish that Treasury, with the assistance of the FHFA-C, is a controlling shareholder and rely on that conclusion to argue that it has a fiduciary duty based on state law. The contract, otherwise stated, is one step removed from the purported genesis of the fiduciary duty—the application of state-law principles. That gap is too much in light of the court’s obligation to narrowly construe the Tucker Act’s waiver of sovereign immunity. *See Smith*, 855 F.2d at 1552 (noting that the Tucker Act is narrowly construed); *see also Perry II*, 864 F.3d at 619–20 (rejecting the legal theory that the Enterprises’ shareholders’ need to reference the PSPAs for their fiduciary duty claim was enough to conclude that the claim was rooted in a contract for purposes of the Tucker Act).

Second, plaintiffs fail to demonstrate the applicability of the state-law principles underlying their theory for why Treasury assumed fiduciary duties. Federal law governs the obligations Treasury incurred by entering into the PSPAs. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 519 (1988) (“The proposition that federal common law continues to govern the ‘obligations to and rights of the United States under its contracts’ is nearly as old as *Erie* [*v. Tompkins*, 304 U.S. 64 (1938),] itself.”). Although courts may shape federal law by drawing from state-law principles, plaintiffs do not explain why doing so is appropriate in this instance.



Third, plaintiffs do not prevail even if their fiduciary duty claim could be founded on a contract and federal common law incorporates the state-law principles regarding controlling shareholders' fiduciary obligations. Under Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders. *See Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1344 (Del. 1987); *Parsch v. Massey*, 79 Va. Cir. 446 (2009); *see also Quadrant Structured Prod. Co. v. Vertin*, 102 A.3d 155, 183 (Del. Ch. 2014) (acknowledging that those "who effectively control a corporation" owe a fiduciary duty to others).<sup>17</sup> To have the requisite level of control, the controlling shareholder must (1) be able to exercise a majority of the corporation's voting power or (2) direct the corporation without owning a majority of stock. *Kahn v. Lynch Commc'n Sys.*, 638 A.2d 1110, 1113 (Del. 1994). The latter, effective exercise of control, "is not an easy test to satisfy"; the individual or group must be, "as a practical matter, . . . no differently situated than if they had majority voting control." *In re PNB Holding Co. S'holders Litig.*, No. CIV.A. 28-N, 2006 WL 2403999, at \*9 (Del. Ch. Aug. 18, 2006).

Plaintiffs have not established that Treasury meets either control test. First, plaintiffs do not allege that Treasury owns any of the Enterprises' voting stock.

---

<sup>17</sup> The court refers to Delaware and Virginia law because Fannie is a Delaware corporation, and Freddie is a Virginia corporation. When evaluating Virginia law, the court also looks to Delaware state court decisions because Virginia courts do so to resolve unsettled issues in the Commonwealth. *E.g., U.S. Inspect Inc. v. McGreevy*, No. 160966, 2000 WL 33232337, at \*4 (Va. Cir. Ct. Nov. 27, 2000).

Treasury purchased preferred stock and acquired the right to buy common (i.e., voting) stock, but there is no indication that Treasury exercised its warrants or otherwise acquired common stock.<sup>18</sup> Second, plaintiffs do not demonstrate that Treasury exercised effective control over the Enterprises or was, in plaintiffs' terms, a "dominant shareholder." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 29 (quoting *Sisti*, 324 F. Supp. 3d at 283 n.9). Although Treasury acquired the right to preclude the Enterprises from taking certain actions, Treasury did not control the Enterprises because it could not direct any action—it could only respond to certain requests made by the Enterprises. As a practical matter, therefore, Treasury is situated differently than if it had majority voting power.

Having rejected the contentions advanced by plaintiffs in their opposition brief, the court turns to an argument that appears for the first time in plaintiffs' supplemental brief, which was filed at the court's request after the initial round of briefing on defendant's omnibus motion to dismiss was complete, *Fairholme II* was decided, and the court held a status conference regarding further proceedings in the

---

<sup>18</sup> Even if Treasury had exercised its option to buy a majority of the voting stock, it would not be a controlling shareholder because the FHFA-C succeeded to all of the shareholders' rights. See 12 U.S.C. § 4617(b)(2)(A) (noting that the FHFA-C, by operation of law, succeeds to all rights and powers of any Enterprise shareholder). Treasury, therefore, would have no voting power.

related cases.<sup>19</sup> In their supplemental brief, plaintiffs contend that their fiduciary duty claim was founded on a contention that Treasury and the FHFA- C acted as a “control group,” that this contention was set forth in their opposition brief in the section addressing the court’s jurisdiction over their fiduciary duty claim, and that the court did not, in *Fairholme II*, consider this contention. But no such contention was made in plaintiffs’ opposition brief.

In their opposition brief, plaintiffs explained that under state law, multiple shareholders who are legally connected can form a “control group” and be “deemed a single, majority shareholder,” and then asserted that Treasury and the FHFA-C were such a control group, acting in concert as the United States. *See* Pls.’ Corrected Combined Opp’n to Def.’s Omnibus Mot. to Dismiss 22–26. In other words, plaintiffs advanced their control group contention solely to establish that their suit was against the United States. In the portion of their opposition devoted to countering defendant’s jurisdictional attack on their fiduciary duty claim, plaintiffs asserted only two bases for a fiduciary duty; each one was treated separately as governing the conduct of either Treasury or the FHFA-C. They did not argue that the fiduciary duty arose from Treasury and the FHFA-C acting as a control group. Accordingly, the court did not consider plaintiffs’ control group allegation as a foundation for any fiduciary duty claim in *Fairholme*

---

<sup>19</sup> As defendant notes, the court did not invite plaintiffs, after the status conference held March 5, 2020, to relitigate issues already decided in *Fairholme II*.

*II*, among the arguments raised by the plaintiffs in these related cases.

Because plaintiffs' control group contention was not raised in their opposition brief in support of their fiduciary duty claim, it is waived. *See United States v. Ford Motor Co.*, 463 F.3d 1267, 1277 (Fed. Cir. 2006) (explaining that "[a]rguments raised for the first time in a reply brief are not properly before this court"); *Ironclad/EEI v. United States*, 78 Fed. Cl. 351, 358 (2007) (noting that "under the law of this circuit, arguments not presented in a party's principal brief to the court are typically deemed to have been waived"). But even if plaintiffs' argument were not waived, it is not persuasive. In *Fairholme II*, the court explained why neither Treasury nor the FHFA-C owed a fiduciary duty to the shareholders of Fannie and Freddie. 147 Fed. Cl. at 37–40. The court is not persuaded that a control group composed of two entities, neither of which was bound by the fiduciary duty posited by plaintiffs, would be bound by a fiduciary duty simply because the entities are alleged to have worked in concert against the interests of the other shareholders of the Enterprises. Plaintiffs' attempt to graft a state law concept of a control group of shareholders onto a Tucker Act jurisdictional inquiry is not anchored in binding or even persuasive precedent, as explained in *Fairholme II*. *Id.* at 39–40. Having considered the allegations in plaintiffs' amended complaint, the timely arguments set forth in plaintiffs' opposition brief, and the untimely argument raised in plaintiffs' supplemental brief, the court concludes that it lacks jurisdiction over plaintiffs' fiduciary duty claim because it sounds in

tort. Therefore, it dismisses count III of their amended complaint.

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

Defendant also argues that plaintiffs' Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the FHFA-C. Plaintiffs counter that they have pleaded the predicates for takings and illegal-exaction claims, which means that it is irrelevant whether they also alleged facts that are germane to tortious actions.

When a party pleads the predicates for a takings claim or illegal-exaction claim, the court possesses jurisdiction to entertain such claims. *See Hansen v. United States*, 65 Fed. Cl. 76, 80–81 (2005) (“[S]o long as there is some material evidence in the record that establishes the predicates for a [claim covered by the Tucker Act,] . . . a plaintiff succeeds in demonstrating subject matter jurisdiction in this court . . .”). Those claims, at a basic level, are contentions that the government expropriated private property lawfully (takings) or unlawfully (illegal exaction). *See Orient Overseas Container Line (UK) Ltd. v. United States*, 48 Fed. Cl. 284, 289 (2000) (“Takings claims arise because of a deprivation of property that is authorized by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation.” (citing *Dureiko v. United States*, 209 F.3d 1345, 1359 (Fed. Cir. 2000); *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007–08 (Ct. Cl. 1967))). If a party alleges the necessary predicates for these claims, the court is not deprived

of jurisdiction even if the complaint contains allegations that could support a tort claim. *See El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1353 (Fed. Cir. 2004) (“That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims.”); *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that this court has jurisdiction over a takings claim “even if the government’s action was subject to legal challenge on some other ground”). Here, plaintiffs plead the predicates for takings and illegal-exaction claims by alleging, in essence, that they were forced to give their property to the government because of lawful or unlawful government conduct. Therefore, it is of no import to the court’s jurisdiction whether plaintiffs have alleged facts that would also support a tort claim.

**C. The court lacks jurisdiction over plaintiffs’ implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract.**

Defendant argues next that the court lacks jurisdiction to entertain plaintiffs’ implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract. Specifically, defendant asserts that plaintiffs have not established that they are intended beneficiaries independent of their status as shareholders and that any benefit that is related to their status as shareholders is insufficient for jurisdiction. Plaintiffs counter that they are intended third-party beneficiaries of implied contracts, between the FHFA and each Enterprise’s

board, in which the boards consented to the conservatorships in exchange for the FHFA-C operating the Enterprises as a fiduciary and returning them to sound condition. Specifically, plaintiffs assert that the intent to benefit the shareholders is evident from (1) the boards' consent to the conservatorships because shareholders would benefit from a conservator focused on returning the Enterprises to a better condition, and (2) the government acknowledging that the Enterprises' stock would remain outstanding while the Enterprises were in conservatorship.

The court's jurisdiction over contract claims is limited by the Tucker Act. *Ransom v. United States*, 900 F.2d 242, 244 (Fed. Cir. 1990). Of particular import here, ordinarily, a plaintiff must be in privity of contract with the United States to invoke this court's jurisdiction over a contract claim against the government. *Fid. & Guar. Ins. Underwriters, Inc. v. United States*, 805 F.3d 1082, 1087 (Fed. Cir. 2015). But privity is not required if "the plaintiff can demonstrate that it was an intended third-party beneficiary under the contract." *Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1361 (Fed. Cir. 2016).

"Third party beneficiary status is an 'exceptional privilege.'" *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (quoting *German All. Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912)). The conditions for attaining such status are "stringent." *Anderson v. United States*, 344 F.3d 1343, 1352 (Fed. Cir. 2003). "[S]hareholders seeking status to sue as third-party beneficiaries of an allegedly breached contract must 'demonstrate that the contract not only reflects the express or implied intention to benefit the

party, but that it reflects an intention to benefit the party *directly*.” *Castle v. United States*, 301 F.3d 1328, 1338 (Fed. Cir. 2002) (quoting *Glass*, 258 F.3d at 1354). Specifically, “the contract must express the intent of the promissor to benefit the shareholder personally, independently of his or her status as shareholder.” *Glass*, 258 F.3d at 1353–54. As a practical matter, the shareholder does not personally benefit independent of its status as a shareholder when the contractual promises pertain only to the treatment of the company. *See FDIC v. United States*, 342 F.3d 1313, 1320 (Fed. Cir. 2003) (noting that the broken promises concerned the treatment of the company such that the plaintiffs did not benefit independent of their status as shareholders); *accord Maher v. United States*, 314 F.3d 600, 605 (Fed. Cir. 2002) (concluding that the plaintiffs were not third-party beneficiaries when they failed to “establish[] that the government took on any obligations in the merger agreement for [the plaintiffs’] personal benefit, or even that the merger agreement contains any provisions pertaining to [the plaintiffs] personally”).

As plaintiffs are not parties to the alleged implied contracts between the FHFA and the Enterprises, the relevant issue is whether plaintiffs are third-party beneficiaries of those agreements. They are not. First, it is of no import that the Enterprises, as plaintiffs argue, purportedly agreed to the conservatorships because that would serve the interests of shareholders. Indeed, “every action of a corporation is supposed to benefit its shareholders,” but the “law has not viewed this general benefit as making every shareholder a third-party beneficiary.”



*Suess v. United States*, 33 Fed. Cl. 89, 94 (1995). Second, plaintiffs' allegations reflect that they only benefit from the alleged implied contracts by virtue of their shareholder status. The relevant promises concerned how the FHFA-C would operate the Enterprises; the crux of the purported agreements was the FHFA-C promising to operate the Enterprises as a fiduciary to preserve their assets and return them to sound condition. Because the promises in the alleged implied contracts were directed at the Enterprises, plaintiffs cannot be third-party beneficiaries of the alleged contract. *See FDIC*, 342 F.3d at 1320. Third, plaintiffs have not demonstrated that the FHFA intended that plaintiffs would benefit independently of their status as shareholders even if they did so benefit. Plaintiffs rely on the FHFA's statements that private stock would remain outstanding and shareholders would continue to hold an economic interest in their stock. Those factual statements, however, do not reflect that the FHFA intended to confer any specific benefit on plaintiffs independent of their role as shareholders. Because plaintiffs have not alleged facts reflecting that the FHFA intended to confer a personal benefit on them, they are not third-party beneficiaries. *See Glass*, 258 F.3d at 1353–54. In sum, the court lacks jurisdiction to entertain plaintiffs' implied-in-fact-contract claim because plaintiffs are neither parties to a contract with the government nor third-party beneficiaries of any such agreement. Therefore, the court dismisses count IV of their amended complaint.

## V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiffs' claims,

defendant challenges plaintiffs' standing to pursue their claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. *Starr Int'l Co. v. United States*, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is "assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that controls. *See Allen v. Wright*, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted."), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Thus, in a suit brought by shareholders, it is the substance of the allegations and not the label assigned to the allegations— i.e., direct or derivative—that matters. *See Starr*, 856 F.3d at 966–67; *see also In re Sunrise Sec. Litig.*, 916 F.2d 874, 882 (3d Cir. 1990) ("Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties."). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based on the rights of the company. *See Starr*, 856 F.3d at 966–67; *see also Weir v. Stagg*, No. 09-21745-CIV, 2011 WL 13174531, at \*9 (S.D. Fla. Feb. 7, 2011) ("Shareholders do not have standing to bring a direct action for injuries suffered by a corporation, but rather, must bring a derivative action."). A

shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the corporation’s injuries—to have standing to litigate those claims. *See Starr*, 856 F.3d at 966–67.

Defendant argues that plaintiffs lack standing because their claims, pled as direct claims, actually belong to the Enterprises and are therefore derivative in nature. The parties in this case and the related cases fully briefed and argued this issue prior to the court issuing the *Fairholme II* decision. The court concluded in *Fairholme II* that Fannie and Freddie shareholders lack standing to pursue direct claims that are derivative in nature. Thereafter, the court solicited short supplemental briefs from plaintiffs and defendant regarding the applicability of the holdings in *Fairholme II* to this case. In their supplemental brief, plaintiffs suggest that their allegations are materially different from those asserted in *Fairholme* for purposes of standing, while defendant contends in its supplemental brief that there are no material differences. All of the parties’ arguments are addressed below.

**A. Plaintiffs’ allegations are not materially different from the allegations in *Fairholme*.**

As an initial matter, plaintiffs contend that their allegations are materially different from those advanced in *Fairholme* in two respects, such that the standing inquiry would be affected. Plaintiffs first argue that the type of harm they have suffered and the type of relief they have requested distinguish their claims from the direct claims in *Fairholme*. In essence, plaintiffs attempt to distinguish what they

characterize as the *Fairholme* plaintiffs' allegation of the expropriation of the Enterprises' assets from their allegation of the expropriation of their economic interests. As defendant points out, however, the direct claims in *Fairholme* and the claims in this case are virtually indistinguishable in nature. All four counts of the amended complaint in this case mirror, in every essential way, the direct takings, illegal-exaction, fiduciary duty, and breach-of-implied-contract claims in *Fairholme*. Expropriation of the shareholders' economic interests was alleged in *Fairholme*, just as it is alleged in the amended complaint in this case. Compare *Fairholme II*, 147 Fed. Cl. at 20, 46–47, with 2d Am. Compl. ¶¶ 91, 108–110. Thus, the standing analysis in *Fairholme II* is fully applicable to the claims presented here.

Plaintiffs next invoke their reliance on the allegation of the existence of a “control group,” formed by Treasury and the FHFA-C, that dominated the Enterprises and injured them. In their view, this factual distinction in their amended complaint is significant because it was not discussed in *Fairholme II*. Plaintiffs fail to explain, however, how this factual distinction gives them standing to bring their claims. Plaintiffs apparently infer a logical connection between a control group of shareholders and a controlling shareholder, but the connection is not explained in a way that is helpful to the court. Indeed, in their supplemental brief plaintiffs cite primarily to a section of their opposition brief that does not address the topic of standing at all. If plaintiffs wished to advance a standing argument that specifically relied on the state law concept of a control group of shareholders and cases discussing such a

phenomenon, no such argument was made in their opposition brief. Thus, any such standing argument that plaintiffs may be attempting to make in their supplemental brief, to the extent that one could be discerned, is waived as untimely.<sup>20</sup> *See Ironclad/EEI*, 78 Fed. Cl. at 358.

**B. Plaintiffs' claims actually belong  
to the Enterprises.**

Having determined that plaintiffs' allegations do not differ materially from those advanced in *Fairholme*, the court turns to defendant's contention that plaintiffs lack standing to litigate their claims. Defendant's standing argument is premised on its assertion that plaintiffs' claims actually belong to the Enterprises—and are therefore derivative in nature—because, to prevail, plaintiffs would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises. Plaintiffs counter that they assert direct claims because the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises' capital structure to plaintiffs' detriment, which renders the claims for such conduct both direct and derivative under the dual-nature exception.<sup>21</sup> Defendant replies

---

<sup>20</sup> Even if this argument were not waived, the court agrees with defendant that the control group scenario alleged by plaintiffs also fails to satisfy the criteria for dual-natured claims that might provide standing to a shareholder plaintiff asserting direct claims. *See* Section V.B, *infra* (discussing the criteria for dual-natured claims).

<sup>21</sup> The plaintiffs in the related cases also asserted that their claims must be construed as direct claims to vindicate important federal policies if shareholders cannot assert derivative claims because of HERA. But as this court held in *Fairholme II*, the

that the Federal Circuit rejected the notion that a plaintiff states a direct claim by alleging it was targeted by the challenged action. Defendant also contends that the dual-nature exception is not applicable because Treasury was not a controlling shareholder, the Enterprises did not issue new shares, and the PSPA Amendments did not involve the reallocation of power.

Neither theory plaintiffs advance for why their claims are substantively direct, rather than derivative, is persuasive. First, it is of no import whether the government targeted shareholders with the PSPA Amendments. *See Starr*, 856 F.3d at 973 (noting that the plaintiffs did not “sufficiently explain why the Government’s subjective motivations are relevant to the inquiry into direct standing”). The direct-versus-derivative inquiry “turns on the plaintiff’s injury, not the defendant’s motive.” *Pagan v. Calderon*, 448 F.3d 16, 30 (1st Cir. 2006). Second, plaintiffs have not asserted claims that qualify as both direct and derivative based on the dual-nature exception. The Federal Circuit explained that, pursuant to this exception, shareholder claims may be both direct and derivative “when a ‘reduction in [the] economic value and voting power affected the minority stockholders uniquely . . . .’” *Starr*, 856 F.3d at 968 (quoting *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006)). Specifically, shareholder claims are both direct and derivative if

---

shareholders of the Enterprises, notwithstanding HERA, have standing to assert derivative claims because of the FHFA-C’s conflict of interest. 147 Fed. Cl. at 49–51.

“(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.”

*Id.* (quoting *Gentile*, 906 A.2d at 100). The exception does not apply here because Treasury was not a controlling shareholder at the time the PSPA Amendments were executed,<sup>22</sup> the PSPA Amendments did not involve the issuance of new shares, and shareholder voting power was not reallocated under the PSPA Amendments. It is not enough, contrary to plaintiffs’ contention, that the government allegedly exacted economic value from the other shareholders by rearranging the corporate structure. See *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016) (applying *Gentile* and holding a plaintiff does not state a direct claim under the dual-nature exception by pleading the “extraction of solely economic value from the minority by a controlling stockholder”). Because plaintiffs have not established that their claims are substantively direct in nature, they cannot demonstrate that they have standing to litigate those claims.

Plaintiffs fare no better if the court moves beyond their arguments for why their claims are

---

<sup>22</sup> Treasury is not a controlling shareholder for the reasons set forth in Section IV.B.1, *supra*.

substantively direct in nature. Federal law governs whether plaintiffs' claims are direct or derivative. *See Starr*, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. *Id.*; *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 (1991) (noting the "presumption that state law should be incorporated into federal common law"). Under Delaware law, the test for whether a shareholder's claim is derivative or direct depends on the answers to two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (en banc). "Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow." *Gentile*, 906 A.2d at 99, *discussed in Starr*, 856 F.3d at 965. Such claims are derivative even "though the overpayment may diminish the value of the corporation's stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend." *Protas v. Cavanagh*, No. CIV.A. 6555-VCG, 2012 WL 1580969, at \*6 (Del. Ch. May 4, 2012); *see also Hometown Fin. Inc. v. United States*, 56 Fed. Cl. 477, 486 (2003) ("[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to



nothing more than a diminution in stock value or a loss of dividends.”).

Plaintiffs focus on the expropriation of the Enterprises’ assets via compulsory payments of all profits. The gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury. Regardless of plaintiffs’ label (direct) or theory (taking, illegal exaction, breach of fiduciary duty, or breach of implied contract) for their claims, the claims are substantively derivative in nature because they are premised on allegations of overpayment.<sup>23</sup> *See Gentile*, 906 A.2d at 99; *see also Roberts*, 889 F.3d at 409 (explaining that the plaintiffs asserted “classic derivative claims” when they alleged that “the [PSPA Amendments] illegally dissipated corporate assets by transferring them to Treasury”). Plaintiffs cannot transform their substantively derivative claims into direct claims by

---

<sup>23</sup> Plaintiffs would remain unsuccessful if their allegations of waste and mismanagement (styled as self dealing, overreach, or abuse of discretion) were construed to be indicative of some action other than overpayment. Any claims premised on waste and mismanagement are derivative in nature. *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) (noting that “mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature”). Plaintiffs’ claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. *See Hometown*, 56 Fed. Cl. at 486 (stock prices); *In re Straight Path Commc’ns Inc. Consol. S’holder Litig.*, No. CV 2017-0486-SG, 2017 WL 5565264, at \*4 (Del. Ch. Nov. 20, 2017) (“Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . .”).

merely alleging that, as a result of overpayments, they were deprived of their stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiffs' purported "harms are 'merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.'" *Protas*, 2012 WL 1580969, at \*6 (quoting *Gentile*, 906 A.2d at 99); *see also Agostino v. Hicks*, 845 A.2d 1110, 1122 (Del. Ch. 2004) ("[T]he inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation."). Because plaintiffs' claims are derivative in nature, plaintiffs lack standing to pursue those claims on their own behalf.

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

Plaintiffs, while acknowledging that they assert only direct claims,<sup>24</sup> attempt to avoid a dismissal of those claims for lack of standing by contending that "[e]ven if [their] direct claims were deemed derivative, they still may assert them, under circuit precedent,

---

<sup>24</sup> Indeed, there is no dispute that the four claims plaintiffs assert in their amended complaint are direct claims. In each count plaintiffs emphasize that the harm to plaintiffs is direct. 2d Am. Compl. ¶¶ 111, 115, 121, 137. In addition, the relief requested by plaintiffs is for monetary relief payable to them, not to the Enterprises. *Id.* at 48; *see also* Pls.' Suppl. Br. on Outstanding Mot. to Dismiss 3–4 (arguing that payments to the Enterprises would be of no use to plaintiffs). Finally, the amended complaint contains a statement that plaintiffs' claims are direct in nature. *See* 2d Am. Compl. ¶¶ 105 ("[A]ny claim raised by Appaloosa that might be considered derivative on behalf of the Company is in fact direct, on behalf of Appaloosa itself.").

because the [FHFA- C] as conservator has a manifest conflict of interest.” Pls.’ Corrected Combined Opp’n to Def.’s Omnibus Mot. to Dismiss 39. The precedent upon which plaintiffs rely is the Federal Circuit’s decision in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999).

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

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

As for plaintiffs’ suggestion that their direct claims could be deemed derivative, they identify no authority for that recharacterization of their claims, even though they had the opportunity to do so in their opposition brief and their supplemental brief. The court finds plaintiffs’ “direct claims deemed

derivative” argument, Pls.’ Suppl. Br. on Outstanding Mot. to Dismiss 5 (emphasis removed), to be unsupported by authority and unpersuasive for the purpose of establishing plaintiffs’ standing to bring the claims in their amended complaint.<sup>25</sup>

**D. Plaintiffs’ standing to bring direct claims  
is not established by another holding in  
*First Hartford*.**

Finally, the court addresses an assertion in plaintiffs’ opposition brief that was not explicitly addressed in *Fairholme II*. Only one sentence of that sixty-page brief was devoted to the following contention included among plaintiffs’ standing arguments: “[T]he Federal Circuit has repeatedly recognized a direct claim where a shareholder alleged deprivation of a contingent property interest in a bank.” Pls.’ Corrected Combined Opp’n to Def.’s Omnibus Mot. to Dismiss 38 (citing *First Hartford*, 194 F.3d at 1296; *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 957 n.2 (Fed. Cir. 1992)). Defendant, in support of its challenge to plaintiffs’ standing to bring their claims, clearly relied on more recent precedent, the Federal Circuit’s decision in *Starr*, to argue that plaintiffs’ claims were derivative claims, not direct claims. Plaintiffs, notwithstanding their citation to *First Hartford* and a footnote in a case discussed in *First Hartford*, did not attempt, in any meaningful way, to explain why *Starr* should not be applied and followed in this case. Because plaintiffs’ reliance on *First Hartford* as support for a

---

<sup>25</sup> As defendant notes, claims brought on behalf of the Enterprises are asserted in numerous shareholder derivative claims in these related cases.

shareholder's standing to bring direct claims is cursory and undeveloped, the court is within its discretion to deem this argument waived. See *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (noting that the court has discretion on whether to consider undeveloped arguments).

Even if this argument were not waived, the Federal Circuit's *Starr* decision remains the binding precedent most on point. In *Starr*, the distinction between direct and derivative claims brought by shareholders is the focus of the Federal Circuit's standing analysis. 856 F.3d at 963–73. Just as here, the plaintiffs brought takings and illegal-exaction claims related to a government intervention, during a financial crisis, affecting the future of a corporation in which they owned shares. *Id.* at 958–61. *Starr* provides the test for determining whether such claims are direct or derivative in nature and requires that nominally direct claims—that are actually derivative claims—be dismissed for lack of standing. *Id.* at 973.

In the face of this binding precedent, the court cannot conclude that the holding in *First Hartford*, which concerns direct Fifth Amendment takings claims, is more relevant. It is true that in *First Hartford* shareholders of a bank in receivership could pursue their takings claims as direct claims against the United States. 194 F.3d at 1287. However, *First Hartford* does not address the distinction between direct and derivative claims. When faced with binding precedent that addresses a crucial distinction, such as *Starr*, and one that does not, such as *First Hartford*, the court follows the precedent most on point. Cf. *Union Elec. Co. v. United States*, 363 F.3d

1292, 1297 (Fed. Cir. 2004) (“[W]e have repeatedly held that the disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue.” (citing *Boeing N. Am., Inc. v. Roche*, 298 F.3d 1274, 1282 (Fed. Cir. 2002))).

In sum, plaintiffs have not established that they have standing to litigate their claims because they do not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court dismisses plaintiffs’ claims on standing grounds to the extent that it has subject-matter jurisdiction over those claims.<sup>26</sup>

## VI. CONCLUSION

For the reasons stated above, the court **GRANTS** defendant’s motion to dismiss and **DISMISSES** plaintiffs’ complaint because the court lacks jurisdiction to entertain their breach of fiduciary duty and implied-in-fact-contract claims, and plaintiffs lack standing to pursue any of their claims. The clerk shall enter judgment accordingly. No costs.

**IT IS SO ORDERED.**

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

---

<sup>26</sup> As explained above, the court lacks jurisdiction over plaintiffs’ claims for breach of fiduciary duty and breach of implied contract. *See supra* Sections IV.B.1 (fiduciary duty), IV.C (contract). In addition, because all of plaintiffs’ claims must be dismissed for lack of standing, the court need not reach defendant’s remaining arguments that these claims should be dismissed for failure to state a claim upon which relief can be granted.

---

APPENDIX E

---

**In the United States Court of Federal Claims**

No. 18-529C

(Filed: June 8, 2020)

\*\*\*\*\*

MASON CAPITAL L.P.	* Motion to Dismiss;
et al.,	* RCFC 12(b)(1);
Plaintiffs,	* RCFC 12(b)(6);
v.	* Jurisdiction;
THE UNITED STATES,	* Standing; Direct
Defendant.	* Claims;
	* Instrumentalities;
	* Coercion; Agent;
	* Conservators;
	* Conflict of Interest;
	* Third-Party
	* Beneficiaries; Stock;
	* Shareholders;
	* Fannie; Freddie;
	* FHFA

\*\*\*\*\*

*Lawrence D. Rosenberg*, Washington, DC, for plaintiffs.

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

**OPINION AND ORDER****SWEENEY, Chief Judge**

Plaintiffs in this case challenge the actions of the United States during the conservatorships of the Federal National Mortgage Association (“Fannie”) and the Federal Home Loan Mortgage Corporation (“Freddie”). Specifically, plaintiffs take issue with the conservator for Fannie and Freddie (collectively, the “Enterprises”) amending a funding agreement between the Enterprises and the United States Department of the Treasury (“Treasury”). Based on the revisions to that agreement, plaintiffs seek the return of money illegally exacted, damages for breach of contract and breach of fiduciary duty, and compensation for a taking pursuant to the Fifth Amendment to the United States Constitution (“Constitution”). Defendant moves to dismiss plaintiffs’ amended complaint, arguing that the court lacks subject-matter jurisdiction over plaintiffs’ claims, plaintiffs lack standing to pursue their claims, and plaintiffs fail to state a claim upon which relief may be granted. For the reasons stated below, the court grants defendant’s motion to dismiss.

**I. BACKGROUND****A. The Enterprises are private companies that are under the control of a conservator.****1. The Enterprises operated independently before the financial crisis.**

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities that



are sold to investors.<sup>1</sup> 1st Am. Compl. ¶¶ 17–18; *Fairholme II*, 147 Fed. Cl. at 15. Congress chartered Fannie in 1938 and established Freddie in 1970. 1st Am. Compl. ¶¶ 17–18. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. *Id.* Freddie is organized under Virginia law, and Fannie is organized under Delaware law. *Id.* The Enterprises issued their own common and preferred stock. *Id.* ¶ 20. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. *Fairholme II*, 147 Fed. Cl. at 15. Those owning preferred stock, including plaintiffs in this suit, acquired the right to receive dividends and a liquidation preference. 1st Am. Compl. ¶ 20.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. *Id.* ¶ 21. Although the Enterprises began recording losses in 2007, they were stable and adequately capitalized. *Id.* ¶¶ 23–24. Otherwise stated, the Enterprises were not in financial distress or otherwise at risk of insolvency. *Id.*

---

<sup>1</sup> This background section is a less comprehensive version of the court’s recitation of facts in a related case, *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1 (2019) (“*Fairholme I*”), *motion to certify interlocutory appeal granted*, 147 Fed. Cl. 126 (2020).

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

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (“HERA”), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency (“FHFA”) and provided it with supervisory and regulatory authority over the Enterprises. *See* 12 U.S.C. § 4511(a)–(b) (2018).<sup>2</sup> Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator (“FHFA-C”) for each Enterprise to reorganize, rehabilitate, or wind up its affairs.<sup>3</sup> *Id.* § 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its obligations. *Id.* § 4617(a)(3).<sup>4</sup> The conservator, once appointed, functions independently; it is not “subject to the direction or supervision of any other agency of the United States or any State in the

---

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

<sup>3</sup> To avoid any ambiguity, the court reiterates that it is using “FHFA” to refer to the agency acting in its regulatory role and “FHFA-C” when discussing the agency acting as a conservator.

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

exercise of [its] rights, powers, and privileges . . .” *Id.* § 4617(a)(7).

Congress also delineated the scope of the FHFA-C’s powers in HERA. *See generally id.* § 4617. As soon as it is appointed, the FHFA-C “immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . .” *Id.* § 4617(b)(2)(A). Congress also conferred on the conservator the power to “[o]perate the [Enterprise].” *Id.* § 4617(b)(2)(B). Pursuant to that power, the conservator “may,” among other things, “perform all functions of the [Enterprise],” “preserve and conserve the assets and property of the [Enterprise],” and “provide by contract for assistance in fulfilling any function . . . of the [conservator].” *Id.* The conservator “may” also “take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise].” *Id.* § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator “may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]” and “take any action authorized by [12 U.S.C. § 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA].” *Id.* § 4617(b)(2)(J). By describing the FHFA-C’s role primarily in terms of what powers it “may” exercise, *see generally id.* § 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its powers, *see United States v. Rodgers*, 461 U.S. 677,

706 (1983) (“The word ‘may,’ when used in a statute, usually implies some degree of discretion.”). Simply stated, the FHFA has “extraordinarily broad flexibility to carry out its role as conservator.” *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 606 (D.C. Cir. 2017) (“*Perry II*”), *cert. denied*, 138 S. Ct. 978 (2018).

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

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(*g*) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. *Id.* §§ 1455(*l*)(4), 1719(*g*)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the availability of mortgage finance, and protect taxpayers. *Id.* §§ 1455(*l*)(1)(B), 1719(*g*)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

- (i) The need for preferences or priorities regarding payments to the Government.
- (ii) Limits on maturity or disposition of obligations or securities to be purchased.
- (iii) The [Enterprise’s] plan for the orderly resumption of private market funding or capital market access.
- (iv) The probability of the [Enterprise] fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the [Enterprise's] status as a private shareholder-owned company.

(vi) Restrictions on the use of [Enterprise] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

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

#### **4. The FHFA became the conservator for each Enterprise.**

Around the beginning of September 2008, the FHFA and Treasury sought to persuade each Enterprise's board of directors to consent to conservatorship. 1st Am. Compl. ¶ 34. The FHFA told each Enterprise's board that conservatorship would further the interests of the shareholders. *Id.* Around the same time, the FHFA made an offer to each board: consent to a conservatorship in exchange for the FHFA-C aiming to preserve and conserve the Enterprises' assets, attempting to restore the Enterprises to sound and solvent condition, and terminating the conservatorships when those goals were achieved. *Id.* ¶¶ 5, 7; *Fairholme II*, 147 Fed. Cl. at 17. Each Enterprise's board accepted that offer and consented to a conservatorship on September 6, 2008, with an understanding that the FHFA-C would operate in the aforementioned limited ways. *Fairholme II*, 147 Fed. Cl. at 17.

The conservatorships became effective on September 6, 2008, upon each Enterprise's board's consent. 1st Am. Compl. ¶¶ 34–35; *see also* 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when “[t]he [Enterprise], by

resolution of its board of directors or its shareholders or members, consents to the appointment”).

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

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement (“PSPA”) with Treasury for each Enterprise. 1st Am. Compl. ¶ 6. Treasury entered into the agreements pursuant to its authority under HERA to buy the Enterprises’ securities. *Id.* ¶¶ 6, 36. Under the PSPAs, Treasury committed to provide up to \$100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. *Id.* ¶ 36. If an Enterprise’s liabilities exceeded its assets, then the Enterprise could draw on Treasury’s funding commitment in an amount equal to the difference between the Enterprise’s liabilities and assets. *Fairholme II*, 147 Fed. Cl. at 17.

In return for Treasury’s funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their respective common stock at a nominal price. 1st Am. Compl. ¶ 36. Treasury’s preferred stock had an initial liquidation preference of \$1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury’s funding commitment. *Id.* In the event of a liquidation, Treasury was entitled to recover the full liquidation value of its shares before any other shareholder would receive compensation. *Id.* Second, Treasury bargained for the right to a quarterly cash dividend

that would be equal, per annum, to 10% of its liquidation preference. *Id.* An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. *Id.* Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. *Id.* ¶¶ 36, 42. Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. *Id.* ¶ 37.

The FHFA-C and Treasury amended each Enterprise's PSPA on May 6, 2009, to increase Treasury's funding commitment to each Enterprise from \$100 billion to \$200 billion. *Id.* ¶ 44. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed \$200 billion. *Id.* ¶ 45.

#### **6. The Enterprises' finances improved during their conservatorships.**

In the early stages of the conservatorships, each Enterprise's net worth decreased as it reported losses. *Fairholme II*, 147 Fed. Cl. at 18. Some of the losses resulted from the FHFA-C writing down the value of

deferred tax assets.<sup>5</sup> *Id.* Notwithstanding those on-paper losses, as of late 2009, Fannie had drawn only \$60 billion from Treasury, and Freddie had only drawn \$51 billion. 1st Am. Compl. ¶ 46.

By 2011 and into 2012, the Enterprises' financial outlooks were promising. In addition to an improvement in the housing market, the Enterprises had improved their financial performance. *Id.* ¶ 51. They were positioned to further improve their financial condition by revising their valuations of deferred tax assets because of growing profits, and by increasing their earnings due to reduced credit losses. *Id.* The FHFA-C and Treasury were aware of those forthcoming changes and the Enterprises' improving outlooks. *Id.* ¶ 8. In August 2012, Treasury and FHFA-C knew that the Enterprises would soon experience improved profitability and received projections reflecting that the Enterprises would have positive comprehensive income in 2012. *Id.* ¶¶ 52–53. Otherwise stated, the FHFA-C and Treasury knew, by early August 2012, that the Enterprises were poised to generate profits in excess of their respective dividend obligations to Treasury. *Id.* ¶ 51.

### **7. Treasury and the FHFA-C agreed to a third amendment to the PSPAs.**

At an unspecified time prior to August 2012, Treasury and the FHFA-C began considering a third

---

<sup>5</sup> A deferred tax asset is an asset that may be used to offset future tax liability. *Fairholme II*, 147 Fed. Cl. at 18 n.4. A company must write down the value of that deferred asset if it is unlikely to be used to offset future taxable profits. *Id.* This write down occurs, for example, if a company predicts it will not be profitable in the future. *Id.*



amendment to each PSPA. Treasury was the driving force behind the initiative to amend the PSPAs' terms. *Id.* ¶¶ 57, 69. Indeed, an FHFA official reported in early August 2012 that Treasury was making a “renewed push” to implement a new amendment. *Id.* ¶ 65 (quoting the FHFA official). The FHFA-C learned of the proposed changes before the Enterprises; Treasury informed the Enterprises that the new terms were forthcoming and announced the changes to the Enterprises. *Id.* ¶ 67. Treasury officials who were involved with the process do not recall Treasury making any backup or contingency plans in the event that the FHFA-C rejected the proposed terms. *Fairholme II*, 147 Fed. Cl. at 19. The FHFA-C accepted the changes without advocating for different terms. *Id.*

Treasury and the FHFA-C decided to announce the changed terms in mid-August 2012 because, according to Treasury, the Enterprises would be reporting earnings exceeding their dividend obligation at the beginning of that month. *Id.* On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA (“PSPA Amendment”). 1st Am. Compl. ¶¶ 2, 9, 54. A key component of the amended PSPAs is the requirement—referred to here as the “Net Worth Sweep”—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise’s net worth (except for a small capital reserve amount) rather than a dividend based on a set percentage of the liquidation preference.<sup>6</sup> *Id.* ¶ 54.

---

<sup>6</sup> The capital reserve for each Enterprise started at \$3 billion and was set to decrease to \$0 by January 2018, but the

Additionally, under the amended PSPAs, the Enterprises are not obligated to pay a periodic commitment fee. *Id.* ¶ 65.

**a. Treasury wanted to ensure that it benefited from the new terms.**

With the PSPAs, Treasury sought to secure a more beneficial arrangement for itself, as a representative for taxpayers. During the lead-up to the PSPA Amendments, a Treasury official acknowledged in an internal communication that the government had resolved to “ensure existing common equity holders will not have access to any positive earnings from the [Enterprises] in the future.” *Id.* ¶ 57 (emphasis removed) (quoting the document). Treasury recognized its goal of obtaining all of the Enterprises’ profits by executing the PSPA Amendments; it intended to take “every dollar of earnings that [the Enterprises] generate[] . . . to benefit taxpayers.” *Id.* ¶ 10 (quoting a Treasury announcement).

**b. The FHFA-C agreed to changes that benefit Treasury.**

For its part, the FHFA-C was operating under the belief that Treasury would benefit from the PSPA Amendments. The FHFA-C prioritized Treasury’s interests over the fate of the Enterprises and the interests of their shareholders. *Id.* ¶ 77. Mel Watt—a former FHFA Director—commented at the time that he did not “lay awake at night worrying what’s fair to the shareholders.” *Id.* (quoting an interview).

---

Enterprises and Treasury agreed in December 2017 to reset the capital reserve amount to \$3 billion in the first quarter of 2018. 1st Am. Compl. ¶ 54; *Fairholme II*, 147 Fed. Cl. at 19 n.5.

**c. Treasury and the FHFA understood that the PSPA Amendments would not facilitate the Enterprises exiting conservatorship.**

Treasury was aware that the new terms of the PSPAs were not conducive to the Enterprises exiting conservatorship. Treasury acknowledged that its goal was to facilitate the “wind down” of the Enterprises. *Id.* ¶ 57 (quoting a Treasury report). At the time of the PSPA Amendments, Treasury explained that the new deal would ensure that the Enterprises “will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form.” *Id.* ¶ 70 (emphasis removed) (quoting Treasury press release).

The FHFA shared a similar sentiment. The FHFA’s former Acting Director, Edward DeMarco, testified before the United States Senate that the PSPA Amendments “reinforce the notion that the [Enterprises] will not be building capital as a potential step to regaining their former corporate status.” *Id.* ¶ 77 (emphasis removed) (quoting the testimony). Indeed, the FHFA explained to Congress that its vision for the future included a housing industry without Fannie and Freddie. *Fairholme II*, 147 Fed. Cl. at 20.

**d. Treasury has benefited from the PSPA Amendments at the expense of the Enterprises and other shareholders.**

There are four significant effects that flowed from the PSPA Amendments. First, plaintiffs lost their economic interests in the Enterprises because, under the new terms, private shareholders can never receive dividends or liquidation distributions. 1st Am.

Compl. ¶¶ 2, 9, 89–90. Second, Treasury acquired plaintiffs’ economic interests in the Enterprises because Treasury now possesses “the entire value” of the Enterprises. *Id.* ¶ 94. Third, Treasury reaped a windfall of \$128.9 billion in comparison to what it would have received absent changes to the PSPAs. *Id.* ¶¶ 86–87 (alleging that the Enterprises paid Treasury \$223.6 billion under the PSPA Amendments but would have only paid Treasury \$94.7 billion under the previous terms). Fourth, the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink of insolvency. *Id.* ¶¶ 55, 88.

**8. Treasury and the FHFA are committed to ending the conservatorships.**

On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the Treasury Secretary to develop, “as soon as practicable,” a plan for “[e]nding the conservatorships of the [Enterprises] upon the completion of specified reforms . . . .”<sup>7</sup> Memorandum on Federal Housing

---

<sup>7</sup> The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source, the Federal Register. *See Murakami v. United States*, 46 Fed. Cl. 731, 739 (2000) (noting that the court may take judicial notice of government documents), *aff’d*, 398 F.3d 1342, 1354–55 (Fed. Cir. 2005); *see also Democracy Forward Found. v. White House Office of Am. Innovation*, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) (“[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum.”). *See generally* Fed. R. Evid. 201 (discussing judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the

Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must include proposals for “[s]etting the conditions necessary for the termination of the conservatorships” and outlined some of those conditions. *Id.* at 12,480. Subsequently, Treasury issued a plan in which it advocated for “begin[ning] the process of ending the [Enterprises’] conservatorships.”<sup>8</sup> U.S. Dep’t of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), <https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf> [<https://perma.cc/RGH8-N385>]; *accord id.* at 26 (“It is, after 11 years, time to bring the conservatorships to an end.”). As part of the plan to end the conservatorships, Treasury proposed that it and the FHFA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. *Id.* at 26–27.

The FHFA shares Treasury’s goals with respect to the conservatorships. Mark Calabria, the current FHFA Director, testified during his confirmation

---

court may consider facts derived from sources subject to judicial notice without converting the motion into one for summary judgment. *Sebastian v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

<sup>8</sup> The court takes judicial notice of Treasury’s reform plan because it is a government record available from a reliable source, Treasury’s website. *See supra* note 7.

hearing that he wanted to end the conservatorships.<sup>9</sup> 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony). *See generally Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 116th Cong. 10–40, 74–75, 148–85 (2019) [hereinafter *Calabria Testimony*] (documenting Mr. Calabria’s testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that each Enterprise retains. *Calabria Testimony, supra*, at 150; *see also id.* at 25 (“I support the idea of having significantly more capital at the [Enterprises].”).

#### **B. Plaintiffs own Fannie and Freddie stock.**

There are two plaintiffs in this case: Mason Capital, L.P. and Mason Capital Master Fund, L.P. (collectively, “Mason”). The first plaintiff is a Delaware limited partnership; the second is a Cayman Islands limited partnership. 1st Am. Compl. ¶¶ 13–14. Each plaintiff owned Fannie preferred stock and Freddie preferred stock at the time of the Net Worth Sweep. *Id.* The shares owned by these plaintiffs were primarily purchased after the conservatorships were established in 2008. Pls.’ Corrected Combined Opp’n to Def.’s Omnibus Mot. to Dismiss 1.

---

<sup>9</sup> The court takes judicial notice of the relevant testimony because the statements are recorded in government documents. *See supra* note 7.

## II. PROCEDURAL HISTORY

Plaintiffs filed their complaint on April 11, 2018. This case was coordinated with similar, related cases assigned to the undersigned judge.<sup>10</sup> Plaintiffs filed their first amended complaint in this case on August 16, 2018. In their amended complaint, plaintiffs present four claims. Plaintiffs first assert that the Net Worth Sweep constitutes a Fifth Amendment taking (count I) of their economic interests in their stock. Plaintiffs next assert, in the alternative, that the Net Worth Sweep constitutes an illegal exaction (count II) of those same economic interests because the (1) FHFA was operating unconstitutionally and (2) FHFA-C and Treasury exceeded their statutory authority when they approved the PSPA Amendments. Plaintiffs also plead a breach-of-fiduciary-duty claim (“fiduciary duty claim”) (count III) premised on the Net Worth Sweep being unreasonable, arbitrary, and contrary to the duty owed to the Mason shareholders. Additionally, plaintiffs assert a breach-of-implied-contract claim (count IV) based on a purported agreement by which the Enterprises consented to the conservatorship in exchange for the FHFA agreeing to preserve the Enterprises’ assets with the goal of making them safe and solvent. Specifically, plaintiffs assert that each dividend payment under the Net Worth Sweep constitutes a breach because it depletes the Enterprises’ assets in a manner that undermines the goals of conservatorship.

---

<sup>10</sup> A fuller recitation of the procedural history of this case and related cases is provided in *Fairholme II*, 147 Fed. Cl. at 21–23.

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case and eleven related cases before the undersigned.<sup>11</sup> The plaintiffs in each of the twelve cases filed a response brief on their respective dockets; some of the plaintiffs relied on a joint brief filed in six of the cases, others, as is the case here, filed a joint brief for five of the cases in which the plaintiffs are all represented by the same counsel. Defendant filed its omnibus reply brief in each of the cases on May 6, 2019. The parties have fully briefed defendant’s motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiffs in this case have adopted the favorable arguments made by the plaintiffs in the related cases to the extent that such arguments are relevant.<sup>12</sup> Defendant’s motion to dismiss is now ripe for adjudication.

---

<sup>11</sup> The eleven related cases are *Fairholme Funds, Inc. v. United States*, No. 13-465C; *Washington Federal v. United States*, No. 13-385C; *Cacciapalle v. United States*, No. 13-466C; *Fisher v. United States*, No. 13-608C; *Arrowood Indemnity Company v. United States*, No. 13-698C; *Reid v. United States*, No. 14-152C; *Rafter v. United States*, No. 14-740C; *Owl Creek Asia I, L.P. v. United States*, No. 18-281C; *Akanthos Opportunity Master Fund, L.P. v. United States*, No. 18-369C; *Appaloosa Investment Limited Partnership I v. United States*, No. 18-370C; and *CSS, LLC v. United States*, No. 18-371C.

<sup>12</sup> The court addresses in this opinion some arguments that were made primarily by the plaintiffs in the related cases to provide context for the resolution of defendant’s motion to



### III. STANDARD OF REVIEW

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

A claim that survives a jurisdictional challenge remains subject to dismissal under RCFC 12(b)(6) if it does not provide a basis for the court to grant relief. *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002) (“A motion to dismiss . . . for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant

---

dismiss. In addition, to the extent that any of plaintiffs’ less-developed arguments are not discussed in this opinion, the court found such arguments to be unpersuasive.

do not entitle him to a legal remedy.”) To survive a motion to dismiss under RCFC 12(b)(6), a plaintiff must include in the complaint “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Indeed, “[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 814–19 (1982).

#### IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a “threshold matter.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998). Subject-matter jurisdiction cannot be waived or forfeited because it “involves a court’s power to hear a case.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Ex parte McCardle*, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it is “an inflexible matter that must be considered before proceeding to evaluate the merits of a case.” *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006); accord *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1004–05 (Fed. Cir. 2015). Either party, or the court *sua sponte*, may challenge the court’s subject-matter jurisdiction at any time. *Arbaugh*, 546 U.S. at 506; see also *Jeun v. United States*, 128 Fed. Cl. 203, 209–10 (2016) (collecting cases).

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

Defendant challenges the court’s jurisdiction to entertain plaintiffs’ claims on a number of bases. Specifically, defendant argues that plaintiffs have not asserted claims against the United States and that the court lacks jurisdiction over the subject matter of

certain claims. The court addresses these contentions in turn.<sup>13</sup>

**A. Plaintiffs have asserted claims against the United States.**

The court first considers whether plaintiffs have asserted claims against the United States, a necessary element of jurisdiction in the Court of Federal Claims. As set forth in their amended complaint, all of plaintiffs' claims are premised on actions taken by the FHFA-C and Treasury. Defendant argues that the court lacks jurisdiction to consider any claims premised on the FHFA-C's or Treasury's conduct. In response, plaintiffs contend that they have asserted claims against the government because (1) Treasury was involved in the challenged conduct, (2) the FHFA-C was coerced by the government, (3) the FHFA-C was the government's agent, and (4) the FHFA-C, in collaboration with Treasury, is a government actor. The court addresses each contention in turn.

**1. The court cannot exercise jurisdiction based on allegations of Treasury's involvement.**

Plaintiffs initially argue that the court has jurisdiction over their Fifth Amendment takings and illegal-exaction claims because they have alleged the involvement of Treasury—indisputably a part of the

---

<sup>13</sup> In *Fairholme II*, the court addressed additional jurisdictional concerns that were not raised or are not implicated in this case. *See generally* 147 Fed. Cl. at 24–25 (rejecting defendant's contention that the claims of the *Fairholme* plaintiffs were barred by 28 U.S.C. § 1500), 34–37 (rejecting the contention of a putative intervenor that the Court of Federal Claims lacks jurisdiction to entertain Fifth Amendment takings claims).

federal government—in the action underlying these claims, i.e., the Net Worth Sweep. Defendant counters that Treasury alone could not have implemented the PSPA Amendments, and Treasury’s role as a counterparty to the voluntary agreement with the Enterprises is not sufficient to establish jurisdiction over plaintiffs’ takings claim. Defendant further asserts that the court’s order allowing jurisdictional discovery reflects that plaintiffs’ allegations concerning Treasury alone are insufficient to confer jurisdiction.

The parties’ dispute on the import of allegations concerning Treasury is ultimately immaterial in light of the court’s determination, explained below, that the FHFA-C—the other party involved in the PSPA Amendments—is the United States. Nonetheless, the court notes, as defendant asserts, that it implicitly acknowledged in its February 26, 2014 discovery order, issued in *Fairholme* and related cases, that the allegations concerning Treasury alone were insufficient to support jurisdiction. In that order, the court permitted the plaintiffs in those related cases to conduct fact discovery on whether the FHFA-C was “the ‘United States’ for purposes of the Tucker Act.” *Fairholme Funds, Inc. v. United States*, 114 Fed. Cl. 718, 721 (2014). The aforementioned discovery would have been unnecessary (and unwarranted) if, as plaintiffs assert here, the court has jurisdiction over plaintiffs’ claims based on their allegations concerning Treasury.

**2. The FHFA-C was not coerced into approving the PSPA Amendments.**

Plaintiffs also argue that the FHFA-C is the United States because the FHFA-C was coerced into approving the PSPA Amendments by Treasury. Defendant counters that the FHFA-C was not coerced by Treasury because the FHFA-C had a choice of whether to accept or reject the PSPA Amendments. Defendant asserts that there is no coercion if a party has a choice, regardless of how difficult refusal of a particular option may be. Indeed, defendant contends that plaintiffs fail to proffer any allegations that Treasury required the FHFA-C to enter into the agreements against its will. Defendant further asserts that other courts have declined to conclude that the FHFA-C felt compelled to follow Treasury based on allegations that Treasury invented the amendment concept or led the process.

**a. The court has jurisdiction over claims based on actions that resulted from government coercion.**

The court has jurisdiction over claims premised on the FHFA-C's actions if Treasury's "influence over the" FHFA-C "was coercive rather than merely persuasive." *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154 (Fed. Cir. 2014). The line between coercion and persuasion "is highly fact-specific." *Id.* Precedent from the United States Court of Appeals for the Federal Circuit ("Federal Circuit") frames the contours of the inquiry. In *Langenegger v. United States*, the plaintiffs pleaded that the United States coerced El Salvador by threatening to withhold financial and military assistance unless El Salvador

passed legislation expropriating private property. 756 F.2d 1565, 1567 (Fed. Cir. 1985). The Federal Circuit disagreed with the plaintiffs' characterization of the threats because "[d]iplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of [coercion], however difficult refusal may be as a practical matter." *Id.* at 1572. Similarly, the Federal Circuit concluded in *B & G Enterprises, Ltd. v. United States* that California was not coerced into enacting restrictions on smoking, notwithstanding the federal government conditioning grants on states enacting such limits. 220 F.3d 1318, 1321, 1325 (Fed. Cir. 2000); *see also A & D Auto*, 748 F.3d at 1155 (explaining that "coercion was not established" in *B & G*). The court explained that "it was California's decision to create [the] restrictions[;] . . . Congress may have provided the bait, but California decided to bite." *B & G*, 220 F.3d at 1325. In *A & D Auto*, the Federal Circuit addressed coercion in the context of the government allegedly conditioning vital financial assistance to bankrupt automobile companies on those companies terminating some of their franchise agreements. 748 F.3d at 1145. Unable to resolve the issue due to gaps in the record, the court noted in dicta that a relevant consideration was "whether the government financing was essential to the companies." *Id.*

A common thread runs through the Federal Circuit's decisions: the importance of choice. A nonfederal actor is not coerced when it can choose to go against the wishes of the United States, even if doing so will cause significant hardships, *Langenegger*, 756 F.2d at 1567, or result in a loss of

prospective benefits, *id.*; *B & G*, 220 F.3d at 1325. But there is no choice, in any meaningful sense, when there is only one realistic option. *A & D Auto*, 748 F.3d at 1145 (noting the importance of considering whether the companies could survive without accepting the government's offer); *cf. Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) (noting that, with respect to Congress's spending powers, "the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions"). Put differently, the nonfederal actor must make a voluntary decision, which it cannot do if there is only one realistic option. *See BMR Gold Corp. v. United States*, 41 Fed. Cl. 277, 282 (1998) (finding that the "the necessary element of coerciveness" for a taking was missing because the plaintiff granted the military permission to cross his land); *accord Henn v. Nat'l Geographic Soc.*, 819 F.2d 824, 826 (7th Cir. 1987) (noting that hard choices remain voluntary when they are not akin to "Don Corleone's '[m]ake him an offer he can't refuse'"). In sum, the FHFA-C was not coerced if it voluntarily chose to enter into the PSPA Amendments.

**b. Plaintiffs have not established that Treasury coerced the FHFA-C into approving the PSPA Amendments.**

In support of their contention that Treasury coerced the FHFA-C into approving the PSPA Amendments, plaintiffs allege that Treasury proposed the terms of the amendments and used its influence over the FHFA-C to ensure compliance with Treasury's wishes. Those allegations are not enough to establish



coercion. First, given the Enterprises' improving financial condition and Treasury's existing funding commitment, the FHFA-C's decision to execute the PSPA Amendments was voluntary because it could reject the deals without imperiling the Enterprises. The facts here, therefore, are diametrically opposed to the circumstances in *A & D Auto* that the Federal Circuit suggested may support coercion because the automobile dealers faced insolvency if they did not accede to the financing terms. *See* 748 F.3d at 1145. Second, the FHFA-C's lack of protestation is informative. "[T]he very fact that FHFA[-C] itself [did] not br[ing] suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA[-C] was an independent, willing participant in its negotiations with the Treasury." *Robinson v. Fed. Hous. Fin. Agency*, 223 F. Supp. 3d 659, 668 (E.D. Ky. 2016), *aff'd*, 876 F.3d 220 (6th Cir. 2017). The court's conclusion is bolstered by the fact that another court has held that materially similar allegations to those at issue here did not "come close to a reasonable inference that [the] FHFA[-C] considered itself bound to do whatever Treasury ordered." *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) ("*Perry I*"), *aff'd in part, rev'd in part sub nom. Perry II*, 864 F.3d at 591. This court agrees with the reasoning in *Perry I*: the PSPA Amendments were executed by sophisticated parties, and many agreements arise from a party's proposal being accepted by the other party. *Id.* Plaintiffs have not established that the FHFA-C was coerced into approving the PSPA Amendments by Treasury.

### 3. The FHFA-C is not Treasury's agent.

Plaintiffs further argue that the FHFA-C's actions are attributable to the United States because the FHFA-C is Treasury's agent. Defendant counters that plaintiffs have not pleaded an agency relationship because Treasury does not control the FHFA-C's operations. Indeed, defendant notes that Treasury is statutorily barred from exercising such control.

The United States is subject to claims in this court for the actions of a third party "if [that] party is acting as the government's agent . . . ." *A & D Auto*, 748 F.3d at 1154. "An essential element of agency is the principal's right to control the agent's actions." *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01 cmt. f (Am. Law. Inst. 2005)); accord *O'Neill v. Dep't of Hous. & Urban Dev.*, 220 F.3d 1354, 1360 (Fed. Cir. 2000) (acknowledging that the common-law meaning of agency requires, among other things, that the principal has the right to control the agent's conduct); see also *Preseault v. United States*, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (concluding that a state's actions were attributable to the United States when the state acted pursuant to the Interstate Commerce Commission's order); *Hendler v. United States*, 952 F.2d 1364, 1378–79 (Fed. Cir. 1991) (attributing a state's actions to the United States when the state acted under authority flowing from an Environmental Protection Agency order). The facts, as alleged, do not reflect that Treasury controlled the FHFA-C's actions because Congress explicitly precluded the FHFA-C from being subservient to another agency, 12 U.S.C. § 4617(a)(7) (providing that the FHFA-C cannot be subject to the "direction or supervision" of any other

agency), and plaintiffs have not alleged facts indicating that Treasury exercised such control notwithstanding the statutory bar. Although the FHFA-C was required by the PSPAs to obtain Treasury's approval for certain actions (e.g., issuing dividends), the PSPAs did not provide Treasury with the right to unilaterally order amendments. Moreover, plaintiffs describe an FHFA-C that made decisions independently: Treasury sought to influence the opinions of the FHFA-C's senior officials; Treasury "push[ed]" for the PSPA Amendments; and the FHFA-C agreed to the PSPA Amendments. 1st Am. Compl. ¶¶ 2, 63, 65. Simply stated, plaintiffs have not alleged facts establishing that Treasury exercised the control over the FHFA-C that is necessary for an agency relationship.

**4. The FHFA-C is the United States because the FHFA-C retains the FHFA's governmental character.**

In addition, plaintiffs contend that the FHFA-C is itself a government actor.<sup>14</sup> Defendant disagrees. First, relying on *O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 412 U.S. 79 (1994), defendant argues that the FHFA-C is not the United States because the FHFA-C stands in the Enterprises' shoes. Specifically, defendant asserts that Congress's decision to have the FHFA-C succeed to the Enterprises' rights reflects that Congress intended

---

<sup>14</sup> To determine whether this action is against the United States, the court need not reach plaintiffs' argument that Treasury and the FHFA-C formed a "control group." See Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 22–26.

that the FHFA-C step into the Enterprises' private shoes and shed its government character. Second, defendant argues that the FHFA-C's exercise of nontraditional conservatorship powers is immaterial because Congress can expand the conservator's role without transforming it into a government actor. Third, defendant argues that the Enterprises are not government instrumentalities—which means that the FHFA did not step into the shoes of a government actor when it became the Enterprises' conservator—because the government does not retain permanent authority to appoint the Enterprises' directors. Defendant contends that the government only has temporary, albeit indefinite, control over the Enterprises because the conservatorships are not permanent.

In response, plaintiffs dispute the premise of defendant's argument that, pursuant to *O'Melveny*, the FHFA becomes the Enterprises when acting as conservator. Plaintiffs assert that *O'Melveny* does not concern whether an entity is the United States or, if the decision can be read as addressing that issue, is distinguishable because it concerns receivers or is limited to conservators exercising traditional conservator powers. Second, plaintiffs argue that the FHFA has not shed its government status, even if it has stepped into the Enterprises' shoes, when it acts as conservator. Specifically, plaintiffs assert that the FHFA-C retains the FHFA's government status because (1) the FHFA-C has acted beyond the traditional conservator powers and (2) Congress expressed its intention for that result by precluding the conservator from being subject to the supervision of "any *other* agency." 12 U.S.C. § 4617 (emphasis

added). Third, plaintiffs argue that their claims are against the United States, even if the FHFA-C steps into the shoes of the Enterprises, because the Enterprises are government instrumentalities.

In short, the parties disagree over the government status of the FHFA-C. The FHFA is indisputably the United States, *see id.* § 4511(a) (establishing the FHFA as an “independent agency of the Federal Government”), and so the only question is whether the FHFA sheds that status when it acts as conservator. In other jurisdictions, courts have held (with near unanimity) that the FHFA loses its government status pursuant to *O’Melveny*. In *O’Melveny*, the United States Supreme Court (“Supreme Court”) explained that the Federal Deposit Insurance Corporation (“FDIC”) “steps into [the] shoes” of a private company when acting as receiver and sheds its government character because the FDIC “succeed[s] to . . . all rights, titles, powers, and privileges of the [entity in receivership] . . .” 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); *see also AG Route Seven P’ship v. United States*, 57 Fed. Cl. 521, 534 (2003) (citing *O’Melveny* for the proposition that the FDIC as receiver is a “private party, and not the government *per se*” because it “is merely standing in the shoes . . . of the defunct thrift”). The courts drawing from *O’Melveny* have concluded that the FHFA steps into the shoes of the Enterprises and sheds its government character when acting as conservator because Congress provided that the FHFA-C exercises the same rights with respect to the Enterprises as Congress granted to the FDIC as receiver. *See, e.g., Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017); *cf. Ameristar Fin. Servicing Co. v. United*

*States*, 75 Fed. Cl. 807, 811 (2007) (concluding, with respect to the FDIC, that the step-into-the-shoes principle set forth in *O'Melveny* also applies in the conservator context).

**a. The FHFA-C is not the United States if the FHFA steps into the Enterprises' shoes when acting as conservator.**

Plaintiffs initially contend that defendant's reliance on *O'Melveny* is erroneous because, assuming that *O'Melveny* applies, the FHFA-C is the United States even though it steps into the Enterprises' shoes. Specifically, plaintiffs assert that the FHFA-C is the United States under the facts alleged because (1) the FHFA-C exercises nontraditional conservator powers, (2) Congress intended that the FHFA-C retain the FHFA's government status, and (3) the FHFA-C steps into the shoes of a government instrumentality. The court addresses each assertion in turn.

First, the FHFA-C did not become a government actor by exercising powers beyond those traditionally afforded to a conservator. As a threshold matter, plaintiffs have not alleged facts reflecting that the FHFA-C used such powers; the execution of the PSPA Amendments was a "quintessential conservatorship" function. *Perry II*, 864 F.3d at 607. More importantly, however, plaintiffs would not prevail even if the FHFA-C exercised nontraditional conservatorship powers in agreeing to the PSPA Amendments. When this argument was pressed in other jurisdictions, it was rejected:

It may well be true that FHFA's actions would not be allowed under traditional principles of corporate or conservatorship law, but it does not

follow that those actions are therefore governmental. Legislatures can expand conservatorship and similar powers without transforming conservators into agents of the government. *Cf. Pegram v. Herdrich*, 530 U.S. 211, 225–26 (2000) (explaining that the Employee Retirement Income Security Act altered the common law of trusts to permit certain actions that would otherwise violate the trustee’s fiduciary duties).

*Bhatti v. Fed. Hous. Fin. Agency*, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (footnote omitted). The court agrees with that reasoning, and plaintiffs provide no authority that supports a contrary result. Although plaintiffs state that the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) decision in *Waterview Management Co. v. FDIC*, 105 F.3d 696 (D.C. Cir. 1997), supports their position, they are mistaken. *Waterview* is not on point because the D.C. Circuit did not hold that a conservator is *per se* the United States when acting pursuant to a congressional grant of broad powers. Rather, it held that, as a matter of statutory interpretation, the existence of a receivership did not preempt a prereceivership contract. *Id.* at 699–702.

Second, Congress’s instruction that the FHFA-C is not subject to the supervision of any other agency does not reflect congressional intent for the FHFA to retain its government status when acting as conservator even if it steps into the shoes of the Enterprises. Because the court only reaches this issue by assuming that *O’Melveny* is instructive, the statutory language concerning supervision of the FHFA-C does not support a finding of jurisdiction because the same

language is present in the statute that the Supreme Court addressed in *O'Melveny*. See 512 U.S. at 85–86 (discussing 12 U.S.C. § 1821). Compare 12 U.S.C. § 1821(c)(3)(C) (“When acting as conservator or receiver . . . , [the FDIC] shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC’s] rights, powers, and privileges.”), with *id.* § 4617(a)(7) (“When acting as conservator or receiver, the [FHFA] 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 [FHFA].”).

The third argument advanced by plaintiffs—that the FHFA-C is the United States because it steps into the shoes of a government instrumentality—also is not meritorious. A government instrumentality’s actions are attributable to the United States for purposes of the Tucker Act. See *Corr v. Metro. Wash. Airports Auth.*, 702 F.3d 1334, 1336 (Fed. Cir. 2012) (noting that a claim against a government instrumentality is a claim against the United States for purposes of the Little Tucker Act, 28 U.S.C. § 1346(a)(2)). The Supreme Court established in *Lebron v. National Railroad Passenger Corp.* that a company is a government instrumentality when (1) it is created by “special law,” (2) it is established “for the furtherance of governmental objectives,” and (3) the federal government “retains for itself permanent authority to appoint a majority of the [company’s] directors . . . .” 513 U.S. 374, 400 (1995). After *Lebron*, the Supreme Court clarified that, for purposes of the instrumentality test, “the practical reality of federal



control and supervision prevails over Congress' disclaimer of the [the entity's] governmental status." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1233 (2015).

There is no dispute that the Enterprises satisfy the first two prongs of the *Lebron* test; Congress created the Enterprises by special law to achieve governmental objectives related to the housing market. See 12 U.S.C. § 4501; see also *Herron*, 861 F.3d at 167 (addressing claims involving Fannie and noting that "[t]his case satisfies the first two *Lebron* criteria"); *Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1406–07 (9th Cir. 1996) (reaching same conclusion for Freddie). The status of the Enterprises, therefore, turns on the third prong: whether the government retains permanent authority to appoint a majority of the Enterprises' directors.

The Federal Circuit has not addressed the government-control prong with respect to the Enterprises, but courts in other jurisdictions have done so. Those decisions provide a starting point for the court. It appears that every court to consider the issue, with the exception of one district court, has held that the government does not exercise permanent control over the Enterprises. *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 279 (D.R.I. 2018) (concluding that the government retains permanent authority to control the Enterprises after noting that "[t]he non-controlling precedent to date" has reached the opposite conclusion). Most of the courts that concluded that the government lacks permanent control over the Enterprises issued their decisions before the Supreme Court in *Association of American*

*Railroads* emphasized the importance of evaluating the practical reality over nomenclature, and the other courts focused on the statutory purpose for the conservatorships rather than the Enterprises' actual situation. *E.g.*, *Herron*, 861 F.3d at 169 (relying on the notion that a conservatorship is fundamentally temporary). In other words, the courts adopting the prevailing view considered the issue of control without regard for the Supreme Court's instruction to focus on the practical reality. The court, therefore, does not find those decisions persuasive.

The crux of the inquiry, as the Supreme Court mandates, is on the practical reality of the government's control over the Enterprises. *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1233. It is of no import that Congress nominally authorized a facially temporary conservatorship, *see* 12 U.S.C. § 4617(a) (permitting the FHFA to act as conservator to "reorganiz[e]" or "rehabilitat[e]" the Enterprises), because Congress's disclaimers are no substitute for the court's obligation to assess the government's actual control, *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1233. The court focuses on the length of the conservatorship because the FHFA-C wields complete control over the Enterprises so long as they are in conservatorship. *See generally* 12 U.S.C. § 4617.

Plaintiffs allege that the Enterprises will remain undercapitalized—and thus subject to conservatorship pursuant to 12 U.S.C. § 4617(a)(3)(J)—until the PSPAs, in their current form, are changed because the Enterprises cannot accumulate any capital under the existing terms of the PSPAs. Although the PSPAs could be further amended, plaintiffs' allegations reflect that Treasury

and the FHFA-C will not do so because the purpose of the PSPA Amendments is to prevent the Enterprises from accumulating the necessary capital to become independent companies. Plaintiffs, in short, have alleged that the government intended, and has taken steps to ensure, that the conservatorships never end. Those facts, viewed in isolation, would support a conclusion that the practical reality is that the Enterprises are under permanent government control. The court's inquiry, however, is not limited to plaintiffs' allegations because it has taken judicial notice of relevant facts reflecting that the status quo has changed: The Treasury Secretary and the FHFA Director are now both committed to ending the conservatorships. Moreover, the idea that the Enterprises are permanently subject to government control because they can never accumulate the capital needed to exit the conservatorships is undermined by recent developments. Indeed, Treasury proposed amending the Net Worth Sweep to allow the Enterprises to retain more capital, and the FHFA Director testified during his confirmation hearing that, if confirmed, he would seek to increase the amount of capital that the Enterprises retain. Simply stated, the practical reality is that the Enterprises are not subject to permanent government control because the relevant parties are working to terminate the conservatorships.<sup>15</sup>

---

<sup>15</sup> Plaintiffs may disagree with the court's conclusion that events occurring after the PSPA Amendments are relevant to determining whether the Enterprises were under permanent government control during the events discussed in plaintiffs' complaint. Even if the court agreed that events occurring after

In sum, the FHFA-C does not become the United States if the FHFA steps into the Enterprises' shoes when serving as conservator.

**b. The FHFA-C retains the FHFA's government character because the FHFA-C does not step into the Enterprises' shoes.**

The key inquiry, therefore, is whether the FHFA steps into the shoes of the Enterprises when acting as conservator. Defendant argues that the FHFA-C sheds its government character and assumes the identity of the Enterprises based on the reasoning in *O'Melveny*. Defendant's reliance on *O'Melveny* is misplaced. *O'Melveny* concerns a receiver stepping into the shoes of a failed bank. 512 U.S. at 86. The roles of a conservator and receiver are meaningfully different. In a recent decision, the United States District Court for the District of Rhode Island artfully explained the differences and their import for assessing whether the FHFA-C is the government:

The *O'Melveny* Court held that FDIC, when acting as a receiver for a private entity, steps into the shoes of that private entity for state law claims. This holding makes sense given the purpose of receivership: "to preserve a company's

---

the PSPA Amendments are not germane, plaintiffs still would not prevail because they allege that the conservatorships began as temporary measures. See 1st Am. Compl.¶ 7 (noting the temporary nature of the conservatorships and quoting an FHFA publication stating that the conservatorships would be terminated once the Enterprises had been restored "to a safe and solvent condition"); *id.* (noting that the FHFA reassured the market that the Enterprises would return to normal business operations). Thus, the Enterprises were not under permanent government control before the PSPA Amendments.

assets, for the benefit of creditors, in the face of bankruptcy.” When FDIC is appointed receiver, it must dispose of the received entity’s assets, resolving obligations and claims made against the entity. Notably, “[i]n receivership, the receiver owes fiduciary duties to the creditors, which the corporation would otherwise owe to creditors during a period of insolvency.” It logically follows, then, that the receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity.

Conservatorship, in contrast, serves a different function. FHFA has described the purpose of conservatorship is “to establish control and oversight of a company to put it in a sound and solvent condition.” Conservators, unlike receivers, have a fiduciary duty running to the corporation itself.

This is “critically distinct” from the fiduciary duties owed as a receiver—the receiver does indeed “step into the shoes” of the entity by assuming the fiduciary duties *of* the entity, but the conservator does not: it remains distinct, and rather owes a duty *to* the entity. Given the difference in fiduciary duties, *O’Melveny’s* “steps into the shoes” holding makes sense in the context of receivership, but not in the context of conservatorship.

*Sisti*, 324 F. Supp. 3d at 282–83 (citations and footnotes omitted). *See generally* Brian Taylor Goldman, *The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State-Action*, 17 J. Bus. & Sec. L. 11, 23–30 (2016). The district court, relying on

the above analysis, declined to treat the FHFA-C as a private actor. *Sisti*, 324 F. Supp. 3d at 284. This court agrees with the reasoning and conclusion in *Sisti*: the FHFA does not shed its government character when acting as conservator because it does not step into the shoes of the Enterprises. Otherwise stated, the FHFA-C is the United States because it retains the FHFA's government character. Plaintiffs' claims, therefore, are against the United States for purposes of the Tucker Act.

**B. The court lacks jurisdiction over plaintiffs' claim that sounds in tort.**

**1. Plaintiffs' fiduciary duty claim sounds in tort.**

Defendant next argues that the court lacks jurisdiction over plaintiffs' fiduciary duty claim because the United States does not owe to each Enterprise's shareholders a fiduciary duty that is grounded in a statute or contract. Defendant asserts that such a fiduciary duty cannot be based on (1) HERA because, pursuant to the statute, the FHFA-C is only required to act in the government's and the Enterprises' best interests; or (2) the PSPAs because plaintiffs are not parties to those contracts. Plaintiffs, in their opposition to defendant's motion to dismiss, counter that their claim is based on a fiduciary duty rooted in both HERA and the PSPAs. As to HERA, plaintiffs assert that Congress made the FHFA-C a fiduciary by authorizing it to control the Enterprises, entrusting it with duties that are at the core of what it means to be a fiduciary, and using terminology—"conservator"—associated with a fiduciary. With respect to the PSPAs, plaintiffs argue

that Treasury owes a fiduciary duty to the shareholders because it, acting with the FHFA-C, acquired control rights under the contract.

The court, pursuant to the Tucker Act, lacks jurisdiction over tort claims. 28 U.S.C. § 1491(a)(1). A breach of fiduciary duty is generally classified as a tort. *Newby v. United States*, 57 Fed. Cl. 382, 294 (2003). A fiduciary duty claim, however, does not sound in tort for purposes of the Tucker Act when the fiduciary relationship is founded on a money-mandating statute or a contractual provision between the claimant and United States. *See Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (statute); *Cleveland Chair Co. v. United States*, 557 F.2d 244, 246 (Ct. Cl. 1977) (contract); *see also* 28 U.S.C. § 1491(a)(1) (providing jurisdiction over claims “founded upon . . . any Act of Congress . . . or contract with the United States”).

The initial issue is whether HERA establishes a fiduciary relationship between the FHFA-C and the Enterprises’ shareholders. The court begins with the language of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). “If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect.” *Rosete v. Office of Pers. Mgmt.*, 48 F.3d 514, 517 (Fed. Cir. 1995); *accord Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”). Congress provided in HERA that the FHFA-C is only required to act in the interests of itself or the Enterprises. 12 U.S.C. § 4617(b)(2)(J). That statement reflects a clear intent: the FHFA-C does not owe a fiduciary duty to

shareholders because the conservator is not required to consider shareholders' interests.<sup>16</sup> *See id.*; *see also Collins v. Mnuchin*, 938 F.3d 553, 580 (5th Cir. 2019) (en banc) (noting that HERA “may permit” the FHFA-C to pursue actions that are “inconsistent with fiduciary duties”), *petitions for cert. filed*, 88 U.S.L.W. 3114 (U.S. Sept. 25, 2019) (No. 19-422), 88 U.S.L.W. 3146 (U.S. Oct. 25, 2019) (No. 19-563). The plain language controls, and therefore the court does not consider the peripheral considerations urged by plaintiffs such as the implications of the word “conservator,” the FHFA-C’s control over the Enterprises, or the FHFA-C’s other powers. In sum, plaintiffs cannot establish jurisdiction for their fiduciary duty claim by relying on HERA.

Next, the court turns to whether Treasury, acting together with the FHFA-C, owed a fiduciary duty to the Enterprises’ other shareholders because it acquired control rights by agreeing to the PSPAs. Plaintiffs’ argument is premised on the state-law

---

<sup>16</sup> The court’s interpretation of HERA’s plain language is buttressed by the fact that Congress seemingly made a deliberate decision to exclude shareholder interests from the FHFA-C’s considerations. Congress modeled HERA on the Financial Institutions Reform, Recovery, and Enforcement Act (“FIRREA”). *Jacobs v. Fed. Hous. Fin. Agency*, 908 F.3d 884, 893 (3d Cir. 2018). Under FIRREA, Congress permitted the FDIC as conservator to consider the best interests of a bank, its depositors, or the FDIC. 12 U.S.C. § 1821(d)(2)(J)(ii). Although Congress permitted the FDIC to take into consideration the interests of its depositors, Congress omitted the analogue of depositors—shareholders—from the list of germane interests that the conservator can consider when acting pursuant to HERA. *Compare id.* (FIRREA), *with* 12 U.S.C. § 4617(b)(2)(J) (HERA). The omission is telling.



principle (which they term “general corporate law”) that a controlling shareholder owes a fiduciary duty to the minority shareholders. The court is not convinced. First, plaintiffs’ allegation of a fiduciary relationship is not founded on a contract within the meaning of the Tucker Act. Plaintiffs are not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs. They invoke the contracts solely to establish that Treasury, with the assistance of the FHFA-C, is a controlling shareholder and rely on that conclusion to argue that it has a fiduciary duty based on state law. The contract, otherwise stated, is one step removed from the purported genesis of the fiduciary duty—the application of state-law principles. That gap is too much in light of the court’s obligation to narrowly construe the Tucker Act’s waiver of sovereign immunity. *See Smith*, 855 F.2d at 1552 (noting that the Tucker Act is narrowly construed); *see also Perry II*, 864 F.3d at 619–20 (rejecting the legal theory that the Enterprises’ shareholders’ need to reference the PSPAs for their fiduciary duty claim was enough to conclude that the claim was rooted in a contract for purposes of the Tucker Act).

Second, plaintiffs fail to demonstrate the applicability of the state-law principles underlying their theory for why Treasury assumed fiduciary duties. Federal law governs the obligations Treasury incurred by entering into the PSPAs. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 519 (1988) (“The proposition that federal common law continues to govern the ‘obligations to and rights of the United States under its contracts’ is nearly as old as *Erie [v. Tompkins]*, 304 U.S. 64 (1938),] itself.”). Although

courts may shape federal law by drawing from state-law principles, plaintiffs do not explain why doing so is appropriate in this instance.

Third, plaintiffs do not prevail even if their fiduciary duty claim could be founded on a contract and federal common law incorporates the state-law principles regarding controlling shareholders' fiduciary obligations. Under Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders. *See Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1344 (Del. 1987); *Parsch v. Massey*, 79 Va. Cir. 446 (2009); *see also Quadrant Structured Prod. Co. v. Vertin*, 102 A.3d 155, 183 (Del. Ch. 2014) (acknowledging that those "who effectively control a corporation" owe a fiduciary duty to others).<sup>17</sup> To have the requisite level of control, the controlling shareholder must (1) be able to exercise a majority of the corporation's voting power or (2) direct the corporation without owning a majority of stock. *Kahn v. Lynch Commc'n Sys.*, 638 A.2d 1110, 1113 (Del. 1994). The latter, effective exercise of control, "is not an easy test to satisfy"; the individual or group must be, "as a practical matter, . . . no differently situated than if they had majority voting control." *In re PNB Holding Co. S'holders Litig.*, No. CIV.A. 28-N, 2006 WL 2403999, at \*9 (Del. Ch. Aug. 18, 2006).

---

<sup>17</sup> The court refers to Delaware and Virginia law because Fannie is a Delaware corporation, and Freddie is a Virginia corporation. When evaluating Virginia law, the court also looks to Delaware state court decisions because Virginia courts do so to resolve unsettled issues in the Commonwealth. *E.g.*, *U.S. Inspect Inc. v. McGreevy*, No. 160966, 2000 WL 33232337, at \*4 (Va. Cir. Ct. Nov. 27, 2000).

Plaintiffs have not established that Treasury meets either control test. First, plaintiffs do not allege that Treasury owns any of the Enterprises' voting stock. Treasury purchased preferred stock and acquired the right to buy common (i.e., voting) stock, but there is no indication that Treasury exercised its warrants or otherwise acquired common stock.<sup>18</sup> Second, plaintiffs do not demonstrate that Treasury exercised effective control over the Enterprises or was, in plaintiffs' terms, a "dominant shareholder." Pls.' Corrected Combined Opp'n to Def's Omnibus Mot. to Dismiss 29 (quoting *Sisti*, 324 F. Supp. 3d at 283 n.9). Although Treasury acquired the right to preclude the Enterprises from taking certain actions, Treasury did not control the Enterprises because it could not direct any action—it could only respond to certain requests made by the Enterprises. As a practical matter, therefore, Treasury is situated differently than if it had majority voting power.

Having rejected the contentions advanced by plaintiffs in their opposition brief, the court turns to an argument that appears for the first time in plaintiffs' supplemental brief, which was filed at the court's request after the initial round of briefing on defendant's omnibus motion to dismiss was complete, *Fairholme II* was decided, and the court held a status conference regarding further proceedings in the

---

<sup>18</sup> Even if Treasury had exercised its option to buy a majority of the voting stock, it would not be a controlling shareholder because the FHFA-C succeeded to all of the shareholders' rights. See 12 U.S.C. § 4617(b)(2)(A) (noting that the FHFA-C, by operation of law, succeeds to all rights and powers of any Enterprise shareholder). Treasury, therefore, would have no voting power.

related cases.<sup>19</sup> In their supplemental brief, plaintiffs contend that their fiduciary duty claim was founded on a contention that Treasury and the FHFA-C acted as a “control group,” that this contention was set forth in their opposition brief in the section addressing the court’s jurisdiction over their fiduciary duty claim, and that the court did not, in *Fairholme II*, consider this contention. But no such contention was made in plaintiffs’ opposition brief.

In their opposition brief, plaintiffs explained that under state law, multiple shareholders who are legally connected can form a “control group” and be “deemed a single, majority shareholder,” and then asserted that Treasury and the FHFA-C were such a control group, acting in concert as the United States. *See* Pls.’ Corrected Combined Opp’n to Def’s Omnibus Mot. to Dismiss 22–26. In other words, plaintiffs advanced their control group contention solely to establish that their suit was against the United States. In the portion of their opposition devoted to countering defendant’s jurisdictional attack on their fiduciary duty claim, plaintiffs asserted only two bases for a fiduciary duty; each one was treated separately as governing the conduct of either Treasury or the FHFA-C. They did not argue that the fiduciary duty arose from Treasury and the FHFA-C acting as a control group. Accordingly, the court did not consider plaintiffs’ control group allegation as a foundation for any fiduciary duty claim in *Fairholme*

---

<sup>19</sup> As defendant notes, the court did not invite plaintiffs, after the status conference held March 5, 2020, to relitigate issues already decided in *Fairholme II*.

*II*, among the arguments raised by the plaintiffs in these related cases.

Because plaintiffs' control group contention was not raised in their opposition brief in support of their fiduciary duty claim, it is waived. *See United States v. Ford Motor Co.*, 463 F.3d 1267, 1277 (Fed. Cir. 2006) (explaining that "[a]rguments raised for the first time in a reply brief are not properly before this court"); *Ironclad/EEI v. United States*, 78 Fed. Cl. 351, 358 (2007) (noting that "under the law of this circuit, arguments not presented in a party's principal brief to the court are typically deemed to have been waived"). But even if plaintiffs' argument were not waived, it is not persuasive. In *Fairholme II*, the court explained why neither Treasury nor the FHFA-C owed a fiduciary duty to the shareholders of Fannie and Freddie. 147 Fed. Cl. at 37–40. The court is not persuaded that a control group composed of two entities, neither of which was bound by the fiduciary duty posited by plaintiffs, would be bound by a fiduciary duty simply because the entities are alleged to have worked in concert against the interests of the other shareholders of the Enterprises. Plaintiffs' attempt to graft a state law concept of a control group of shareholders onto a Tucker Act jurisdictional inquiry is not anchored in binding or even persuasive precedent, as explained in *Fairholme II. Id.* at 39–40. Having considered the allegations in plaintiffs' amended complaint, the timely arguments set forth in plaintiffs' opposition brief, and the untimely argument raised in plaintiffs' supplemental brief, the court concludes that it lacks jurisdiction over plaintiffs' fiduciary duty claim because it sounds in

tort. Therefore, it dismisses count III of their amended complaint.

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

Defendant also argues that plaintiffs' Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the FHFA-C. Plaintiffs counter that they have pleaded the predicates for takings and illegal-exaction claims, which means that it is irrelevant whether they also alleged facts that are germane to tortious actions.

When a party pleads the predicates for a takings claim or illegal-exaction claim, the court possesses jurisdiction to entertain such claims. *See Hansen v. United States*, 65 Fed. Cl. 76, 80–81 (2005) (“[S]o long as there is some material evidence in the record that establishes the predicates for a [claim covered by the Tucker Act,] . . . a plaintiff succeeds in demonstrating subject matter jurisdiction in this court . . .”). Those claims, at a basic level, are contentions that the government expropriated private property lawfully (takings) or unlawfully (illegal exaction). *See Orient Overseas Container Line (UK) Ltd. v. United States*, 48 Fed. Cl. 284, 289 (2000) (“Takings claims arise because of a deprivation of property that is authorized by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation.” (citing *Dureiko v. United States*, 209 F.3d 1345, 1359 (Fed. Cir. 2000); *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007–08 (Ct. Cl. 1967))). If a party alleges the necessary predicates for these claims, the court is not deprived

of jurisdiction even if the complaint contains allegations that could support a tort claim. *See El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1353 (Fed. Cir. 2004) (“That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims.”); *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that this court has jurisdiction over a takings claim “even if the government’s action was subject to legal challenge on some other ground”). Here, plaintiffs plead the predicates for takings and illegal-exaction claims by alleging, in essence, that they were forced to give their property to the government because of lawful or unlawful government conduct. Therefore, it is of no import to the court’s jurisdiction whether plaintiffs have alleged facts that would also support a tort claim.

**C. The court lacks jurisdiction over  
plaintiffs’ implied-in-fact-contract claim  
because plaintiffs are not third-party  
beneficiaries of such a contract.**

Defendant argues next that the court lacks jurisdiction to entertain plaintiffs’ implied-in-fact-contract claim because plaintiffs are not third-party beneficiaries of such a contract. Specifically, defendant asserts that plaintiffs have not established that they are intended beneficiaries independent of their status as shareholders and that any benefit that is related to their status as shareholders is insufficient for jurisdiction. Plaintiffs counter that they are intended third-party beneficiaries of implied contracts, between the FHFA and each Enterprise’s

board, in which the boards consented to the conservatorships in exchange for the FHFA-C operating the Enterprises as a fiduciary and returning them to sound condition. Specifically, plaintiffs assert that the intent to benefit the shareholders is evident from (1) the boards' consent to the conservatorships because shareholders would benefit from a conservator focused on returning the Enterprises to a better condition, and (2) the government acknowledging that the Enterprises' stock would remain outstanding while the Enterprises were in conservatorship.

The court's jurisdiction over contract claims is limited by the Tucker Act. *Ransom v. United States*, 900 F.2d 242, 244 (Fed. Cir. 1990). Of particular import here, ordinarily, a plaintiff must be in privity of contract with the United States to invoke this court's jurisdiction over a contract claim against the government. *Fid. & Guar. Ins. Underwriters, Inc. v. United States*, 805 F.3d 1082, 1087 (Fed. Cir. 2015). But privity is not required if "the plaintiff can demonstrate that it was an intended third-party beneficiary under the contract." *Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1361 (Fed. Cir. 2016).

"Third party beneficiary status is an 'exceptional privilege.'" *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (quoting *German All. Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912)). The conditions for attaining such status are "stringent." *Anderson v. United States*, 344 F.3d 1343, 1352 (Fed. Cir. 2003). "[S]hareholders seeking status to sue as third-party beneficiaries of an allegedly breached contract must 'demonstrate that the contract not only reflects the express or implied intention to benefit the



party, but that it reflects an intention to benefit the party *directly*.” *Castle v. United States*, 301 F.3d 1328, 1338 (Fed. Cir. 2002) (quoting *Glass*, 258 F.3d at 1354). Specifically, “the contract must express the intent of the promissor to benefit the shareholder personally, independently of his or her status as shareholder.” *Glass*, 258 F.3d at 1353–54. As a practical matter, the shareholder does not personally benefit independent of its status as a shareholder when the contractual promises pertain only to the treatment of the company. See *FDIC v. United States*, 342 F.3d 1313, 1320 (Fed. Cir. 2003) (noting that the broken promises concerned the treatment of the company such that the plaintiffs did not benefit independent of their status as shareholders); *accord Maher v. United States*, 314 F.3d 600, 605 (Fed. Cir. 2002) (concluding that the plaintiffs were not third-party beneficiaries when they failed to “establish[] that the government took on any obligations in the merger agreement for [the plaintiffs’] personal benefit, or even that the merger agreement contains any provisions pertaining to [the plaintiffs] personally”).

As plaintiffs are not parties to the alleged implied contracts between the FHFA and the Enterprises, the relevant issue is whether plaintiffs are third-party beneficiaries of those agreements. They are not. First, it is of no import that the Enterprises, as plaintiffs argue, purportedly agreed to the conservatorships because that would serve the interests of shareholders. Indeed, “every action of a corporation is supposed to benefit its shareholders,” but the “law has not viewed this general benefit as making every shareholder a third-party beneficiary.”

*Suess v. United States*, 33 Fed. Cl. 89, 94 (1995). Second, plaintiffs' allegations reflect that they only benefit from the alleged implied contracts by virtue of their shareholder status. The relevant promises concerned how the FHFA-C would operate the Enterprises; the crux of the purported agreements was the FHFA-C promising to operate the Enterprises as a fiduciary to preserve their assets and return them to sound condition. Because the promises in the alleged implied contracts were directed at the Enterprises, plaintiffs cannot be third-party beneficiaries of the alleged contract. *See FDIC*, 342 F.3d at 1320. Third, plaintiffs have not demonstrated that the FHFA intended that plaintiffs would benefit independently of their status as shareholders even if they did so benefit. Plaintiffs rely on the FHFA's statements that private stock would remain outstanding and shareholders would continue to hold an economic interest in their stock. Those factual statements, however, do not reflect that the FHFA intended to confer any specific benefit on plaintiffs independent of their role as shareholders. Because plaintiffs have not alleged facts reflecting that the FHFA intended to confer a personal benefit on them, they are not third-party beneficiaries. *See Glass*, 258 F.3d at 1353–54. In sum, the court lacks jurisdiction to entertain plaintiffs' implied-in-fact-contract claim because plaintiffs are neither parties to a contract with the government nor third-party beneficiaries of any such agreement. Therefore, the court dismisses count IV of their amended complaint.

## V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiffs' claims,

defendant challenges plaintiffs' standing to pursue their claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. *Starr Int'l Co. v. United States*, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is "assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that controls. *See Allen v. Wright*, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted."), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Thus, in a suit brought by shareholders, it is the substance of the allegations and not the label assigned to the allegations—i.e., direct or derivative—that matters. *See Starr*, 856 F.3d at 966–67; *see also In re Sunrise Sec. Litig.*, 916 F.2d 874, 882 (3d Cir. 1990) ("Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties."). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based on the rights of the company. *See Starr*, 856 F.3d at 966–67; *see also Weir v. Stagg*, No. 09-21745-CIV, 2011 WL 13174531, at \*9 (S.D. Fla. Feb. 7, 2011) ("Shareholders do not have standing to bring a direct action for injuries suffered by a corporation, but rather, must bring a derivative action."). A

shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the corporation’s injuries—to have standing to litigate those claims. *See Starr*, 856 F.3d at 966–67.

Defendant argues that plaintiffs lack standing because their claims, pled as direct claims, actually belong to the Enterprises and are therefore derivative in nature. The parties in this case and the related cases fully briefed and argued this issue prior to the court issuing the *Fairholme II* decision. The court concluded in *Fairholme II* that Fannie and Freddie shareholders lack standing to pursue direct claims that are derivative in nature. Thereafter, the court solicited short supplemental briefs from plaintiffs and defendant regarding the applicability of the holdings in *Fairholme II* to this case. In their supplemental brief, plaintiffs suggest that their allegations are materially different from those asserted in *Fairholme* for purposes of standing, while defendant contends in its supplemental brief that there are no material differences. All of the parties’ arguments are addressed below.

**A. Plaintiffs’ allegations are not materially different from the allegations in *Fairholme*.**

As an initial matter, plaintiffs contend that their allegations are materially different from those advanced in *Fairholme* in two respects, such that the standing inquiry would be affected. Plaintiffs first argue that the type of harm they have suffered and the type of relief they have requested distinguish their claims from the direct claims in *Fairholme*. In essence, plaintiffs attempt to distinguish what they

characterize as the *Fairholme* plaintiffs' allegation of the expropriation of the Enterprises' assets from their allegation of the expropriation of their economic interests. As defendant points out, however, the direct claims in *Fairholme* and the claims in this case are virtually indistinguishable in nature. All four counts of the amended complaint in this case mirror, in every essential way, the direct takings, illegal-exaction, fiduciary duty, and breach-of-implied-contract claims in *Fairholme*. Expropriation of the shareholders' economic interests was alleged in *Fairholme*, just as it is alleged in the first amended complaint in this case. Compare *Fairholme II*, 147 Fed. Cl. at 20, 46–47, with 1st Am. Compl. ¶¶ 89, 106–108. Thus, the standing analysis in *Fairholme II* is fully applicable to the claims presented here.

Plaintiffs next invoke their reliance on the allegation of the existence of a “control group,” formed by Treasury and the FHFA-C, that dominated the Enterprises and injured them. In their view, this factual distinction in their amended complaint is significant because it was not discussed in *Fairholme II*. Plaintiffs fail to explain, however, how this factual distinction gives them standing to bring their claims. Plaintiffs apparently infer a logical connection between a control group of shareholders and a controlling shareholder, but the connection is not explained in a way that is helpful to the court. Indeed, in their supplemental brief plaintiffs cite primarily to a section of their opposition brief that does not address the topic of standing at all. If plaintiffs wished to advance a standing argument that specifically relied on the state law concept of a control group of shareholders and cases discussing such a

phenomenon, no such argument was made in their opposition brief. Thus, any such standing argument that plaintiffs may be attempting to make in their supplemental brief, to the extent that one could be discerned, is waived as untimely.<sup>20</sup> *See Ironclad/EEI*, 78 Fed. Cl. at 358.

**B. Plaintiffs' claims actually belong to the Enterprises.**

Having determined that plaintiffs' allegations do not differ materially from those advanced in *Fairholme*, the court turns to defendant's contention that plaintiffs lack standing to litigate their claims. Defendant's standing argument is premised on its assertion that plaintiffs' claims actually belong to the Enterprises—and are therefore derivative in nature—because, to prevail, plaintiffs would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises. Plaintiffs counter that they assert direct claims because the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises' capital structure to plaintiffs' detriment, which renders the claims for such conduct both direct and derivative under the dual-nature exception.<sup>21</sup>

---

<sup>20</sup> Even if this argument were not waived, the court agrees with defendant that the control group scenario alleged by plaintiffs also fails to satisfy the criteria for dual-natured claims that might provide standing to a shareholder plaintiff asserting direct claims. *See* Section V.B, *infra* (discussing the criteria for dual-natured claims).

<sup>21</sup> The plaintiffs in the related cases also asserted that their claims must be construed as direct claims to vindicate important federal policies if shareholders cannot assert derivative claims

Defendant replies that the Federal Circuit rejected the notion that a plaintiff states a direct claim by alleging it was targeted by the challenged action. Defendant also contends that the dual-nature exception is not applicable because Treasury was not a controlling shareholder, the Enterprises did not issue new shares, and the PSPA Amendments did not involve the reallocation of power.

Neither theory plaintiffs advance for why their claims are substantively direct, rather than derivative, is persuasive. First, it is of no import whether the government targeted shareholders with the PSPA Amendments. *See Starr*, 856 F.3d at 973 (noting that the plaintiffs did not “sufficiently explain why the Government’s subjective motivations are relevant to the inquiry into direct standing”). The direct-versus-derivative inquiry “turns on the plaintiff’s injury, not the defendant’s motive.” *Pagan v. Calderon*, 448 F.3d 16, 30 (1st Cir. 2006). Second, plaintiffs have not asserted claims that qualify as both direct and derivative based on the dual-nature exception. The Federal Circuit explained that, pursuant to this exception, shareholder claims may be both direct and derivative “when a ‘reduction in [the] economic value and voting power affected the minority stockholders uniquely . . . .’” *Starr*, 856 F.3d at 968 (quoting *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006)). Specifically, shareholder claims are both direct and derivative if

---

because of HERA. But as this court held in *Fairholme II*, the shareholders of the Enterprises, notwithstanding HERA, have standing to assert derivative claims because of the FHFA-C’s conflict of interest. 147 Fed. Cl. at 49–51.

“(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.”

*Id.* (quoting *Gentile*, 906 A.2d at 100). The exception does not apply here because Treasury was not a controlling shareholder at the time the PSPA Amendments were executed,<sup>22</sup> the PSPA Amendments did not involve the issuance of new shares, and shareholder voting power was not reallocated under the PSPA Amendments. It is not enough, contrary to plaintiffs’ contention, that the government allegedly exacted economic value from the other shareholders by rearranging the corporate structure. See *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016) (applying *Gentile* and holding a plaintiff does not state a direct claim under the dual-nature exception by pleading the “extraction of solely economic value from the minority by a controlling stockholder”). Because plaintiffs have not established that their claims are substantively direct in nature, they cannot demonstrate that they have standing to litigate those claims.

Plaintiffs fare no better if the court moves beyond its arguments for why their claims are substantively

---

<sup>22</sup> Treasury is not a controlling shareholder for the reasons set forth in Section IV.B.1, *supra*.



direct in nature. Federal law governs whether plaintiffs' claims are direct or derivative. *See Starr*, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. *Id.*; *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 (1991) (noting the "presumption that state law should be incorporated into federal common law"). Under Delaware law, the test for whether a shareholder's claim is derivative or direct depends on the answers to two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (en banc). "Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow." *Gentile*, 906 A.2d at 99, *discussed in Starr*, 856 F.3d at 965. Such claims are derivative even "though the overpayment may diminish the value of the corporation's stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend." *Protas v. Cavanagh*, No. CIV.A. 6555-VCG, 2012 WL 1580969, at \*6 (Del. Ch. May 4, 2012); *see also Hometown Fin. Inc. v. United States*, 56 Fed. Cl. 477, 486 (2003) ("[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to

nothing more than a diminution in stock value or a loss of dividends.”).

Plaintiffs focus on the expropriation of the Enterprises’ assets via compulsory payments of all profits. The gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury. Regardless of plaintiffs’ label (direct) or theory (taking, illegal exaction, breach of fiduciary duty, or breach of implied contract) for their claims, the claims are substantively derivative in nature because they are premised on allegations of overpayment.<sup>23</sup> See *Gentile*, 906 A.2d at 99; see also *Roberts*, 889 F.3d at 409 (explaining that the plaintiffs asserted “classic derivative claims” when they alleged that “the [PSPA Amendments] illegally dissipated corporate assets by transferring them to Treasury”). Plaintiffs cannot transform their substantively derivative claims into direct claims by

---

<sup>23</sup> Plaintiffs would remain unsuccessful if their allegations of waste and mismanagement (styled as self dealing, overreach, or abuse of discretion) were construed to be indicative of some action other than overpayment. Any claims premised on waste and mismanagement are derivative in nature. *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) (noting that “mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature”). Plaintiffs’ claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. See *Hometown*, 56 Fed. Cl. at 486 (stock prices); *In re Straight Path Commc’ns Inc. Consol. S’holder Litig.*, No. CV 2017-0486-SG, 2017 WL 5565264, at \*4 (Del. Ch. Nov. 20, 2017) (“Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . .”).

merely alleging that, as a result of overpayments, they were deprived of their stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiffs' purported "harms are 'merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.'" *Protas*, 2012 WL 1580969, at \*6 (quoting *Gentile*, 906 A.2d at 99); *see also Agostino v. Hicks*, 845 A.2d 1110, 1122 (Del. Ch. 2004) ("[T]he inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation."). Because plaintiffs' claims are derivative in nature, plaintiffs lack standing to pursue those claims on their own behalf.

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

Plaintiffs, while acknowledging that they assert only direct claims,<sup>24</sup> attempt to avoid a dismissal of those claims for lack of standing by contending that "[e]ven if [their] direct claims were deemed derivative, they still may assert them, under circuit precedent, because the [FHFA-C] as conservator has a manifest

---

<sup>24</sup> Indeed, there is no dispute that the four claims plaintiffs assert in their amended complaint are direct claims. In each count plaintiffs emphasize that the harm to plaintiffs is direct. 1st Am. Compl. ¶¶ 109, 113, 119, 135. In addition, the relief requested by plaintiffs is for monetary relief payable to them, not to the Enterprises. *Id.* at 46; *see also* Pls.' Suppl. Br. on Outstanding Mot. to Dismiss 3–4 (arguing that payments to the Enterprises would be of no use to plaintiffs). Finally, the amended complaint contains a statement that plaintiffs' claims are direct in nature. *See* 1st Am. Compl. ¶ 103 ("[A]ny claim raised by Mason that might be considered derivative on behalf of the Company is in fact direct, on behalf of Mason itself.").

conflict of interest.” Pls.’ Corrected Combined Opp’n to Def.’s Omnibus Mot. to Dismiss 39. The precedent upon which plaintiffs rely is the Federal Circuit’s decision in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999).

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

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

As for plaintiffs’ suggestion that their direct claims could be deemed derivative, they identify no authority for that recharacterization of their claims, even though they had the opportunity to do so in their opposition brief and their supplemental brief. The court finds plaintiffs’ “direct claims deemed derivative” argument, Pls.’ Suppl. Br. on Outstanding

Mot. to Dismiss 5 (emphasis removed), to be unsupported by authority and unpersuasive for the purpose of establishing plaintiffs' standing to bring the claims in their amended complaint.<sup>25</sup>

**D. Plaintiffs' standing to bring direct claims  
is not established by another holding in  
*First Hartford*.**

Finally, the court addresses an assertion in plaintiffs' opposition brief that was not explicitly addressed in *Fairholme II*. Only one sentence of that sixty-page brief was devoted to the following contention included among plaintiffs' standing arguments: "[T]he Federal Circuit has repeatedly recognized a direct claim where a shareholder alleged deprivation of a contingent property interest in a bank." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 38 (citing *First Hartford*, 194 F.3d at 1296; *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 957 n.2 (Fed. Cir. 1992)). Defendant, in support of its challenge to plaintiffs' standing to bring their claims, clearly relied on more recent precedent, the Federal Circuit's decision in *Starr*, to argue that plaintiffs' claims were derivative claims, not direct claims. Plaintiffs, notwithstanding their citation to *First Hartford* and a footnote in a case discussed in *First Hartford*, did not attempt, in any meaningful way, to explain why *Starr* should not be applied and followed in this case. Because plaintiffs' reliance on *First Hartford* as support for a shareholder's standing to bring direct claims is

---

<sup>25</sup> As defendant notes, claims brought on behalf of the Enterprises are asserted in numerous shareholder derivative claims in these related cases.

cursory and undeveloped, the court is within its discretion to deem this argument waived. See *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (noting that the court has discretion on whether to consider undeveloped arguments).

Even if this argument were not waived, the Federal Circuit's *Starr* decision remains the binding precedent most on point. In *Starr*, the distinction between direct and derivative claims brought by shareholders is the focus of the Federal Circuit's standing analysis. 856 F.3d at 963–73. Just as here, the plaintiffs brought takings and illegal-exaction claims related to a government intervention, during a financial crisis, affecting the future of a corporation in which they owned shares. *Id.* at 958–61. *Starr* provides the test for determining whether such claims are direct or derivative in nature and requires that nominally direct claims—that are actually derivative claims—be dismissed for lack of standing. *Id.* at 973.

In the face of this binding precedent, the court cannot conclude that the holding in *First Hartford*, which concerns direct Fifth Amendment takings claims, is more relevant. It is true that in *First Hartford* shareholders of a bank in receivership could pursue their takings claims as direct claims against the United States. 194 F.3d at 1287. However, *First Hartford* does not address the distinction between direct and derivative claims. When faced with binding precedent that addresses a crucial distinction, such as *Starr*, and one that does not, such as *First Hartford*, the court follows the precedent most on point. Cf. *Union Elec. Co. v. United States*, 363 F.3d 1292, 1297 (Fed. Cir. 2004) (“[W]e have repeatedly

held that the disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue.” (citing *Boeing N. Am., Inc. v. Roche*, 298 F.3d 1274, 1282 (Fed. Cir. 2002))).

In sum, plaintiffs have not established that they have standing to litigate their claims because they do not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court dismisses plaintiffs’ claims on standing grounds to the extent that it has subject-matter jurisdiction over those claims.<sup>26</sup>

## VI. CONCLUSION

For the reasons stated above, the court **GRANTS** defendant’s motion to dismiss and **DISMISSES** plaintiffs’ complaint because the court lacks jurisdiction to entertain their breach of fiduciary duty and implied-in-fact-contract claims, and plaintiffs lack standing to pursue any of their claims. The clerk shall enter judgment accordingly. No costs.

**IT IS SO ORDERED.**

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

---

<sup>26</sup> As explained above, the court lacks jurisdiction over plaintiffs’ claims for breach of fiduciary duty and breach of implied contract. *See supra* Sections IV.B.1 (fiduciary duty), IV.C (contract). In addition, because all of plaintiffs’ claims must be dismissed for lack of standing, the court need not reach defendant’s remaining arguments that these claims should be dismissed for failure to state a claim upon which relief can be granted.

---

APPENDIX F

---

**In the United States Court of Federal Claims**

No. 18-371C

(Filed: June 8, 2020)

\*\*\*\*\*

CSS, LLC,	* Motion to Dismiss;
Plaintiff,	* RCFC 12(b)(1);
v.	* RCFC 12(b)(6);
THE UNITED STATES,	* Jurisdiction;
Defendant.	* Standing; Direct
	* Claims;
	* Instrumentalities;
	* Coercion; Agent;
	* Conservators;
	* Conflict of Interest;
	* Third-Party
	* Beneficiaries; Stock;
	* Shareholders;
	* Fannie; Freddie;
	* FHFA

\*\*\*\*\*

*Lawrence D. Rosenberg*, Washington, DC, for plaintiff.

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



**OPINION AND ORDER****SWEENEY, Chief Judge**

Plaintiff in this case challenges the actions of the United States during the conservatorships of the Federal National Mortgage Association (“Fannie”) and the Federal Home Loan Mortgage Corporation (“Freddie”). Specifically, plaintiff takes issue with the conservator for Fannie and Freddie (collectively, the “Enterprises”) amending a funding agreement between the Enterprises and the United States Department of the Treasury (“Treasury”). Based on the revisions to that agreement, plaintiff seeks the return of money illegally exacted, damages for breach of contract and breach of fiduciary duty, and compensation for a taking pursuant to the Fifth Amendment to the United States Constitution (“Constitution”). Defendant moves to dismiss plaintiff’s amended complaint, arguing that the court lacks subject-matter jurisdiction over plaintiff’s claims, plaintiff lacks standing to pursue its claims, and plaintiff fails to state a claim upon which relief may be granted. For the reasons stated below, the court grants defendant’s motion to dismiss.

**I. BACKGROUND****A. The Enterprises are private companies that are under the control of a conservator.****1. The Enterprises operated independently before the financial crisis.**

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities that

are sold to investors.<sup>1</sup> 1st Am. Compl. ¶¶ 16–17; *Fairholme II*, 147 Fed. Cl. at 15. Congress chartered Fannie in 1938 and established Freddie in 1970. 1st Am. Compl. ¶¶ 16–17. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. *Id.* Freddie is organized under Virginia law, and Fannie is organized under Delaware law. *Id.* The Enterprises issued their own common and preferred stock. *Id.* ¶ 19. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. *Fairholme II*, 147 Fed. Cl. at 15. Those owning preferred stock, including plaintiff in this suit, acquired the right to receive dividends and a liquidation preference. 1st Am. Compl. ¶ 19.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. *Id.* ¶ 20. Although the Enterprises began recording losses in 2007, they were stable and adequately capitalized. *Id.* ¶¶ 22–23. Otherwise stated, the Enterprises were not in financial distress or otherwise at risk of insolvency. *Id.*

---

<sup>1</sup> This background section is a less comprehensive version of the court’s recitation of facts in a related case, *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1 (2019) (“*Fairholme I*”), *motion to certify interlocutory appeal granted*, 147 Fed. Cl. 126 (2020).

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

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (“HERA”), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency (“FHFA”) and provided it with supervisory and regulatory authority over the Enterprises. *See* 12 U.S.C. § 4511(a)–(b) (2018).<sup>2</sup> Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator (“FHFA-C”) for each Enterprise to reorganize, rehabilitate, or wind up its affairs.<sup>3</sup> *Id.* § 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its obligations. *Id.* § 4617(a)(3).<sup>4</sup> The conservator, once appointed, functions independently; it is not “subject to the direction or supervision of any other agency of the United States or any State in the

---

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

<sup>3</sup> To avoid any ambiguity, the court reiterates that it is using “FHFA” to refer to the agency acting in its regulatory role and “FHFA-C” when discussing the agency acting as a conservator.

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

exercise of [its] rights, powers, and privileges . . . .” *Id.* § 4617(a)(7).

Congress also delineated the scope of the FHFA-C’s powers in HERA. *See generally id.* § 4617. As soon as it is appointed, the FHFA-C “immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . . .” *Id.* § 4617(b)(2)(A). Congress also conferred on the conservator the power to “[o]perate the [Enterprise].” *Id.* § 4617(b)(2)(B). Pursuant to that power, the conservator “may,” among other things, “perform all functions of the [Enterprise],” “preserve and conserve the assets and property of the [Enterprise],” and “provide by contract for assistance in fulfilling any function . . . of the [conservator].” *Id.* The conservator “may” also “take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise].” *Id.* § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator “may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]” and “take any action authorized by [12 U.S.C. § 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA].” *Id.* § 4617(b)(2)(J). By describing the FHFA-C’s role primarily in terms of what powers it “may” exercise, *see generally id.* § 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its powers, *see United States v. Rodgers*, 461 U.S. 677,

706 (1983) (“The word ‘may,’ when used in a statute, usually implies some degree of discretion.”). Simply stated, the FHFA has “extraordinarily broad flexibility to carry out its role as conservator.” *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 606 (D.C. Cir. 2017) (“*Perry II*”), *cert. denied*, 138 S. Ct. 978 (2018).

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

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(*g*) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. *Id.* §§ 1455(*l*)(4), 1719(*g*)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the availability of mortgage finance, and protect taxpayers. *Id.* §§ 1455(*l*)(1)(B), 1719(*g*)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

- (i) The need for preferences or priorities regarding payments to the Government.
- (ii) Limits on maturity or disposition of obligations or securities to be purchased.
- (iii) The [Enterprise’s] plan for the orderly resumption of private market funding or capital market access.
- (iv) The probability of the [Enterprise] fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the [Enterprise's] status as a private shareholder-owned company.

(vi) Restrictions on the use of [Enterprise] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

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

#### **4. The FHFA became the conservator for each Enterprise.**

Around the beginning of September 2008, the FHFA and Treasury sought to persuade each Enterprise's board of directors to consent to conservatorship. 1st Am. Compl. 33. The FHFA told each Enterprise's board that conservatorship would further the interests of the shareholders. *Id.* Around the same time, the FHFA made an offer to each board: consent to a conservatorship in exchange for the FHFA-C aiming to preserve and conserve the Enterprises' assets, attempting to restore the Enterprises to sound and solvent condition, and terminating the conservatorships when those goals were achieved. *Id.* ¶¶ 5, 7; *Fairholme II*, 147 Fed. Cl. at 17. Each Enterprise's board accepted that offer and consented to a conservatorship on September 6, 2008, with an understanding that the FHFA-C would operate in the aforementioned limited ways. *Fairholme II*, 147 Fed. Cl. at 17.

The conservatorships became effective on September 6, 2008, upon each Enterprise's board's consent. 1st Am. Compl. ¶¶ 33–34; *see also* 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when “[t]he [Enterprise], by

resolution of its board of directors or its shareholders or members, consents to the appointment”).

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

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement (“PSPA”) with Treasury for each Enterprise. 1st Am. Compl. 6. Treasury entered into the agreements pursuant to its authority under HERA to buy the Enterprises’ securities. *Id.* ¶¶ 6, 35. Under the PSPAs, Treasury committed to provide up to \$100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. *Id.* ¶ 35. If an Enterprise’s liabilities exceeded its assets, then the Enterprise could draw on Treasury’s funding commitment in an amount equal to the difference between the Enterprise’s liabilities and assets. *Fairholme II*, 147 Fed. Cl. at 17.

In return for Treasury’s funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their respective common stock at a nominal price. 1st Am. Compl. ¶ 35. Treasury’s preferred stock had an initial liquidation preference of \$1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury’s funding commitment. *Id.* In the event of a liquidation, Treasury was entitled to recover the full liquidation value of its shares before any other shareholder would receive compensation. *Id.* Second, Treasury bargained for the right to a quarterly cash dividend

that would be equal, per annum, to 10% of its liquidation preference. *Id.* An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. *Id.* Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. *Id.* ¶¶ 35, 41. Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. *Id.* ¶ 36.

The FHFA-C and Treasury amended each Enterprise's PSPA on May 6, 2009, to increase Treasury's funding commitment to each Enterprise from \$100 billion to \$200 billion. *Id.* ¶ 43. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed \$200 billion. *Id.* ¶ 44.

#### **6. The Enterprises' finances improved during their conservatorships.**

In the early stages of the conservatorships, each Enterprise's net worth decreased as it reported losses. *Fairholme II*, 147 Fed. Cl. at 18. Some of the losses resulted from the FHFA-C writing down the value of



deferred tax assets.<sup>5</sup> *Id.* Notwithstanding those on-paper losses, as of late 2009, Fannie had drawn only \$60 billion from Treasury, and Freddie had only drawn \$51 billion. 1st Am. Compl. ¶ 45.

By 2011 and into 2012, the Enterprises' financial outlooks were promising. In addition to an improvement in the housing market, the Enterprises had improved their financial performance. *Id.* ¶ 50. They were positioned to further improve their financial condition by revising their valuations of deferred tax assets because of growing profits, and by increasing their earnings due to reduced credit losses. *Id.* The FHFA-C and Treasury were aware of those forthcoming changes and the Enterprises' improving outlooks. *Id.* ¶ 8. In August 2012, Treasury and FHFA-C knew that the Enterprises would soon experience improved profitability and received projections reflecting that the Enterprises would have positive comprehensive income in 2012. *Id.* ¶¶ 51–52. Otherwise stated, the FHFA-C and Treasury knew, by early August 2012, that the Enterprises were poised to generate profits in excess of their respective dividend obligations to Treasury. *Id.* ¶ 50.

### **7. Treasury and the FHFA-C agreed to a third amendment to the PSPAs.**

At an unspecified time prior to August 2012, Treasury and the FHFA-C began considering a third

---

<sup>5</sup> A deferred tax asset is an asset that may be used to offset future tax liability. *Fairholme II*, 147 Fed. Cl. at 18 n.4. A company must write down the value of that deferred asset if it is unlikely to be used to offset future taxable profits. *Id.* This write down occurs, for example, if a company predicts it will not be profitable in the future. *Id.*

amendment to each PSPA. Treasury was the driving force behind the initiative to amend the PSPAs' terms. *Id.* ¶¶ 56, 68. Indeed, an FHFA official reported in early August 2012 that Treasury was making a “renewed push” to implement a new amendment. *Id.* ¶ 64 (quoting the FHFA official). The FHFA-C learned of the proposed changes before the Enterprises; Treasury informed the Enterprises that the new terms were forthcoming and announced the changes to the Enterprises. *Id.* ¶ 66. Treasury officials who were involved with the process do not recall Treasury making any backup or contingency plans in the event that the FHFA-C rejected the proposed terms. *Fairholme II*, 147 Fed. Cl. at 19. The FHFA-C accepted the changes without advocating for different terms. *Id.*

Treasury and the FHFA-C decided to announce the changed terms in mid-August 2012 because, according to Treasury, the Enterprises would be reporting earnings exceeding their dividend obligation at the beginning of that month. *Id.* On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA (“PSPA Amendment”). 1st Am. Compl. ¶¶ 2, 9, 53. A key component of the amended PSPAs is the requirement—referred to here as the “Net Worth Sweep”—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise’s net worth (except for a small capital reserve amount) rather than a dividend based on a set percentage of the liquidation preference.<sup>6</sup> *Id.* ¶ 53.

---

<sup>6</sup> The capital reserve for each Enterprise started at \$3 billion and was set to decrease to \$0 by January 2018, but the

Additionally, under the amended PSPAs, the Enterprises are not obligated to pay a periodic commitment fee. *Id.* ¶ 64.

**a. Treasury wanted to ensure that it benefited from the new terms.**

With the PSPAs, Treasury sought to secure a more beneficial arrangement for itself, as a representative for taxpayers. During the lead-up to the PSPA Amendments, a Treasury official acknowledged in an internal communication that the government had resolved to “ensure existing common equity holders will not have access to any positive earnings from the [Enterprises] in the future.” *Id.* ¶ 56 (emphasis removed) (quoting the document). Treasury recognized its goal of obtaining all of the Enterprises’ profits by executing the PSPA Amendments; it intended to take “every dollar of earnings that [the Enterprises] generate[] . . . to benefit taxpayers.” *Id.* ¶ 10 (quoting a Treasury announcement).

**b. The FHFA-C agreed to changes that benefit Treasury.**

For its part, the FHFA-C was operating under the belief that Treasury would benefit from the PSPA Amendments. The FHFA-C prioritized Treasury’s interests over the fate of the Enterprises and the interests of their shareholders. *Id.* ¶ 76. Mel Watt—a former FHFA Director—commented at the time that he did not “lay awake at night worrying what’s fair to the shareholders.” *Id.* (quoting an interview).

---

Enterprises and Treasury agreed in December 2017 to reset the capital reserve amount to \$3 billion in the first quarter of 2018. 1st Am. Compl. ¶ 53; *Fairholme II*, 147 Fed. Cl. at 19 n.5.

**c. Treasury and the FHFA understood that the PSPA Amendments would not facilitate the Enterprises exiting conservatorship.**

Treasury was aware that the new terms of the PSPAs were not conducive to the Enterprises exiting conservatorship. Treasury acknowledged that its goal was to facilitate the “wind down” of the Enterprises. *Id.* ¶ 56 (quoting a Treasury report). At the time of the PSPA Amendments, Treasury explained that the new deal would ensure that the Enterprises “will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form.” *Id.* ¶ 69 (emphasis removed) (quoting Treasury press release).

The FHFA shared a similar sentiment. The FHFA’s former Acting Director, Edward DeMarco, testified before the United States Senate that the PSPA Amendments “reinforce the notion that the [Enterprises] will not be building capital as a potential step to regaining their former corporate status.” *Id.* ¶ 76 (emphasis removed) (quoting the testimony). Indeed, the FHFA explained to Congress that its vision for the future included a housing industry without Fannie and Freddie. *Fairholme II*, 147 Fed. Cl. at 20.

**d. Treasury has benefited from the PSPA Amendments at the expense of the Enterprises and other shareholders.**

There are four significant effects that flowed from the PSPA Amendments. First, plaintiff lost its economic interests in the Enterprises because, under the new terms, private shareholders can never receive dividends or liquidation distributions. 1st Am.

Compl. ¶¶ 2, 9, 88–89. Second, Treasury acquired plaintiff’s economic interests in the Enterprises because Treasury now possesses “the entire value” of the Enterprises. *Id.* ¶ 93. Third, Treasury reaped a windfall of \$128.9 billion in comparison to what it would have received absent changes to the PSPAs. *Id.* ¶¶ 85–86 (alleging that the Enterprises paid Treasury \$223.6 billion under the PSPA Amendments but would have only paid Treasury \$94.7 billion under the previous terms). Fourth, the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink of insolvency. *Id.* ¶¶ 54, 87.

**8. Treasury and the FHFA are committed to ending the conservatorships.**

On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the Treasury Secretary to develop, “as soon as practicable,” a plan for “[e]nding the conservatorships of the [Enterprises] upon the completion of specified reforms . . . .”<sup>7</sup> Memorandum on Federal Housing

---

<sup>7</sup> The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source, the Federal Register. *See Murakami v. United States*, 46 Fed. Cl. 731, 739 (2000) (noting that the court may take judicial notice of government documents), *aff’d*, 398 F.3d 1342, 1354–55 (Fed. Cir. 2005); *see also Democracy Forward Found. v. White House Office of Am. Innovation*, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) (“[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum.”). *See generally* Fed. R. Evid. 201 (discussing judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the

Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must include proposals for “[s]etting the conditions necessary for the termination of the conservatorships” and outlined some of those conditions. *Id.* at 12,480. Subsequently, Treasury issued a plan in which it advocated for “begin[ning] the process of ending the [Enterprises’] conservatorships.”<sup>8</sup> U.S. Dep’t of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), <https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf> [<https://perma.cc/RGH8-N385>]; *accord id.* at 26 (“It is, after 11 years, time to bring the conservatorships to an end.”). As part of the plan to end the conservatorships, Treasury proposed that it and the FHFA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. *Id.* at 26–27.

The FHFA shares Treasury’s goals with respect to the conservatorships. Mark Calabria, the current FHFA Director, testified during his confirmation

---

court may consider facts derived from sources subject to judicial notice without converting the motion into one for summary judgment. *Sebastian v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

<sup>8</sup> The court takes judicial notice of Treasury’s reform plan because it is a government record available from a reliable source, Treasury’s website. *See supra* note 7.

hearing that he wanted to end the conservatorships.<sup>9</sup> 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony). *See generally* *Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 116th Cong. 10–40, 74–75, 148–85 (2019) [hereinafter *Calabria Testimony*] (documenting Mr. Calabria’s testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that each Enterprise retains. *Calabria Testimony, supra*, at 150; *see also id.* at 25 (“I support the idea of having significantly more capital at the [Enterprises].”).

#### **B. Plaintiff owns Fannie and Freddie stock.**

There is one plaintiff in this case: CSS, LLC (“CSS”). CSS is an Illinois limited liability company. 1st Am. Compl. 13. CSS owned Fannie preferred stock and Freddie preferred stock at the time of the Net Worth Sweep. *Id.* The shares owned by plaintiff were primarily purchased after the conservatorships were established in 2008. Pls.’ Corrected Combined Opp’n to Def.’s Omnibus Mot. to Dismiss 1.

### **II. PROCEDURAL HISTORY**

Plaintiff filed its complaint on March 8, 2018. This case was coordinated with similar, related cases

---

<sup>9</sup> The court takes judicial notice of the relevant testimony because the statements are recorded in government documents. *See supra* note 7.

assigned to the undersigned judge.<sup>10</sup> Plaintiff filed its first amended complaint in this case on August 16, 2018. In its amended complaint, plaintiff presents four claims. Plaintiff first asserts that the Net Worth Sweep constitutes a Fifth Amendment taking (count I) of its economic interest in its stock. Plaintiff next asserts that the Net Worth Sweep constitutes an illegal exaction (count II) of that same economic interest because the (1) FHFA was operating unconstitutionally and (2) FHFA-C and Treasury exceeded their statutory authority when they approved the PSPA Amendments. Plaintiff also pleads a breach-of-fiduciary-duty claim (“fiduciary duty claim”) (count III) premised on the Net Worth Sweep being unreasonable, arbitrary, and contrary to the duty owed to CSS as a shareholder. Additionally, plaintiff asserts a breach-of-implied-contract claim (count IV) based on a purported agreement by which the Enterprises consented to the conservatorship in exchange for the FHFA agreeing to preserve the Enterprises’ assets with the goal of making them safe and solvent. Specifically, plaintiff asserts that each dividend payment under the Net Worth Sweep constitutes a breach because it depletes the Enterprises’ assets in a manner that undermines the goals of conservatorship.

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case

---

<sup>10</sup> A fuller recitation of the procedural history of this case and related cases is provided in *Fairholme II*, 147 Fed. Cl. at 21–23.



and eleven related cases before the undersigned.<sup>11</sup> The plaintiffs in each of the twelve cases filed a response brief on their respective dockets; some of the plaintiffs relied on a joint brief filed in six of the cases, others, as is the case here, filed a combined brief for five of the cases in which the plaintiffs are all represented by the same counsel. Defendant filed its omnibus reply brief in each of the cases on May 6, 2019. The parties have fully briefed defendant's motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiff in this case has adopted the favorable arguments made by the plaintiffs in the related cases to the extent that such arguments are relevant.<sup>12</sup> Defendant's motion to dismiss is now ripe for adjudication.

---

<sup>11</sup> The eleven related cases are *Fairholme Funds, Inc. v. United States*, No. 13-465C; *Washington Federal v. United States*, No. 13-385C; *Cacciapalle v. United States*, No. 13-466C; *Fisher v. United States*, No. 13-608C; *Arrowood Indemnity Company v. United States*, No. 13-698C; *Reid v. United States*, No. 14-152C; *Rafter v. United States*, No. 14-740C; *Owl Creek Asia I, L.P. v. United States*, No. 18-281C; *Akanthos Opportunity Master Fund, L.P. v. United States*, No. 18-369C; *Appaloosa Investment Limited Partnership I v. United States*, No. 18-370C; and *Mason Capital L.P. v. United States*, No. 18-529C.

<sup>12</sup> The court addresses in this opinion some arguments that were made primarily by the plaintiffs in the related cases to provide context for the resolution of defendant's motion to dismiss. In addition, to the extent that any of plaintiff's less-developed arguments are not discussed in this opinion, the court found such arguments to be unpersuasive.

### III. STANDARD OF REVIEW

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

A claim that survives a jurisdictional challenge remains subject to dismissal under RCFC 12(b)(6) if it does not provide a basis for the court to grant relief. *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002) (“A motion to dismiss . . . for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy.”). To survive a motion to dismiss under RCFC 12(b)(6), a plaintiff must include in the complaint “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*

*Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Indeed, “[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 814–19 (1982).

#### IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a “threshold matter.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998). Subject-matter jurisdiction cannot be waived or forfeited because it “involves a court’s power to hear a case.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Ex parte McCardle*, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it is “an inflexible matter that must be considered before proceeding to evaluate the merits of a case.” *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006); accord *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1004–05 (Fed. Cir. 2015). Either party, or the court *sua sponte*, may challenge the court’s subject-matter jurisdiction at any time. *Arbaugh*, 546 U.S. at 506; see also *Jeun v. United States*, 128 Fed. Cl. 203, 209–10 (2016) (collecting cases).

The ability of the United States Court of Federal Claims (“Court of Federal Claims”) to entertain suits against the United States is limited. “The United States, as sovereign, is immune from suit save as it

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

Defendant challenges the court’s jurisdiction to entertain plaintiff’s claims on a number of bases. Specifically, defendant argues that plaintiff has not asserted claims against the United States and that the court lacks jurisdiction over the subject matter of

certain claims. The court addresses these contentions in turn.<sup>13</sup>

**A. Plaintiff has asserted claims against the United States.**

The court first considers whether plaintiff has asserted claims against the United States, a necessary element of jurisdiction in the Court of Federal Claims. As set forth in its amended complaint, all of plaintiff's claims are premised on actions taken by the FHFA-C and Treasury. Defendant argues that the court lacks jurisdiction to consider any claims premised on the FHFA-C's or Treasury's conduct. In response, plaintiff contends that it has asserted claims against the government because (1) Treasury was involved in the challenged conduct, (2) the FHFA-C was coerced by the government, (3) the FHFA-C was the government's agent, and (4) the FHFA-C, in collaboration with Treasury, is a government actor. The court addresses each contention in turn.

**1. The court cannot exercise jurisdiction based on allegations of Treasury's involvement.**

Plaintiff initially argues that the court has jurisdiction over its Fifth Amendment takings and illegal-exaction claims because it has alleged the involvement of Treasury—indisputably a part of the

---

<sup>13</sup> In *Fairholme II*, the court addressed additional jurisdictional concerns that were not raised or are not implicated in this case. See generally 147 Fed. Cl. at 24–25 (rejecting defendant's contention that the claims of the *Fairholme* plaintiffs were barred by 28 U.S.C. § 1500), 34–37 (rejecting the contention of a putative intervenor that the Court of Federal Claims lacks jurisdiction to entertain Fifth Amendment takings claims).

federal government—in the action underlying these claims, i.e., the Net Worth Sweep. Defendant counters that Treasury alone could not have implemented the PSPA Amendments, and Treasury’s role as a counterparty to the voluntary agreement with the Enterprises is not sufficient to establish jurisdiction over plaintiff’s takings claim. Defendant further asserts that the court’s order allowing jurisdictional discovery reflects that plaintiff’s allegations concerning Treasury alone are insufficient to confer jurisdiction.

The parties’ dispute on the import of allegations concerning Treasury is ultimately immaterial in light of the court’s determination, explained below, that the FHFA-C—the other party involved in the PSPA Amendments—is the United States. Nonetheless, the court notes, as defendant asserts, that it implicitly acknowledged in its February 26, 2014 discovery order, issued in *Fairholme* and related cases, that the allegations concerning Treasury alone were insufficient to support jurisdiction. In that order, the court permitted the plaintiffs in those related cases to conduct fact discovery on whether the FHFA-C was “the ‘United States’ for purposes of the Tucker Act.” *Fairholme Funds, Inc. v. United States*, 114 Fed. Cl. 718, 721 (2014). The aforementioned discovery would have been unnecessary (and unwarranted) if, as plaintiff asserts here, the court has jurisdiction over plaintiff’s claims based on its allegations concerning Treasury.

**2. The FHFA-C was not coerced into approving the PSPA Amendments.**

Plaintiff also argues that the FHFA-C is the United States because the FHFA-C was coerced into approving the PSPA Amendments by Treasury. Defendant counters that the FHFA-C was not coerced by Treasury because the FHFA-C had a choice of whether to accept or reject the PSPA Amendments. Defendant asserts that there is no coercion if a party has a choice, regardless of how difficult refusal of a particular option may be. Indeed, defendant contends that plaintiff fails to proffer any allegations that Treasury required the FHFA-C to enter into the agreements against its will. Defendant further asserts that other courts have declined to conclude that the FHFA-C felt compelled to follow Treasury based on allegations that Treasury invented the amendment concept or led the process.

**a. The court has jurisdiction over claims based on actions that resulted from government coercion.**

The court has jurisdiction over claims premised on the FHFA-C's actions if Treasury's "influence over the" FHFA-C "was coercive rather than merely persuasive." *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154 (Fed. Cir. 2014). The line between coercion and persuasion "is highly fact-specific." *Id.* Precedent from the United States Court of Appeals for the Federal Circuit ("Federal Circuit") frames the contours of the inquiry. In *Langenegger v. United States*, the plaintiffs pleaded that the United States coerced El Salvador by threatening to withhold financial and military assistance unless El Salvador

passed legislation expropriating private property. 756 F.2d 1565, 1567 (Fed. Cir. 1985). The Federal Circuit disagreed with the plaintiffs' characterization of the threats because "[d]iplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of [coercion], however difficult refusal may be as a practical matter." *Id.* at 1572. Similarly, the Federal Circuit concluded in *B & G Enterprises, Ltd. v. United States* that California was not coerced into enacting restrictions on smoking, notwithstanding the federal government conditioning grants on states enacting such limits. 220 F.3d 1318, 1321, 1325 (Fed. Cir. 2000); *see also A & D Auto*, 748 F.3d at 1155 (explaining that "coercion was not established" in *B & G*). The court explained that "it was California's decision to create [the] restrictions[;] . . . Congress may have provided the bait, but California decided to bite." *B & G*, 220 F.3d at 1325. In *A & D Auto*, the Federal Circuit addressed coercion in the context of the government allegedly conditioning vital financial assistance to bankrupt automobile companies on those companies terminating some of their franchise agreements. 748 F.3d at 1145. Unable to resolve the issue due to gaps in the record, the court noted in dicta that a relevant consideration was "whether the government financing was essential to the companies." *Id.*

A common thread runs through the Federal Circuit's decisions: the importance of choice. A nonfederal actor is not coerced when it can choose to go against the wishes of the United States, even if doing so will cause significant hardships, *Langenegger*, 756 F.2d at 1567, or result in a loss of



prospective benefits, *id.*; *B & G*, 220 F.3d at 1325. But there is no choice, in any meaningful sense, when there is only one realistic option. *A & D Auto*, 748 F.3d at 1145 (noting the importance of considering whether the companies could survive without accepting the government’s offer); *cf. Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) (noting that, with respect to Congress’s spending powers, “the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions”). Put differently, the nonfederal actor must make a voluntary decision, which it cannot do if there is only one realistic option. *See BMR Gold Corp. v. United States*, 41 Fed. Cl. 277, 282 (1998) (finding that the “the necessary element of coerciveness” for a taking was missing because the plaintiff granted the military permission to cross his land); *accord Henn v. Nat’l Geographic Soc.*, 819 F.2d 824, 826 (7th Cir. 1987) (noting that hard choices remain voluntary when they are not akin to “Don Corleone’s ‘[m]ake him an offer he can’t refuse’”). In sum, the FHFA-C was not coerced if it voluntarily chose to enter into the PSPA Amendments.

**b. Plaintiff has not established that Treasury coerced the FHFA-C into approving the PSPA Amendments.**

In support of its contention that Treasury coerced the FHFA-C into approving the PSPA Amendments, plaintiff alleges that Treasury proposed the terms of the amendments and used its influence over the FHFA-C to ensure compliance with Treasury’s wishes. Those allegations are not enough to establish

coercion. First, given the Enterprises' improving financial condition and Treasury's existing funding commitment, the FHFA-C's decision to execute the PSPA Amendments was voluntary because it could reject the deals without imperiling the Enterprises. The facts here, therefore, are diametrically opposed to the circumstances in *A & D Auto* that the Federal Circuit suggested may support coercion because the automobile dealers faced insolvency if they did not accede to the financing terms. *See* 748 F.3d at 1145. Second, the FHFA-C's lack of protestation is informative. "[T]he very fact that FHFA[-C] itself [did] not br[ing] suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA[-C] was an independent, willing participant in its negotiations with the Treasury." *Robinson v. Fed. Hous. Fin. Agency*, 223 F. Supp. 3d 659, 668 (E.D. Ky. 2016), *aff'd*, 876 F.3d 220 (6th Cir. 2017). The court's conclusion is bolstered by the fact that another court has held that materially similar allegations to those at issue here did not "come close to a reasonable inference that [the] FHFA[-C] considered itself bound to do whatever Treasury ordered." *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) ("*Perry I*"), *aff'd in part, rev'd in part sub nom. Perry II*, 864 F.3d at 591. This court agrees with the reasoning in *Perry I*: the PSPA Amendments were executed by sophisticated parties, and many agreements arise from a party's proposal being accepted by the other party. *Id.* Plaintiff has not established that the FHFA-C was coerced into approving the PSPA Amendments by Treasury.

### 3. The FHFA-C is not Treasury's agent.

Plaintiff further argues that the FHFA-C's actions are attributable to the United States because the FHFA-C is Treasury's agent. Defendant counters that plaintiff has not pleaded an agency relationship because Treasury does not control the FHFA-C's operations. Indeed, defendant notes that Treasury is statutorily barred from exercising such control.

The United States is subject to claims in this court for the actions of a third party "if [that] party is acting as the government's agent . . . ." *A & D Auto*, 748 F.3d at 1154. "An essential element of agency is the principal's right to control the agent's actions." *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01 cmt. f (Am. Law. Inst. 2005)); accord *O'Neill v. Dep't of Hous. & Urban Dev.*, 220 F.3d 1354, 1360 (Fed. Cir. 2000) (acknowledging that the common-law meaning of agency requires, among other things, that the principal has the right to control the agent's conduct); see also *Preseault v. United States*, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (concluding that a state's actions were attributable to the United States when the state acted pursuant to the Interstate Commerce Commission's order); *Hendler v. United States*, 952 F.2d 1364, 1378–79 (Fed. Cir. 1991) (attributing a state's actions to the United States when the state acted under authority flowing from an Environmental Protection Agency order). The facts, as alleged, do not reflect that Treasury controlled the FHFA-C's actions because Congress explicitly precluded the FHFA-C from being subservient to another agency, 12 U.S.C. § 4617(a)(7) (providing that the FHFA-C cannot be subject to the "direction or supervision" of any other

agency), and plaintiff has not alleged facts indicating that Treasury exercised such control notwithstanding the statutory bar. Although the FHFA-C was required by the PSPAs to obtain Treasury's approval for certain actions (e.g., issuing dividends), the PSPAs did not provide Treasury with the right to unilaterally order amendments. Moreover, plaintiff describes an FHFA-C that made decisions independently: Treasury sought to influence the opinions of the FHFA-C's senior officials; Treasury "push[ed]" for the PSPA Amendments; and the FHFA-C agreed to the PSPA Amendments. 1st Am. Compl. ¶¶ 2, 62, 64. Simply stated, plaintiff has not alleged facts establishing that Treasury exercised the control over the FHFA-C that is necessary for an agency relationship.

**4. The FHFA-C is the United States because the FHFA-C retains the FHFA's governmental character.**

In addition, plaintiff contends that the FHFA-C is itself a government actor.<sup>14</sup> Defendant disagrees. First, relying on *O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 412 U.S. 79 (1994), defendant argues that the FHFA-C is not the United States because the FHFA-C stands in the Enterprises' shoes. Specifically, defendant asserts that Congress's decision to have the FHFA-C succeed to the Enterprises' rights reflects that Congress intended

---

<sup>14</sup> To determine whether this action is against the United States, the court need not reach plaintiff's argument that Treasury and the FHFA-C formed a "control group." See Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 22–26.

that the FHFA-C step into the Enterprises' private shoes and shed its government character. Second, defendant argues that the FHFA-C's exercise of nontraditional conservatorship powers is immaterial because Congress can expand the conservator's role without transforming it into a government actor. Third, defendant argues that the Enterprises are not government instrumentalities—which means that the FHFA did not step into the shoes of a government actor when it became the Enterprises' conservator—because the government does not retain permanent authority to appoint the Enterprises' directors. Defendant contends that the government only has temporary, albeit indefinite, control over the Enterprises because the conservatorships are not permanent.

In response, plaintiff disputes the premise of defendant's argument that, pursuant to *O'Melveny*, the FHFA becomes the Enterprises when acting as conservator. Plaintiff asserts that *O'Melveny* does not concern whether an entity is the United States or, if the decision can be read as addressing that issue, is distinguishable because it concerns receivers or is limited to conservators exercising traditional conservator powers. Second, plaintiff argues that the FHFA has not shed its government status, even if it has stepped into the Enterprises' shoes, when it acts as conservator. Specifically, plaintiff asserts that the FHFA-C retains the FHFA's government status because (1) the FHFA-C has acted beyond the traditional conservator powers and (2) Congress expressed its intention for that result by precluding the conservator from being subject to the supervision of "any *other* agency." 12 U.S.C. § 4617 (emphasis

added). Third, plaintiff argues that its claims are against the United States, even if the FHFA-C steps into the shoes of the Enterprises, because the Enterprises are government instrumentalities.

In short, the parties disagree over the government status of the FHFA-C. The FHFA is indisputably the United States, *see id.* § 4511(a) (establishing the FHFA as an “independent agency of the Federal Government”), and so the only question is whether the FHFA sheds that status when it acts as conservator. In other jurisdictions, courts have held (with near unanimity) that the FHFA loses its government status pursuant to *O’Melveny*. In *O’Melveny*, the United States Supreme Court (“Supreme Court”) explained that the Federal Deposit Insurance Corporation (“FDIC”) “steps into [the] shoes” of a private company when acting as receiver and sheds its government character because the FDIC “succeed[s] to . . . all rights, titles, powers, and privileges of the [entity in receivership] . . .” 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); *see also AG Route Seven P’ship v. United States*, 57 Fed. Cl. 521, 534 (2003) (citing *O’Melveny* for the proposition that the FDIC as receiver is a “private party, and not the government *per se*” because it “is merely standing in the shoes . . . of the defunct thrift”). The courts drawing from *O’Melveny* have concluded that the FHFA steps into the shoes of the Enterprises and sheds its government character when acting as conservator because Congress provided that the FHFA-C exercises the same rights with respect to the Enterprises as Congress granted to the FDIC as receiver. *See, e.g., Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017); *cf. Ameristar Fin. Servicing Co. v. United*

*States*, 75 Fed. Cl. 807, 811 (2007) (concluding, with respect to the FDIC, that the step-into-the-shoes principle set forth in *O'Melveny* also applies in the conservator context).

**a. The FHFA-C is not the United States if the FHFA steps into the Enterprises' shoes when acting as conservator.**

Plaintiff initially contends that defendant's reliance on *O'Melveny* is erroneous because, assuming that *O'Melveny* applies, the FHFA-C is the United States even though it steps into the Enterprises' shoes. Specifically, plaintiff asserts that the FHFA-C is the United States under the facts alleged because (1) the FHFA-C exercises nontraditional conservator powers, (2) Congress intended that the FHFA-C retain the FHFA's government status, and (3) the FHFA-C steps into the shoes of a government instrumentality. The court addresses each assertion in turn.

First, the FHFA-C did not become a government actor by exercising powers beyond those traditionally afforded to a conservator. As a threshold matter, plaintiff has not alleged facts reflecting that the FHFA-C used such powers; the execution of the PSPA Amendments was a "quintessential conservatorship" function. *Perry II*, 864 F.3d at 607. More importantly, however, plaintiff would not prevail even if the FHFA-C exercised nontraditional conservatorship powers in agreeing to the PSPA Amendments. When this argument was pressed in other jurisdictions, it was rejected:

It may well be true that FHFA's actions would not be allowed under traditional principles of corporate or conservatorship law, but it does not

follow that those actions are therefore governmental. Legislatures can expand conservatorship and similar powers without transforming conservators into agents of the government. *Cf. Pegram v. Herdrich*, 530 U.S. 211, 225–26 (2000) (explaining that the Employee Retirement Income Security Act altered the common law of trusts to permit certain actions that would otherwise violate the trustee’s fiduciary duties).

*Bhatti v. Fed. Hous. Fin. Agency*, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (footnote omitted). The court agrees with that reasoning, and plaintiff provides no authority that supports a contrary result. Although plaintiff states that the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) decision in *Waterview Management Co. v. FDIC*, 105 F.3d 696 (D.C. Cir. 1997), supports its position, it is mistaken. *Waterview* is not on point because the D.C. Circuit did not hold that a conservator is *per se* the United States when acting pursuant to a congressional grant of broad powers. Rather, it held that, as a matter of statutory interpretation, the existence of a receivership did not preempt a prereceivership contract. *Id.* at 699–702.

Second, Congress’s instruction that the FHFA-C is not subject to the supervision of any other agency does not reflect congressional intent for the FHFA to retain its government status when acting as conservator even if it steps into the shoes of the Enterprises. Because the court only reaches this issue by assuming that *O’Melveny* is instructive, the statutory language concerning supervision of the FHFA-C does not support a finding of jurisdiction because the same



language is present in the statute that the Supreme Court addressed in *O'Melveny*. See 512 U.S. at 85–86 (discussing 12 U.S.C. § 1821). Compare 12 U.S.C. § 1821(c)(3)(C) (“When acting as conservator or receiver . . . , [the FDIC] shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC’s] rights, powers, and privileges.”), with *id.* § 4617(a)(7) (“When acting as conservator or receiver, the [FHFA] 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 [FHFA].”).

The third argument advanced by plaintiff—that the FHFA-C is the United States because it steps into the shoes of a government instrumentality—also is not meritorious. A government instrumentality’s actions are attributable to the United States for purposes of the Tucker Act. See *Corr v. Metro. Wash. Airports Auth.*, 702 F.3d 1334, 1336 (Fed. Cir. 2012) (noting that a claim against a government instrumentality is a claim against the United States for purposes of the Little Tucker Act, 28 U.S.C. § 1346(a)(2)). The Supreme Court established in *Lebron v. National Railroad Passenger Corp.* that a company is a government instrumentality when (1) it is created by “special law,” (2) it is established “for the furtherance of governmental objectives,” and (3) the federal government “retains for itself permanent authority to appoint a majority of the [company’s] directors . . . .” 513 U.S. 374, 400 (1995). After *Lebron*, the Supreme Court clarified that, for purposes of the instrumentality test, “the practical reality of federal

control and supervision prevails over Congress' disclaimer of the [the entity's] governmental status." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1233 (2015).

There is no dispute that the Enterprises satisfy the first two prongs of the *Lebron* test; Congress created the Enterprises by special law to achieve governmental objectives related to the housing market. See 12 U.S.C. § 4501; see also *Herron*, 861 F.3d at 167 (addressing claims involving Fannie and noting that "[t]his case satisfies the first two *Lebron* criteria"); *Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1406–07 (9th Cir. 1996) (reaching same conclusion for Freddie). The status of the Enterprises, therefore, turns on the third prong: whether the government retains permanent authority to appoint a majority of the Enterprises' directors.

The Federal Circuit has not addressed the government-control prong with respect to the Enterprises, but courts in other jurisdictions have done so. Those decisions provide a starting point for the court. It appears that every court to consider the issue, with the exception of one district court, has held that the government does not exercise permanent control over the Enterprises. *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 279 (D.R.I. 2018) (concluding that the government retains permanent authority to control the Enterprises after noting that "[t]he non-controlling precedent to date" has reached the opposite conclusion). Most of the courts that concluded that the government lacks permanent control over the Enterprises issued their decisions before the Supreme Court in *Association of American*

*Railroads* emphasized the importance of evaluating the practical reality over nomenclature, and the other courts focused on the statutory purpose for the conservatorships rather than the Enterprises' actual situation. *E.g.*, *Herron*, 861 F.3d at 169 (relying on the notion that a conservatorship is fundamentally temporary). In other words, the courts adopting the prevailing view considered the issue of control without regard for the Supreme Court's instruction to focus on the practical reality. The court, therefore, does not find those decisions persuasive.

The crux of the inquiry, as the Supreme Court mandates, is on the practical reality of the government's control over the Enterprises. *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1233. It is of no import that Congress nominally authorized a facially temporary conservatorship, *see* 12 U.S.C. § 4617(a) (permitting the FHFA to act as conservator to "reorganiz[e]" or "rehabilitat[e]" the Enterprises), because Congress's disclaimers are no substitute for the court's obligation to assess the government's actual control, *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1233. The court focuses on the length of the conservatorship because the FHFA-C wields complete control over the Enterprises so long as they are in conservatorship. *See generally* 12 U.S.C. § 4617.

Plaintiff alleges that the Enterprises will remain undercapitalized—and thus subject to conservatorship pursuant to 12 U.S.C. § 4617 (a)(3)(J)—until the PSPAs, in their current form, are changed because the Enterprises cannot accumulate any capital under the existing terms of the PSPAs. Although the PSPAs could be further amended, plaintiff's allegations reflect that Treasury and the FHFA-C will not do so

because the purpose of the PSPA Amendments is to prevent the Enterprises from accumulating the necessary capital to become independent companies. Plaintiff, in short, has alleged that the government intended, and has taken steps to ensure, that the conservatorships never end. Those facts, viewed in isolation, would support a conclusion that the practical reality is that the Enterprises are under permanent government control. The court's inquiry, however, is not limited to plaintiff's allegations because it has taken judicial notice of relevant facts reflecting that the status quo has changed: the Treasury Secretary and the FHFA Director are now both committed to ending the conservatorships. Moreover, the idea that the Enterprises are permanently subject to government control because they can never accumulate the capital needed to exit the conservatorships is undermined by recent developments. Indeed, Treasury proposed amending the Net Worth Sweep to allow the Enterprises to retain more capital, and the FHFA Director testified during his confirmation hearing that, if confirmed, he would seek to increase the amount of capital that the Enterprises retain. Simply stated, the practical reality is that the Enterprises are not subject to permanent government control because the relevant parties are working to terminate the conservatorships.<sup>15</sup>

---

<sup>15</sup> Plaintiff may disagree with the court's conclusion that events occurring after the PSPA Amendments are relevant to determining whether the Enterprises were under permanent government control during the events discussed in plaintiff's complaint. Even if the court agreed that events occurring after

In sum, the FHFA-C does not become the United States if the FHFA steps into the Enterprises' shoes when serving as conservator.

**b. The FHFA-C retains the FHFA's government character because the FHFA-C does not step into the Enterprises' shoes.**

The key inquiry, therefore, is whether the FHFA steps into the shoes of the Enterprises when acting as conservator. Defendant argues that the FHFA-C sheds its government character and assumes the identity of the Enterprises based on the reasoning in *O'Melveny*. Defendant's reliance on *O'Melveny* is misplaced. *O'Melveny* concerns a receiver stepping into the shoes of a failed bank. 512 U.S. at 86. The roles of a conservator and receiver are meaningfully different. In a recent decision, the United States District Court for the District of Rhode Island artfully explained the differences and their import for assessing whether the FHFA-C is the government:

The *O'Melveny* Court held that FDIC, when acting as a receiver for a private entity, steps into the shoes of that private entity for state law claims. This holding makes sense given the purpose of receivership: "to preserve a company's

---

the PSPA Amendments are not germane, plaintiff still would not prevail because it alleges that the conservatorships began as temporary measures. See 1st Am. Compl. ¶ 7 (noting the temporary nature of the conservatorships and quoting an FHFA publication stating that the conservatorships would be terminated once the Enterprises had been restored "to a safe and solvent condition"); *id.* (noting that the FHFA reassured the market that the Enterprises would return to normal business operations). Thus, the Enterprises were not under permanent government control before the PSPA Amendments.

assets, for the benefit of creditors, in the face of bankruptcy.” When FDIC is appointed receiver, it must dispose of the received entity’s assets, resolving obligations and claims made against the entity. Notably, “[i]n receivership, the receiver owes fiduciary duties to the creditors, which the corporation would otherwise owe to creditors during a period of insolvency.” It logically follows, then, that the receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity.

Conservatorship, in contrast, serves a different function. FHFA has described the purpose of conservatorship is “to establish control and oversight of a company to put it in a sound and solvent condition.” Conservators, unlike receivers, have a fiduciary duty running to the corporation itself.

This is “critically distinct” from the fiduciary duties owed as a receiver—the receiver does indeed “step into the shoes” of the entity by assuming the fiduciary duties *of* the entity, but the conservator does not: it remains distinct, and rather owes a duty *to* the entity. Given the difference in fiduciary duties, *O’Melveny’s* “steps into the shoes” holding makes sense in the context of receivership, but not in the context of conservatorship.

*Sisti*, 324 F. Supp. 3d at 282–83 (citations and footnotes omitted). *See generally* Brian Taylor Goldman, *The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State-Action*, 17 J. Bus. & Sec. L. 11, 23–30 (2016). The district court, relying on

the above analysis, declined to treat the FHFA-C as a private actor. *Sisti*, 324 F. Supp. 3d at 284. This court agrees with the reasoning and conclusion in *Sisti*: the FHFA does not shed its government character when acting as conservator because it does not step into the shoes of the Enterprises. Otherwise stated, the FHFA-C is the United States because it retains the FHFA's government character. Plaintiff's claims, therefore, are against the United States for purposes of the Tucker Act.

**B. The court lacks jurisdiction over plaintiff's claim that sounds in tort.**

**1. Plaintiff's fiduciary duty claim sounds in tort.**

Defendant next argues that the court lacks jurisdiction over plaintiff's fiduciary duty claim because the United States does not owe to each Enterprise's shareholders a fiduciary duty that is grounded in a statute or contract. Defendant asserts that such a fiduciary duty cannot be based on (1) HERA because, pursuant to the statute, the FHFA-C is only required to act in the government's and the Enterprises' best interests; or (2) the PSPAs because plaintiff is not a party to those contracts. Plaintiff, in its opposition to defendant's motion to dismiss, counters that its claim is based on a fiduciary duty rooted in both HERA and the PSPAs. As to HERA, plaintiff asserts that Congress made the FHFA-C a fiduciary by authorizing it to control the Enterprises, entrusting it with duties that are at the core of what it means to be a fiduciary, and using terminology—"conservator"—associated with a fiduciary. With respect to the PSPAs, plaintiff argues that Treasury

owes a fiduciary duty to the shareholders because it, acting with the FHFA-C, acquired control rights under the contract.

The court, pursuant to the Tucker Act, lacks jurisdiction over tort claims. 28 U.S.C. § 1491(a)(1). A breach of fiduciary duty is generally classified as a tort. *Newby v. United States*, 57 Fed. Cl. 382, 294 (2003). A fiduciary duty claim, however, does not sound in tort for purposes of the Tucker Act when the fiduciary relationship is founded on a money-mandating statute or a contractual provision between the claimant and United States. *See Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (statute); *Cleveland Chair Co. v. United States*, 557 F.2d 244, 246 (Ct. Cl. 1977) (contract); *see also* 28 U.S.C. § 1491(a)(1) (providing jurisdiction over claims “founded upon . . . any Act of Congress . . . or contract with the United States”).

The initial issue is whether HERA establishes a fiduciary relationship between the FHFA-C and the Enterprises’ shareholders. The court begins with the language of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). “If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect.” *Rosete v. Office of Pers. Mgmt.*, 48 F.3d 514, 517 (Fed. Cir. 1995); *accord Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”). Congress provided in HERA that the FHFA-C is only required to act in the interests of itself or the Enterprises. 12 U.S.C. § 4617(b)(2)(J). That statement reflects a clear intent: the FHFA-C does not owe a fiduciary duty to



shareholders because the conservator is not required to consider shareholders' interests.<sup>16</sup> *See id.*; *see also Collins v. Mnuchin*, 938 F.3d 553, 580 (5th Cir. 2019) (en banc) (noting that HERA “may permit” the FHFA-C to pursue actions that are “inconsistent with fiduciary duties”), *petitions for cert. filed*, 88 U.S.L.W. 3114 (U.S. Sept. 25, 2019) (No. 19-422), 88 U.S.L.W. 3146 (U.S. Oct. 25, 2019) (No. 19-563). The plain language controls, and therefore the court does not consider the peripheral considerations urged by plaintiff such as the implications of the word “conservator,” the FHFA-C’s control over the Enterprises, or the FHFA-C’s other powers. In sum, plaintiff cannot establish jurisdiction for its fiduciary duty claim by relying on HERA.

Next, the court turns to whether Treasury, acting together with the FHFA-C, owed a fiduciary duty to the Enterprises’ other shareholders because it acquired control rights by agreeing to the PSPAs. Plaintiffs argument is premised on the state-law

---

<sup>16</sup> The court’s interpretation of HERA’s plain language is buttressed by the fact that Congress seemingly made a deliberate decision to exclude shareholder interests from the FHFA-C’s considerations. Congress modeled HERA on the Financial Institutions Reform, Recovery, and Enforcement Act (“FIRREA”). *Jacobs v. Fed. Hous. Fin. Agency*, 908 F.3d 884, 893 (3d Cir. 2018). Under FIRREA, Congress permitted the FDIC as conservator to consider the best interests of a bank, its depositors, or the FDIC. 12 U.S.C. § 1821(d)(2)(J)(ii). Although Congress permitted the FDIC to take into consideration the interests of its depositors, Congress omitted the analogue of depositors—shareholders—from the list of germane interests that the conservator can consider when acting pursuant to HERA. *Compare id.* (FIRREA), *with* 12 U.S.C. § 4617(b)(2)(J) (HERA). The omission is telling.

principle (which it terms “general corporate law”) that a controlling shareholder owes a fiduciary duty to the minority shareholders. The court is not convinced. First, plaintiff’s allegation of a fiduciary relationship is not founded on a contract within the meaning of the Tucker Act. Plaintiff is not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs. It invokes the contracts solely to establish that Treasury, with the assistance of the FHFA-C, is a controlling shareholder and relies on that conclusion to argue that Treasury has a fiduciary duty based on state law. The contract, otherwise stated, is one step removed from the purported genesis of the fiduciary duty—the application of state-law principles. That gap is too much in light of the court’s obligation to narrowly construe the Tucker Act’s waiver of sovereign immunity. *See Smith*, 855 F.2d at 1552 (noting that the Tucker Act is narrowly construed); *see also Perry II*, 864 F.3d at 619–20 (rejecting the legal theory that the Enterprises’ shareholders’ need to reference the PSPAs for their fiduciary duty claim was enough to conclude that the claim was rooted in a contract for purposes of the Tucker Act).

Second, plaintiff fails to demonstrate the applicability of the state-law principles underlying its theory for why Treasury assumed fiduciary duties. Federal law governs the obligations Treasury incurred by entering into the PSPAs. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 519 (1988) (“The proposition that federal common law continues to govern the ‘obligations to and rights of the United States under its contracts’ is nearly as old as *Erie [v. Tompkins]*, 304 U.S. 64 (1938),] itself.”). Although courts may shape federal law by drawing from state-

law principles, plaintiff does not explain why doing so is appropriate in this instance.

Third, plaintiff does not prevail even if its fiduciary duty claim could be founded on a contract and federal common law incorporates the state-law principles regarding controlling shareholders' fiduciary obligations. Under Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders. *See Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1344 (Del. 1987); *Parsch v. Massey*, 79 Va. Cir. 446 (2009); *see also Quadrant Structured Prod. Co. v. Vertin*, 102 A.3d 155, 183 (Del. Ch. 2014) (acknowledging that those "who effectively control a corporation" owe a fiduciary duty to others).<sup>17</sup> To have the requisite level of control, the controlling shareholder must (1) be able to exercise a majority of the corporation's voting power or (2) direct the corporation without owning a majority of stock. *Kahn v. Lynch Commc'n Sys.*, 638 A.2d 1110, 1113 (Del. 1994). The latter, effective exercise of control, "is not an easy test to satisfy"; the individual or group must be, "as a practical matter, . . . no differently situated than if they had majority voting control." *In re PNB Holding Co. S'holders Litig.*, No. CIV.A. 28-N, 2006 WL 2403999, at \*9 (Del. Ch. Aug. 18, 2006).

---

<sup>17</sup> The court refers to Delaware and Virginia law because Fannie is a Delaware corporation, and Freddie is a Virginia corporation. When evaluating Virginia law, the court also looks to Delaware state court decisions because Virginia courts do so to resolve unsettled issues in the Commonwealth. *E.g.*, *U.S. Inspect Inc. v. McGreevy*, No. 160966, 2000 WL 33232337, at \*4 (Va. Cir. Ct. Nov. 27, 2000).

Plaintiff has not established that Treasury meets either control test. First, plaintiff does not allege that Treasury owns any of the Enterprises' voting stock. Treasury purchased preferred stock and acquired the right to buy common (i.e., voting) stock, but there is no indication that Treasury exercised its warrants or otherwise acquired common stock.<sup>18</sup> Second, plaintiff does not demonstrate that Treasury exercised effective control over the Enterprises or was, in plaintiff's terms, a "dominant shareholder." Pls.' Corrected Combined Opp'n to Def's Omnibus Mot. to Dismiss 29 (quoting *Sisti*, 324 F. Supp. 3d at 283 n.9). Although Treasury acquired the right to preclude the Enterprises from taking certain actions, Treasury did not control the Enterprises because it could not direct any action—it could only respond to certain requests made by the Enterprises. As a practical matter, therefore, Treasury is situated differently than if it had majority voting power.

Having rejected the contentions advanced by plaintiff in its opposition brief, the court turns to an argument that appears for the first time in plaintiff's supplemental brief, which was filed at the court's request after the initial round of briefing on defendant's omnibus motion to dismiss was complete, *Fairholme II* was decided, and the court held a status conference regarding further proceedings in the

---

<sup>18</sup> Even if Treasury had exercised its option to buy a majority of the voting stock, it would not be a controlling shareholder because the FHFA-C succeeded to all of the shareholders' rights. See 12 U.S.C. § 4617(b)(2)(A) (noting that the FHFA-C, by operation of law, succeeds to all rights and powers of any Enterprise shareholder). Treasury, therefore, would have no voting power.

related cases.<sup>19</sup> In its supplemental brief, plaintiff contends that its fiduciary duty claim was founded on a contention that Treasury and the FHFA-C acted as a “control group,” that this contention was set forth in its opposition brief in the section addressing the court’s jurisdiction over its fiduciary duty claim, and that the court did not, in *Fairholme II*, consider this contention. But no such contention was made in plaintiff’s opposition brief.

In its opposition brief, plaintiff explained that under state law, multiple shareholders who are legally connected can form a “control group” and be “deemed a single, majority shareholder,” and then asserted that Treasury and the FHFA-C were such a control group, acting in concert as the United States. *See* Pls.’ Corrected Combined Opp’n to Def’s Omnibus Mot. to Dismiss 22–26. In other words, plaintiff advanced its control group contention solely to establish that its suit was against the United States. In the portion of its opposition devoted to countering defendant’s jurisdictional attack on its fiduciary duty claim, plaintiff asserted only two bases for a fiduciary duty; each one was treated separately as governing the conduct of either Treasury or the FHFA-C. It did not argue that the fiduciary duty arose from Treasury and the FHFA-C acting as a control group. Accordingly, the court did not consider plaintiff’s control group allegation as a foundation for any fiduciary duty claim in *Fairholme II*, among the

---

<sup>19</sup> As defendant notes, the court did not invite plaintiff, after the status conference held March 5, 2020, to relitigate issues already decided in *Fairholme II*.

arguments raised by the plaintiffs in these related cases.

Because plaintiff's control group contention was not raised in its opposition brief in support of its fiduciary duty claim, it is waived. *See United States v. Ford Motor Co.*, 463 F.3d 1267, 1277 (Fed. Cir. 2006) (explaining that "[a]rguments raised for the first time in a reply brief are not properly before this court"); *Ironclad/EEI v. United States*, 78 Fed. Cl. 351, 358 (2007) (noting that "under the law of this circuit, arguments not presented in a party's principal brief to the court are typically deemed to have been waived"). But even if plaintiff's argument were not waived, it is not persuasive. In *Fairholme II*, the court explained why neither Treasury nor the FHFA-C owed a fiduciary duty to the shareholders of Fannie and Freddie. 147 Fed. Cl. at 37–40. The court is not persuaded that a control group composed of two entities, neither of which was bound by the fiduciary duty posited by plaintiff, would be bound by a fiduciary duty simply because the entities are alleged to have worked in concert against the interests of the other shareholders of the Enterprises. Plaintiff's attempt to graft a state law concept of a control group of shareholders onto a Tucker Act jurisdictional inquiry is not anchored in binding or even persuasive precedent, as explained in *Fairholme II*. *Id.* at 39–40. Having considered the allegations in plaintiff's amended complaint, the timely arguments set forth in plaintiff's opposition brief, and the untimely argument raised in plaintiff's supplemental brief, the court concludes that it lacks jurisdiction over plaintiff's fiduciary duty claim because it sounds in

tort. Therefore, it dismisses count III of plaintiff's amended complaint.

**2. Plaintiff's takings and illegal-exaction claims do not sound in tort.**

Defendant also argues that plaintiff's Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the FHFA-C. Plaintiff counters that it has pleaded the predicates for takings and illegal-exaction claims, which means that it is irrelevant whether it also alleged facts that are germane to tortious actions.

When a party pleads the predicates for a takings claim or illegal-exaction claim, the court possesses jurisdiction to entertain such claims. *See Hansen v. United States*, 65 Fed. Cl. 76, 80–81 (2005) (“[S]o long as there is some material evidence in the record that establishes the predicates for a [claim covered by the Tucker Act,] . . . a plaintiff succeeds in demonstrating subject matter jurisdiction in this court . . .”). Those claims, at a basic level, are contentions that the government expropriated private property lawfully (takings) or unlawfully (illegal exaction). *See Orient Overseas Container Line (UK) Ltd. v. United States*, 48 Fed. Cl. 284, 289 (2000) (“Takings claims arise because of a deprivation of property that is authorized by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation.” (citing *Dureiko v. United States*, 209 F.3d 1345, 1359 (Fed. Cir. 2000); *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007–08 (Ct. Cl. 1967))). If a party alleges the necessary predicates for these claims, the court is not deprived

of jurisdiction even if the complaint contains allegations that could support a tort claim. *See El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1353 (Fed. Cir. 2004) (“That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims.”); *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that this court has jurisdiction over a takings claim “even if the government’s action was subject to legal challenge on some other ground”). Here, plaintiff pleads the predicates for takings and illegal-exaction claims by alleging, in essence, that it was forced to give its property to the government because of lawful or unlawful government conduct. Therefore, it is of no import to the court’s jurisdiction whether plaintiff has alleged facts that would also support a tort claim.

**C. The court lacks jurisdiction over plaintiff’s implied-in-fact-contract claim because plaintiff is not a third-party beneficiary of such a contract.**

Defendant argues next that the court lacks jurisdiction to entertain plaintiff’s implied-in-fact-contract claim because plaintiff is not a third-party beneficiary of such a contract. Specifically, defendant asserts that plaintiff has not established that it is an intended beneficiary independent of its status as a shareholder and that any benefit that is related to its status as a shareholder is insufficient for jurisdiction. Plaintiff counters that it is an intended third-party beneficiary of implied contracts, between the FHFA and each Enterprise’s board, in which the boards consented to the conservatorships in exchange for the



FHFA-C operating the Enterprises as a fiduciary and returning them to sound condition. Specifically, plaintiff asserts that the intent to benefit the shareholders is evident from (1) the boards' consent to the conservatorships because shareholders would benefit from a conservator focused on returning the Enterprises to a better condition, and (2) the government acknowledging that the Enterprises' stock would remain outstanding while the Enterprises were in conservatorship.

The court's jurisdiction over contract claims is limited by the Tucker Act. *Ransom v. United States*, 900 F.2d 242, 244 (Fed. Cir. 1990). Of particular import here, ordinarily, a plaintiff must be in privity of contract with the United States to invoke this court's jurisdiction over a contract claim against the government. *Fid. & Guar. Ins. Underwriters, Inc. v. United States*, 805 F.3d 1082, 1087 (Fed. Cir. 2015). But privity is not required if "the plaintiff can demonstrate that it was an intended third-party beneficiary under the contract." *Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1361 (Fed. Cir. 2016).

"Third party beneficiary status is an 'exceptional privilege.'" *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (quoting *German All. Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912)). The conditions for attaining such status are "stringent." *Anderson v. United States*, 344 F.3d 1343, 1352 (Fed. Cir. 2003). "[S]hareholders seeking status to sue as third-party beneficiaries of an allegedly breached contract must 'demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party *directly*.'" *Castle v. United States*, 301 F.3d 1328,

1338 (Fed. Cir. 2002) (quoting *Glass*, 258 F.3d at 1354). Specifically, “the contract must express the intent of the promissor to benefit the shareholder personally, independently of his or her status as shareholder.” *Glass*, 258 F.3d at 1353–54. As a practical matter, the shareholder does not personally benefit independent of its status as a shareholder when the contractual promises pertain only to the treatment of the company. See *FDIC v. United States*, 342 F.3d 1313, 1320 (Fed. Cir. 2003) (noting that the broken promises concerned the treatment of the company such that the plaintiffs did not benefit independent of their status as shareholders); accord *Maher v. United States*, 314 F.3d 600, 605 (Fed. Cir. 2002) (concluding that the plaintiffs were not third-party beneficiaries when they failed to “establish[] that the government took on any obligations in the merger agreement for [the plaintiffs] personal benefit, or even that the merger agreement contains any provisions pertaining to [the plaintiffs] personally”).

As plaintiff is not a party to the alleged implied contracts between the FHFA and the Enterprises, the relevant issue is whether plaintiff is a third-party beneficiary of those agreements. It is not. First, it is of no import that the Enterprises, as plaintiff argues, purportedly agreed to the conservatorships because that would serve the interests of shareholders. Indeed, “every action of a corporation is supposed to benefit its shareholders,” but the “law has not viewed this general benefit as making every shareholder a third-party beneficiary.” *Suess v. United States*, 33 Fed. Cl. 89, 94 (1995). Second, plaintiffs allegations reflect that it only benefits from the alleged implied

contracts by virtue of its shareholder status. The relevant promises concerned how the FHFA-C would operate the Enterprises; the crux of the purported agreements was the FHFA-C promising to operate the Enterprises as a fiduciary to preserve their assets and return them to sound condition. Because the promises in the alleged implied contracts were directed at the Enterprises, plaintiff cannot be a third-party beneficiary of the alleged contract. *See FDIC*, 342 F.3d at 1320. Third, plaintiff has not demonstrated that the FHFA intended that plaintiff would benefit independently of its status as a shareholder even if it did so benefit. Plaintiff relies on the FHFA's statements that private stock would remain outstanding and shareholders would continue to hold an economic interest in their stock. Those factual statements, however, do not reflect that the FHFA intended to confer any specific benefit on plaintiff independent of its role as a shareholder. Because plaintiff has not alleged facts reflecting that the FHFA intended to confer a personal benefit on it, it is not a third-party beneficiary. *See Glass*, 258 F.3d at 1353–54. In sum, the court lacks jurisdiction to entertain plaintiff's implied-in-fact-contract claim because plaintiff is neither a party to a contract with the government nor a third-party beneficiary of any such agreement. Therefore, the court dismisses count IV of its amended complaint.

## V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiff's claims, defendant challenges plaintiff's standing to pursue its claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. *Starr Int'l Co. v.*

*United States*, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is “assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties.” *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that controls. *See Allen v. Wright*, 468 U.S. 737, 752 (1984) (“[T]he standing inquiry requires careful examination of a complaint’s allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted.”), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Thus, in a suit brought by a shareholder, it is the substance of the allegations and not the label assigned to the allegations—i.e., direct or derivative—that matters. *See Starr*, 856 F.3d at 966–67; *see also In re Sunrise Sec. Litig.*, 916 F.2d 874, 882 (3d Cir. 1990) (“Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties.”). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based on the rights of the company. *See Starr*, 856 F.3d at 966–67; *see also Weir v. Stagg*, No. 09-21745-CIV, 2011 WL 13174531, at \*9 (S.D. Fla. Feb. 7, 2011) (“Shareholders do not have standing to bring a direct action for injuries suffered by a corporation, but rather, must bring a derivative action.”). A shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the

corporation's injuries—to have standing to litigate those claims. *See Starr*, 856 F.3d at 966–67.

Defendant argues that plaintiff lacks standing because its claims, pled as direct claims, actually belong to the Enterprises and are therefore derivative in nature. The parties in this case and the related cases fully briefed and argued this issue prior to the court issuing the *Fairholme II* decision. The court concluded in *Fairholme II* that Fannie and Freddie shareholders lack standing to pursue direct claims that are derivative in nature. Thereafter, the court solicited short supplemental briefs from plaintiff and defendant regarding the applicability of the holdings in *Fairholme II* to this case. In its supplemental brief, plaintiff suggests that its allegations are materially different from those asserted in *Fairholme* for purposes of standing, while defendant contends in its supplemental brief that there are no material differences. All of the parties' arguments are addressed below.

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

As an initial matter, plaintiff contends that its allegations are materially different from those advanced in *Fairholme* in two respects, such that the standing inquiry would be affected. Plaintiff first argues that the type of harm it has suffered and the type of relief it has requested distinguish its claims from the direct claims in *Fairholme*. In essence, plaintiff attempts to distinguish what it characterizes as the *Fairholme* plaintiffs' allegation of the expropriation of the Enterprises' assets from its allegation of the expropriation of its economic

interests. As defendant points out, however, the direct claims in *Fairholme* and the claims in this case are virtually indistinguishable in nature. All four counts of the amended complaint in this case mirror, in every essential way, the direct takings, illegal-exaction, fiduciary duty, and breach-of-implied-contract claims in *Fairholme*. Expropriation of the shareholders' economic interests was alleged in *Fairholme*, just as it is alleged in the first amended complaint in this case. *Compare Fairholme II*, 147 Fed. Cl. at 20, 46–47, with 1st Am. Compl. 88, 105–107. Thus, the standing analysis in *Fairholme II* is fully applicable to the claims presented here.

Plaintiff next invokes its reliance on the allegation of the existence of a “control group,” formed by Treasury and the FHFA-C, that dominated the Enterprises and injured it. In its view, this factual distinction in its first amended complaint is significant because it was not discussed in *Fairholme II*. Plaintiff fails to explain, however, how this factual distinction gives it standing to bring its direct claims. Plaintiff apparently infers a logical connection between a control group of shareholders and a controlling shareholder, but the connection is not explained in a way that is helpful to the court. Indeed, in its supplemental brief plaintiff cites primarily to a section of its opposition brief that does not address the topic of standing at all. If plaintiff wished to advance a standing argument that specifically relied on the state law concept of a control group of shareholders and cases discussing such a phenomenon, no such argument was made in its opposition brief. Thus, any such standing argument that plaintiff may be attempting to make in its supplemental brief, to the

extent that one could be discerned, is waived as untimely.<sup>20</sup> See *Ironclad/EEI*, 78 Fed. Cl. at 358.

**B. Plaintiff's claims actually belong to the Enterprises.**

Having determined that plaintiff's allegations do not differ materially from those advanced in *Fairholme*, the court turns to defendant's contention that plaintiff lacks standing to litigate its claims. Defendant's standing argument is premised on its assertion that plaintiff's claims actually belong to the Enterprises—and are therefore derivative in nature—because, to prevail, plaintiff would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises. Plaintiff counters that it asserts direct claims because the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises' capital structure to plaintiff's detriment, which renders the claims for such conduct both direct and derivative under the dual-nature exception.<sup>21</sup> Defendant replies that the Federal Circuit rejected

---

<sup>20</sup> Even if this argument were not waived, the court agrees with defendant that the control group scenario alleged by plaintiff also fails to satisfy the criteria for dual-natured claims that might provide standing to a shareholder plaintiff asserting direct claims. See Section V.B, *infra* (discussing the criteria for dual-natured claims).

<sup>21</sup> The plaintiffs in the related cases also asserted that their claims must be construed as direct claims to vindicate important federal policies if shareholders cannot assert derivative claims because of HERA. But as this court held in *Fairholme II*, the shareholders of the Enterprises, notwithstanding HERA, have standing to assert derivative claims because of the FHFA-C's conflict of interest. 147 Fed. Cl. at 49–51.

the notion that a plaintiff states a direct claim by alleging it was targeted by the challenged action. Defendant also contends that the dual-nature exception is not applicable because Treasury was not a controlling shareholder, the Enterprises did not issue new shares, and the PSPA Amendments did not involve the reallocation of power.

Neither theory plaintiff advances for why its claims are substantively direct, rather than derivative, is persuasive. First, it is of no import whether the government targeted shareholders with the PSPA Amendments. *See Starr*, 856 F.3d at 973 (noting that the plaintiffs did not “sufficiently explain why the Government’s subjective motivations are relevant to the inquiry into direct standing”). The direct-versus-derivative inquiry “turns on the plaintiff’s injury, not the defendant’s motive.” *Pagan v. Calderon*, 448 F.3d 16, 30 (1st Cir. 2006). Second, plaintiff has not asserted claims that qualify as both direct and derivative based on the dual-nature exception. The Federal Circuit explained that, pursuant to this exception, shareholder claims may be both direct and derivative “when a ‘reduction in [the] economic value and voting power affected the minority stockholders uniquely . . . .’” *Starr*, 856 F.3d at 968 (quoting *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006)). Specifically, shareholder claims are both direct and derivative if

“(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.”

*Id.* (quoting *Gentile*, 906 A.2d at 100). The exception does not apply here because Treasury was not a controlling shareholder at the time the PSPA Amendments were executed,<sup>22</sup> the PSPA Amendments did not involve the issuance of new shares, and shareholder voting power was not reallocated under the PSPA Amendments. It is not enough, contrary to plaintiff’s contention, that the government allegedly exacted economic value from the other shareholders by rearranging the corporate structure. See *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016) (applying *Gentile* and holding a plaintiff does not state a direct claim under the dual-nature exception by pleading the “extraction of solely economic value from the minority by a controlling stockholder”). Because plaintiff has not established that its claims are substantively direct in nature, it cannot demonstrate that it has standing to litigate those claims.

Plaintiff fares no better if the court moves beyond its arguments for why its claims are substantively direct in nature. Federal law governs whether plaintiff’s claims are direct or derivative. See *Starr*, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. *Id.*; see also *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 (1991) (noting the “presumption that state law should be incorporated into federal common law”). Under Delaware law, the test for whether a

---

<sup>22</sup> Treasury is not a controlling shareholder for the reasons set forth in Section IV.B.1, *supra*.

shareholder's claim is derivative or direct depends on the answers to two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (en banc). "Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow." *Gentile*, 906 A.2d at 99, *discussed in Starr*, 856 F.3d at 965. Such claims are derivative even "though the overpayment may diminish the value of the corporation's stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend." *Protas v. Cavanagh*, No. CIV.A. 6555-VCG, 2012 WL 1580969, at \*6 (Del. Ch. May 4, 2012); *see also Hometown Fin. Inc. v. United States*, 56 Fed. Cl. 477, 486 (2003) ("[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to nothing more than a diminution in stock value or a loss of dividends.").

Plaintiff focuses on the expropriation of the Enterprises' assets via compulsory payments of all profits. The gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury. Regardless of plaintiff's label (direct) or theory (taking, illegal exaction, breach of fiduciary duty, or breach of implied

contract) for its claims, the claims are substantively derivative in nature because they are premised on allegations of overpayment.<sup>23</sup> *See Gentile*, 906 A.2d at 99; *see also Roberts*, 889 F.3d at 409 (explaining that the plaintiffs asserted “classic derivative claims” when they alleged that “the [PSPA Amendments] illegally dissipated corporate assets by transferring them to Treasury”). Plaintiff cannot transform its substantively derivative claims into direct claims by merely alleging that, as a result of overpayments, it was deprived of its stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiff’s purported “harms are ‘merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.’” *Protas*, 2012 WL 1580969, at \*6 (quoting *Gentile*, 906 A.2d at 99); *see also Agostino v. Hicks*, 845 A.2d 1110, 1122 (Del. Ch. 2004) (“[T]he inquiry should focus on

---

<sup>23</sup> Plaintiff would remain unsuccessful if its allegations of waste and mismanagement (styled as self dealing, overreach, or abuse of discretion) were construed to be indicative of some action other than overpayment. Any claims premised on waste and mismanagement are derivative in nature. *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) (noting that “mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature”). Plaintiff’s claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. *See Hometown*, 56 Fed. Cl. at 486 (stock prices); *In re Straight Path Commc’ns Inc. Consol. S’holder Litig.*, No. CV 2017-0486-SG, 2017 WL 5565264, at \*4 (Del. Ch. Nov. 20, 2017) (“Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . .”).

whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation.”). Because plaintiff’s claims are derivative in nature, plaintiff lacks standing to pursue those claims on its own behalf.

**C. Plaintiff’s claims are direct claims, as pled, and cannot be deemed to be derivative claims.**

Plaintiff, while acknowledging that it asserts only direct claims,<sup>24</sup> attempts to avoid a dismissal of those claims for lack of standing by contending that “[e]ven if [its] direct claims were deemed derivative, [it] still may assert them, under circuit precedent, because the [FHFA-C] as conservator has a manifest conflict of interest.” Pls.’ Corrected Combined Opp’n to Def.’s Omnibus Mot. to Dismiss 39. The precedent upon which plaintiff relies is the Federal Circuit’s decision in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999).

Once defendant challenged the standing of plaintiffs in these related cases to bring direct claims, the opposition brief filed in this case raised a novel standing argument. Although plaintiff continues to

---

<sup>24</sup> Indeed, there is no dispute that the four claims plaintiff asserts in its amended complaint are direct claims. In each count plaintiff emphasizes that the harm to plaintiff is direct. 1st Am. Compl. ¶¶ 108, 112, 118, 134. In addition, the relief requested by plaintiff is for monetary relief payable to it, not to the Enterprises. *Id.* at 46; *see also* Pls.’ Suppl. Br. on Outstanding Mot. to Dismiss 3–4 (arguing that payments to the Enterprises would be of no use to plaintiff). Finally, the amended complaint contains a statement that plaintiff’s claims are direct in nature. *See* 1st Am. Compl. 102 (“[A]ny claim raised by CSS that might be considered derivative on behalf of the Company is in fact direct, on behalf of CSS itself.”).

argue that its claims are direct, and that it has standing to bring direct claims, it posits that “[e]ven if plaintiffs’ direct claims [in these five cases] were deemed derivative, they still may assert them, under circuit precedent, because the [FHFA-C] as conservator has a manifest conflict of interest.” Pls.’ Corrected Combined Opp’n to Def.’s Omnibus Mot. to Dismiss 39. The precedent upon which plaintiff relies is the Federal Circuit’s decision in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999).

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

If plaintiff had asserted derivative claims in its amended complaint, the “conflict of interest” holding in *First Hartford* would have aided plaintiff in its quest to establish standing. But it did not do so. Thus, its reliance on this holding in *First Hartford* is misplaced.

As for plaintiff's suggestion that its direct claims could be deemed derivative, it identifies no authority for that recharacterization of its claims, even though it had the opportunity to do so in its opposition brief and its supplemental brief. The court finds plaintiff's "direct claims deemed derivative" argument, Pls.' Suppl. Br. on Outstanding Mot. to Dismiss 5 (emphasis removed), to be unsupported by authority and unpersuasive for the purpose of establishing plaintiff's standing to bring the claims in its amended complaint.<sup>25</sup>

**D. Plaintiff's standing to bring direct claims  
is not established by another holding in  
*First Hartford*.**

Finally, the court addresses an assertion in plaintiff's opposition brief that was not explicitly addressed in *Fairholme II*. Only one sentence of that sixty-page brief was devoted to the following contention included among plaintiff's standing arguments: "[T]he Federal Circuit has repeatedly recognized a direct claim where a shareholder alleged deprivation of a contingent property interest in a bank." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 38 (citing *First Hartford*, 194 F.3d at 1296; *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 957 n.2 (Fed. Cir. 1992)). Defendant, in support of its challenge to plaintiff's standing to bring its claims, relied on more recent precedent, the Federal Circuit's decision in *Starr*, to argue that plaintiff's claims were derivative claims,

---

<sup>25</sup> As defendant notes, claims brought on behalf of the Enterprises are asserted in numerous shareholder derivative claims in these related cases.

not direct claims. Plaintiff, notwithstanding its citation to *First Hartford* and a footnote in a case discussed in *First Hartford*, did not attempt, in any meaningful way, to explain why *Starr* should not be applied and followed in this case. Because plaintiff's reliance on *First Hartford* as support for a shareholder's standing to bring direct claims is cursory and undeveloped, the court is within its discretion to deem this argument waived. See *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (noting that the court has discretion on whether to consider undeveloped arguments).

Even if this argument were not waived, the Federal Circuit's *Starr* decision remains the binding precedent most on point. In *Starr*, the distinction between direct and derivative claims brought by shareholders is the focus of the Federal Circuit's standing analysis. 856 F.3d at 963–73. Just as here, the plaintiffs brought takings and illegal-exaction claims related to a government intervention, during a financial crisis, affecting the future of a corporation in which they owned shares. *Id.* at 958–61. *Starr* provides the test for determining whether such claims are direct or derivative in nature and requires that nominally direct claims—that are actually derivative claims—be dismissed for lack of standing. *Id.* at 973.

In the face of this binding precedent, the court cannot conclude that the holding in *First Hartford*, which concerns direct Fifth Amendment takings claims, is more relevant. It is true that in *First Hartford* shareholders of a bank in receivership could pursue their takings claims as direct claims against the United States. 194 F.3d at 1287. However, *First*

*Hartford* does not address the distinction between direct and derivative claims. When faced with binding precedent that addresses a crucial distinction, such as *Starr*, and one that does not, such as *First Hartford*, the court follows the precedent most on point. *Cf. Union Elec. Co. v. United States*, 363 F.3d 1292, 1297 (Fed. Cir. 2004) (“[W]e have repeatedly held that the disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue.” (citing *Boeing N. Am., Inc. v. Roche*, 298 F.3d 1274, 1282 (Fed. Cir. 2002))).

In sum, plaintiff has not established that it has standing to litigate its claims because it does not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court dismisses plaintiff’s claims on standing grounds to the extent that it has subject-matter jurisdiction over those claims.<sup>26</sup>

## VI. CONCLUSION

For the reasons stated above, the court **GRANTS** defendant’s motion to dismiss and **DISMISSES** plaintiff’s complaint because the court lacks jurisdiction to entertain its fiduciary duty and implied-in-fact-contract claims, and plaintiff lacks

---

<sup>26</sup> As explained above, the court lacks jurisdiction over plaintiff’s claims for breach of fiduciary duty and breach of implied contract. *See supra* Sections IV.B.1 (fiduciary duty), IV.C (contract). In addition, because all of plaintiff’s claims must be dismissed for lack of standing, the court need not reach defendant’s remaining arguments that these claims should be dismissed for failure to state a claim upon which relief can be granted.



423a

standing to pursue any of its claims. The clerk shall enter judgment accordingly. No costs.

**IT IS SO ORDERED.**

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

---

APPENDIX G

---

**In the United States Court of Federal Claims**

No. 18-369C

(Filed: June 8, 2020)

\*\*\*\*\*

AKANTHOS	* Motion to Dismiss;
OPPORTUNITY MASTER	* RCFC 12(b)(1);
FUND, L.P.,	* RCFC 12(b)(6);
Plaintiff,	* Jurisdiction;
v.	* Standing; Direct
THE UNITED STATES,	* Claims;
Defendant.	* Instrumentalities;
	* Coercion; Agent;
	* Conservators;
	* Conflict of Interest;
	* Third-Party
	* Beneficiaries; Stock;
	* Shareholders;
	* Fannie; Freddie;
	* FHFA

\*\*\*\*\*

*Lawrence D. Rosenberg*, Washington, DC, for plaintiff.

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

**OPINION AND ORDER****SWEENEY, Chief Judge**

Plaintiff in this case challenges the actions of the United States during the conservatorships of the Federal National Mortgage Association (“Fannie”) and the Federal Home Loan Mortgage Corporation (“Freddie”). Specifically, plaintiff takes issue with the conservator for Fannie and Freddie (collectively, the “Enterprises”) amending a funding agreement between the Enterprises and the United States Department of the Treasury (“Treasury”). Based on the revisions to that agreement, plaintiff seeks the return of money illegally exacted, damages for breach of contract and breach of fiduciary duty, and compensation for a taking pursuant to the Fifth Amendment to the United States Constitution (“Constitution”). Defendant moves to dismiss plaintiff’s amended complaint, arguing that the court lacks subject-matter jurisdiction over plaintiff’s claims, plaintiff lacks standing to pursue its claims, and plaintiff fails to state a claim upon which relief may be granted. For the reasons stated below, the court grants defendant’s motion to dismiss.

**I. BACKGROUND****A. The Enterprises are private companies that are under the control of a conservator.****1. The Enterprises operated independently before the financial crisis.**

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities that

are sold to investors.<sup>1</sup> 1st Am. Compl. ¶¶ 16–17; *Fairholme II*, 147 Fed. Cl. at 15. Congress chartered Fannie in 1938 and established Freddie in 1970. 1st Am. Compl. ¶¶ 16–17. Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. *Id.* Freddie is organized under Virginia law, and Fannie is organized under Delaware law. *Id.* The Enterprises issued their own common and preferred stock. *Id.* ¶ 19. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. *Fairholme II*, 147 Fed. Cl. at 15. Those owning preferred stock, including plaintiff in this suit, acquired the right to receive dividends and a liquidation preference. 1st Am. Compl. ¶ 19.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. *Id.* ¶ 20. Although the Enterprises began recording losses in 2007, they were stable and adequately capitalized. *Id.* ¶¶ 22–23. Otherwise stated, the Enterprises were not in financial distress or otherwise at risk of insolvency. *Id.*

---

<sup>1</sup> This background section is a less comprehensive version of the court’s recitation of facts in a related case, *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1 (2019) (“*Fairholme I*”), *motion to certify interlocutory appeal granted*, 147 Fed. Cl. 126 (2020).

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

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (“HERA”), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency (“FHFA”) and provided it with supervisory and regulatory authority over the Enterprises. *See* 12 U.S.C. § 4511(a)–(b) (2018).<sup>2</sup> Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator (“FHFA-C”) for each Enterprise to reorganize, rehabilitate, or wind up its affairs.<sup>3</sup> *Id.* § 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its obligations. *Id.* § 4617(a)(3).<sup>4</sup> The conservator, once appointed, functions independently; it is not “subject to the direction or supervision of any other agency of the United States or any State in the

---

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

<sup>3</sup> To avoid any ambiguity, the court reiterates that it is using “FHFA” to refer to the agency acting in its regulatory role and “FHFA-C” when discussing the agency acting as a conservator.

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

exercise of [its] rights, powers, and privileges . . . *Id.* § 4617(a)(7).

Congress also delineated the scope of the FHFA-C's powers in HERA. *See generally id.* § 4617. As soon as it is appointed, the FHFA-C “immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . . .” *Id.* § 4617(b)(2)(A). Congress also conferred on the conservator the power to “[o]perate the [Enterprise].” *Id.* § 4617(b)(2)(B). Pursuant to that power, the conservator “may,” among other things, “perform all functions of the [Enterprise],” “preserve and conserve the assets and property of the [Enterprise],” and “provide by contract for assistance in fulfilling any function . . . of the [conservator].” *Id.* The conservator “may” also “take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise].” *Id.* § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator “may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]” and “take any action authorized by [12 U.S.C. § 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA].” *Id.* § 4617(b)(2)(J). By describing the FHFA-C's role primarily in terms of what powers it “may” exercise, *see generally id.* § 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its powers, *see United States v. Rodgers*, 461 U.S. 677, 706 (1983)

(“The word ‘may,’ when used in a statute, usually implies some degree of discretion.”). Simply stated, the FHFA has “extraordinarily broad flexibility to carry out its role as conservator.” *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 606 (D.C. Cir. 2017) (“*Perry II*”), *cert. denied*, 138 S. Ct. 978 (2018).

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

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(*g*) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. *Id.* §§ 1455(*l*)(4), 1719(*g*)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the availability of mortgage finance, and protect taxpayers. *Id.* §§ 1455(*l*)(1)(B), 1719(*g*)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

- (i) The need for preferences or priorities regarding payments to the Government.
- (ii) Limits on maturity or disposition of obligations or securities to be purchased.
- (iii) The [Enterprise’s] plan for the orderly resumption of private market funding or capital market access.
- (iv) The probability of the [Enterprise] fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the [Enterprise's] status as a private shareholder-owned company.

(vi) Restrictions on the use of [Enterprise] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

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

#### **4. The FHFA became the conservator for each Enterprise.**

Around the beginning of September 2008, the FHFA and Treasury sought to persuade each Enterprise's board of directors to consent to conservatorship. 1st Am. Compl. ¶ 33. The FHFA told each Enterprise's board that conservatorship would further the interests of the shareholders. *Id.* Around the same time, the FHFA made an offer to each board: consent to a conservatorship in exchange for the FHFA-C aiming to preserve and conserve the Enterprises' assets, attempting to restore the Enterprises to sound and solvent condition, and terminating the conservatorships when those goals were achieved. *Id.* ¶¶ 5, 7; *Fairholme II*, 147 Fed. Cl. at 17. Each Enterprise's board accepted that offer and consented to a conservatorship on September 6, 2008, with an understanding that the FHFA-C would operate in the aforementioned limited ways. *Fairholme II*, 147 Fed. Cl. at 17.

The conservatorships became effective on September 6, 2008, upon each Enterprise's board's consent. 1st Am. Compl. ¶¶ 33–34; *see also* 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when “[t]he [Enterprise], by



resolution of its board of directors or its shareholders or members, consents to the appointment”).

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

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement (“PSPA”) with Treasury for each Enterprise. 1st Am. Compl. ¶ 6. Treasury entered into the agreements pursuant to its authority under HERA to buy the Enterprises’ securities. *Id.* ¶¶ 6, 35. Under the PSPAs, Treasury committed to provide up to \$100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. *Id.* ¶ 35. If an Enterprise’s liabilities exceeded its assets, then the Enterprise could draw on Treasury’s funding commitment in an amount equal to the difference between the Enterprise’s liabilities and assets. *Fairholme II*, 147 Fed. Cl. at 17.

In return for Treasury’s funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their respective common stock at a nominal price. 1st Am. Compl. ¶ 35. Treasury’s preferred stock had an initial liquidation preference of \$1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury’s funding commitment. *Id.* In the event of a liquidation, Treasury was entitled to recover the full liquidation value of its shares before any other shareholder would receive compensation. *Id.* Second, Treasury bargained for the right to a quarterly cash dividend that would

be equal, per annum, to 10% of its liquidation preference. *Id.* An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. *Id.* Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. *Id.* ¶¶ 35, 41. Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. *Id.* ¶ 36.

The FHFA-C and Treasury amended each Enterprise's PSPA on May 6, 2009, to increase Treasury's funding commitment to each Enterprise from \$100 billion to \$200 billion. *Id.* ¶ 43. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed \$200 billion. *Id.* ¶ 44.

## **6. The Enterprises' finances improved during their conservatorships.**

In the early stages of the conservatorships, each Enterprise's net worth decreased as it reported losses. *Fairholme II*, 147 Fed. Cl. at 18. Some of the losses resulted from the FHFA-C writing down the value of deferred tax assets.<sup>5</sup> *Id.* Notwithstanding those on-

---

<sup>5</sup> A deferred tax asset is an asset that may be used to offset future tax liability. *Fairholme II*, 147 Fed. Cl. at 18 n.4. A

paper losses, as of late 2009, Fannie had drawn only \$60 billion from Treasury, and Freddie had only drawn \$51 billion. 1st Am. Compl. ¶ 45.

By 2011 and into 2012, the Enterprises' financial outlooks were promising. In addition to an improvement in the housing market, the Enterprises had improved their financial performance. *Id.* ¶ 50. They were positioned to further improve their financial condition by revising their valuations of deferred tax assets because of growing profits, and by increasing their earnings due to reduced credit losses. *Id.* The FHFA-C and Treasury were aware of those forthcoming changes and the Enterprises' improving outlooks. *Id.* ¶ 8. In August 2012, Treasury and FHFA-C knew that the Enterprises would soon experience improved profitability and received projections reflecting that the Enterprises would have positive comprehensive income in 2012. *Id.* ¶¶ 51–52. Otherwise stated, the FHFA-C and Treasury knew, by early August 2012, that the Enterprises were poised to generate profits in excess of their respective dividend obligations to Treasury. *Id.* ¶ 50.

#### **7. Treasury and the FHFA-C agreed to a third amendment to the PSPAs.**

At an unspecified time prior to August 2012, Treasury and the FHFA-C began considering a third amendment to each PSPA. Treasury was the driving force behind the initiative to amend the PSPAs' terms. *Id.* ¶¶ 56, 68. Indeed, an FHFA official reported in

---

company must write down the value of that deferred asset if it is unlikely to be used to offset future taxable profits. *Id.* This write down occurs, for example, if a company predicts it will not be profitable in the future. *Id.*

early August 2012 that Treasury was making a “renewed push” to implement a new amendment. *Id.* ¶ 64 (quoting the FHFA official). The FHFA-C learned of the proposed changes before the Enterprises; Treasury informed the Enterprises that the new terms were forthcoming and announced the changes to the Enterprises. *Id.* ¶ 66. Treasury officials who were involved with the process do not recall Treasury making any backup or contingency plans in the event that the FHFA-C rejected the proposed terms. *Fairholme II*, 147 Fed. Cl. at 19. The FHFA-C accepted the changes without advocating for different terms. *Id.*

Treasury and the FHFA-C decided to announce the changed terms in mid-August 2012 because, according to Treasury, the Enterprises would be reporting earnings exceeding their dividend obligation at the beginning of that month. *Id.* On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA (“PSPA Amendment”). 1st Am. Compl. ¶¶ 2, 9, 53. A key component of the amended PSPAs is the requirement—referred to here as the “Net Worth Sweep”—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise’s net worth (except for a small capital reserve amount) rather than a dividend based on a set percentage of the liquidation preference.<sup>6</sup> *Id.* ¶ 53. Additionally, under the amended PSPAs, the

---

<sup>6</sup> The capital reserve for each Enterprise started at \$3 billion and was set to decrease to \$0 by January 2018, but the Enterprises and Treasury agreed in December 2017 to reset the capital reserve amount to \$3 billion in the first quarter of 2018. 1st Am. Compl. ¶ 53; *Fairholme II*, 147 Fed. Cl. at 19 n.5.

Enterprises are not obligated to pay a periodic commitment fee. *Id.* ¶ 64.

**a. Treasury wanted to ensure that it benefited from the new terms.**

With the PSPAs, Treasury sought to secure a more beneficial arrangement for itself, as a representative for taxpayers. During the lead-up to the PSPA Amendments, a Treasury official acknowledged in an internal communication that the government had resolved to “ensure existing common equity holders will not have access to any positive earnings from the [Enterprises] in the future.” *Id.* ¶ 56 (emphasis removed) (quoting the document). Treasury recognized its goal of obtaining all of the Enterprises’ profits by executing the PSPA Amendments; it intended to take “every dollar of earnings that [the Enterprises] generate[] . . . to benefit taxpayers.” *Id.* ¶ 10 (quoting a Treasury announcement).

**b. The FHFA-C agreed to changes that benefit Treasury.**

For its part, the FHFA-C was operating under the belief that Treasury would benefit from the PSPA Amendments. The FHFA-C prioritized Treasury’s interests over the fate of the Enterprises and the interests of their shareholders. *Id.* ¶ 76. Mel Watt—a former FHFA Director—commented at the time that he did not “lay awake at night worrying what’s fair to the shareholders.” *Id.* (quoting an interview).

**c. Treasury and the FHFA understood that the PSPA Amendments would not facilitate the Enterprises exiting conservatorship.**

Treasury was aware that the new terms of the PSPAs were not conducive to the Enterprises exiting

conservatorship. Treasury acknowledged that its goal was to facilitate the “wind down” of the Enterprises. *Id.* ¶ 56 (quoting a Treasury report). At the time of the PSPA Amendments, Treasury explained that the new deal would ensure that the Enterprises “will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form.” *Id.* ¶ 69 (emphasis removed) (quoting Treasury press release).

The FHFA shared a similar sentiment. The FHFA’s former Acting Director, Edward DeMarco, testified before the United States Senate that the PSPA Amendments “reinforce the notion that the [Enterprises] will not be building capital as a potential step to regaining their former corporate status.” *Id.* ¶ 76 (emphasis removed) (quoting the testimony). Indeed, the FHFA explained to Congress that its vision for the future included a housing industry without Fannie and Freddie. *Fairholme II*, 147 Fed. Cl. at 20.

**d. Treasury has benefited from the PSPA Amendments at the expense of the Enterprises and other shareholders.**

There are four significant effects that flowed from the PSPA Amendments. First, plaintiff lost its economic interests in the Enterprises because, under the new terms, private shareholders can never receive dividends or liquidation distributions. 1st Am. Compl. ¶¶ 2, 9, 88–89. Second, Treasury acquired plaintiff’s economic interests in the Enterprises because Treasury now possesses “the entire value” of the Enterprises. *Id.* ¶ 93. Third, Treasury reaped a windfall of \$128.9 billion in comparison to what it

would have received absent changes to the PSPAs. *Id.* ¶¶ 85–86 (alleging that the Enterprises paid Treasury \$223.6 billion under the PSPA Amendments but would have only paid Treasury \$94.7 billion under the previous terms). Fourth, the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink of insolvency. *Id.* ¶¶ 54, 87.

#### **8. Treasury and the FHFA are committed to ending the conservatorships.**

On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the Treasury Secretary to develop, “as soon as practicable,” a plan for “[e]nding the conservatorships of the [Enterprises] upon the completion of specified reforms . . . .”<sup>7</sup> Memorandum on Federal Housing Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must

---

<sup>7</sup> The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source, the Federal Register. *See Murakami v. United States*, 46 Fed. Cl. 731, 739 (2000) (noting that the court may take judicial notice of government documents), *aff’d*, 398 F.3d 1342, 1354–55 (Fed. Cir. 2005); *see also Democracy Forward Found. v. White House Office of Am. Innovation*, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) (“[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum.”). *See generally* Fed. R. Evid. 201 (discussing judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the court may consider facts derived from sources subject to judicial notice without converting the motion into one for summary judgment. *Sebastian v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

include proposals for “[s]etting the conditions necessary for the termination of the conservatorships” and outlined some of those conditions. *Id.* at 12,480. Subsequently, Treasury issued a plan in which it advocated for “begin[ning] the process of ending the [Enterprises’] conservatorships.”<sup>8</sup> U.S. Dep’t of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), <https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf> [<https://perma.cc/RGH8-N385>]; *accord id.* at 26 (“It is, after 11 years, time to bring the conservatorships to an end.”). As part of the plan to end the conservatorships, Treasury proposed that it and the FHFA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. *Id.* at 26–27.

The FHFA shares Treasury’s goals with respect to the conservatorships. Mark Calabria, the current FHFA Director, testified during his confirmation hearing that he wanted to end the conservatorships.<sup>9</sup> 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony). *See generally* *Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 116th Cong. 10–40, 74–75, 148–85

---

<sup>8</sup> The court takes judicial notice of Treasury’s reform plan because it is a government record available from a reliable source, Treasury’s website. *See supra* note 7.

<sup>9</sup> The court takes judicial notice of the relevant testimony because the statements are recorded in government documents. *See supra* note 7.



(2019) [hereinafter *Calabria Testimony*] (documenting Mr. Calabria’s testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that each Enterprise retains. *Calabria Testimony, supra*, at 150; *see also id.* at 25 (“I support the idea of having significantly more capital at the [Enterprises].”).

**B. Plaintiff owns Fannie and Freddie stock.**

There is one plaintiff in this case: Akanthos Opportunity Master Fund, L.P. (“Akanthos”). Akanthos is a Cayman Islands Exempted Limited Partnership. 1st Am. Compl. ¶ 13. Akanthos owned Fannie preferred stock and Freddie preferred stock at the time of the Net Worth Sweep. *Id.* The shares owned by plaintiff were primarily purchased after the conservatorships were established in 2008. Pls.’ Corrected Combined Opp’n to Def.’s Omnibus Mot. to Dismiss 1.

**II. PROCEDURAL HISTORY**

Plaintiff filed its complaint on March 8, 2018. This case was coordinated with similar, related cases assigned to the undersigned judge .<sup>10</sup> Plaintiff filed its first amended complaint in this case on August 16, 2018. In its amended complaint, plaintiff presents four claims. Plaintiff first asserts that the Net Worth Sweep constitutes a Fifth Amendment taking (count I) of its economic interest in its stock. Plaintiff next asserts that the Net Worth Sweep constitutes an

---

<sup>10</sup> A fuller recitation of the procedural history of this case and related cases is provided in *Fairholme II*, 147 Fed. Cl. at 21–23.

illegal exaction (count II) of that same economic interest because the (1) FHFA was operating unconstitutionally and (2) FHFA-C and Treasury exceeded their statutory authority when they approved the PSPA Amendments. Plaintiff also pleads a breach-of-fiduciary-duty claim (“fiduciary duty claim”) (count III) premised on the Net Worth Sweep being unreasonable, arbitrary, and contrary to the duty owed to Akanthos as a shareholder. Additionally, plaintiff asserts a breach-of-implied-contract claim (count IV) based on a purported agreement by which the Enterprises consented to the conservatorship in exchange for the FHFA agreeing to preserve the Enterprises’ assets with the goal of making them safe and solvent. Specifically, plaintiff asserts that each dividend payment under the Net Worth Sweep constitutes a breach because it depletes the Enterprises’ assets in a manner that undermines the goals of conservatorship.

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case and eleven related cases before the undersigned.<sup>11</sup> The plaintiffs in each of the twelve cases filed a response brief on their respective dockets; some of the

---

<sup>11</sup> The eleven related cases are *Fairholme Funds, Inc. v. United States*, No. 13-465C; *Washington Federal v. United States*, No. 13-385C; *Cacciapalle v. United States*, No. 13-466C; *Fisher v. United States*, No. 13-608C; *Arrowood Indemnity Company v. United States*, No. 13-698C; *Reid v. United States*, No. 14-152C; *Rafter v. United States*, No. 14-740C; *Owl Creek Asia I, L.P. v. United States*, No. 18-281C; *Appaloosa Investment Limited Partnership I v. United States*, No. 18-370C; *CSS, LLC v. United States*, No. 18-371C; and *Mason Capital L.P. v. United States*, No. 18-529C.

plaintiffs relied on a joint brief filed in six of the cases, others, as is the case here, filed a combined brief for five of the cases in which the plaintiffs are all represented by the same counsel. Defendant filed its omnibus reply brief in each of the cases on May 6, 2019. The parties have fully briefed defendant's motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiff in this case has adopted the favorable arguments made by the plaintiffs in the related cases to the extent that such arguments are relevant.<sup>12</sup> Defendant's motion to dismiss is now ripe for adjudication.

### III. STANDARD OF REVIEW

In ruling on a motion to dismiss a complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), the court generally assumes that the allegations in the complaint are true and construes those allegations in the plaintiff's favor. *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011). With respect to RCFC 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of the evidence, that the court possesses subject-matter jurisdiction.

---

<sup>12</sup> The court addresses in this opinion some arguments that were made primarily by the plaintiffs in the related cases to provide context for the resolution of defendant's motion to dismiss. In addition, to the extent that any of plaintiff's less-developed arguments are not discussed in this opinion, the court found such arguments to be unpersuasive.

*Id.* The allegations in the complaint must include “the facts essential to show jurisdiction.” *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). And, if such jurisdictional facts are challenged in a motion to dismiss, the plaintiff “must support them by competent proof.” *Id.*; accord *Land v. Dollar*, 330 U.S. 731, 735 & n.4 (1947) (“[W]hen a question of the District Court’s jurisdiction is raised, . . . the court may inquire by affidavits or otherwise, into the facts as they exist.” (citations omitted)). If the court finds that it lacks subject-matter jurisdiction, it must, pursuant to RCFC 12(h)(3), dismiss the complaint.

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

#### IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a “threshold matter.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998). Subject-matter

jurisdiction cannot be waived or forfeited because it “involves a court’s power to hear a case.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Ex parte McCardle*, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it is “an inflexible matter that must be considered before proceeding to evaluate the merits of a case.” *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006); accord *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1004–05 (Fed. Cir. 2015). Either party, or the court *sua sponte*, may challenge the court’s subject-matter jurisdiction at any time. *Arbaugh*, 546 U.S. at 506; see also *Jeun v. United States*, 128 Fed. Cl. 203, 209–10 (2016) (collecting cases).

The ability of the United States Court of Federal Claims (“Court of Federal Claims”) to entertain suits against the United States is limited. “The United States, as sovereign, is immune from suit save as it consents to be sued.” *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The waiver of immunity “may not be inferred, but must be unequivocally expressed.” *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). Any such waiver must be narrowly construed. *Smith v. Orr*, 855 F.2d 1544, 1552 (Fed. Cir. 1988). The Tucker Act, the principal statute governing the jurisdiction of this court, waives sovereign immunity for claims against the United States, not sounding in tort, that are founded upon the Constitution, a federal statute or regulation, or an

express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (2018); *White Mountain*, 537 U.S. at 472. However, the Tucker Act is merely a jurisdictional statute and “does not create any substantive right enforceable against the United States for money damages.” *United States v. Testan*, 424 U.S. 392, 298 (1976). Instead, the substantive right must appear in another source of law, such as a “money-mandating constitutional provision, statute or regulation that has been violated, or an express or implied contract with the United States.” *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc).

Defendant challenges the court’s jurisdiction to entertain plaintiff’s claims on a number of bases. Specifically, defendant argues that plaintiff has not asserted claims against the United States and that the court lacks jurisdiction over the subject matter of certain claims. The court addresses these contentions in turn.<sup>13</sup>

#### **A. Plaintiff has asserted claims against the United States.**

The court first considers whether plaintiff has asserted claims against the United States, a necessary element of jurisdiction in the Court of Federal Claims. As set forth in its amended complaint,

---

<sup>13</sup> In *Fairholme II*, the court addressed additional jurisdictional concerns that were not raised or are not implicated in this case. *See generally* 147 Fed. Cl. at 24–25 (rejecting defendant’s contention that the claims of the *Fairholme* plaintiffs were barred by 28 U.S.C. § 1500), 34–37 (rejecting the contention of a putative intervenor that the Court of Federal Claims lacks jurisdiction to entertain Fifth Amendment takings claims).

all of plaintiff's claims are premised on actions taken by the FHFA-C and Treasury. Defendant argues that the court lacks jurisdiction to consider any claims premised on the FHFA-C's or Treasury's conduct. In response, plaintiff contends that it has asserted claims against the government because (1) Treasury was involved in the challenged conduct, (2) the FHFA-C was coerced by the government, (3) the FHFA-C was the government's agent, and (4) the FHFA-C, in collaboration with Treasury, is a government actor. The court addresses each contention in turn.

**1. The court cannot exercise jurisdiction based on allegations of Treasury's involvement.**

Plaintiff initially argues that the court has jurisdiction over its Fifth Amendment takings and illegal-exaction claims because it has alleged the involvement of Treasury—indisputably a part of the federal government—in the action underlying these claims, i.e., the Net Worth Sweep. Defendant counters that Treasury alone could not have implemented the PSPA Amendments, and Treasury's role as a counterparty to the voluntary agreement with the Enterprises is not sufficient to establish jurisdiction over plaintiff's takings claim. Defendant further asserts that the court's order allowing jurisdictional discovery reflects that plaintiff's allegations concerning Treasury alone are insufficient to confer jurisdiction.

The parties' dispute on the import of allegations concerning Treasury is ultimately immaterial in light of the court's determination, explained below, that the FHFA-C—the other party involved in the PSPA Amendments—is the United States. Nonetheless, the

court notes, as defendant asserts, that it implicitly acknowledged in its February 26, 2014 discovery order, issued in *Fairholme* and related cases, that the allegations concerning Treasury alone were insufficient to support jurisdiction. In that order, the court permitted the plaintiffs in those related cases to conduct fact discovery on whether the FHFA-C was “the ‘United States’ for purposes of the Tucker Act.” *Fairholme Funds, Inc. v. United States*, 114 Fed. Cl. 718, 721 (2014). The aforementioned discovery would have been unnecessary (and unwarranted) if, as plaintiff asserts here, the court has jurisdiction over plaintiff’s claims based on its allegations concerning Treasury.

**2. The FHFA-C was not coerced into approving the PSPA Amendments.**

Plaintiff also argues that the FHFA-C is the United States because the FHFA-C was coerced into approving the PSPA Amendments by Treasury. Defendant counters that the FHFA-C was not coerced by Treasury because the FHFA-C had a choice of whether to accept or reject the PSPA Amendments. Defendant asserts that there is no coercion if a party has a choice, regardless of however difficult refusal of a particular option may be. Indeed, defendant contends that plaintiff fails to proffer any allegations that Treasury required the FHFA-C to enter into the agreements against its will. Defendant further asserts that other courts have declined to conclude that the FHFA-C felt compelled to follow Treasury based on allegations that Treasury invented the amendment concept or led the process.



**a. The court has jurisdiction over claims based on actions that resulted from government coercion.**

The court has jurisdiction over claims premised on the FHFA-C's actions if Treasury's "influence over the" FHFA-C "was coercive rather than merely persuasive." *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154 (Fed. Cir. 2014). The line between coercion and persuasion "is highly fact-specific." *Id.* Precedent from the United States Court of Appeals for the Federal Circuit ("Federal Circuit") frames the contours of the inquiry. In *Langenegger v. United States*, the plaintiffs pleaded that the United States coerced El Salvador by threatening to withhold financial and military assistance unless El Salvador passed legislation expropriating private property. 756 F.2d 1565, 1567 (Fed. Cir. 1985). The Federal Circuit disagreed with the plaintiffs' characterization of the threats because "[d]iplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of [coercion], however difficult refusal may be as a practical matter." *Id.* at 1572. Similarly, the Federal Circuit concluded in *B & G Enterprises, Ltd. v. United States* that California was not coerced into enacting restrictions on smoking, notwithstanding the federal government conditioning grants on states enacting such limits. 220 F.3d 1318, 1321, 1325 (Fed. Cir. 2000); *see also A & D Auto*, 748 F.3d at 1155 (explaining that "coercion was not established" in *B & G*). The court explained that "it was California's decision to create [the] restrictions[;] . . . Congress may have provided the bait, but California decided to bite." *B & G*, 220 F.3d at 1325. In *A & D Auto*, the

Federal Circuit addressed coercion in the context of the government allegedly conditioning vital financial assistance to bankrupt automobile companies on those companies terminating some of their franchise agreements. 748 F.3d at 1145. Unable to resolve the issue due to gaps in the record, the court noted in dicta that a relevant consideration was “whether the government financing was essential to the companies.” *Id.*

A common thread runs through the Federal Circuit’s decisions: the importance of choice. A nonfederal actor is not coerced when it can choose to go against the wishes of the United States, even if doing so will cause significant hardships, *Langenegger*, 756 F.2d at 1567, or result in a loss of prospective benefits, *id.*; *B & G*, 220 F.3d at 1325. But there is no choice, in any meaningful sense, when there is only one realistic option. *A & D Auto*, 748 F.3d at 1145 (noting the importance of considering whether the companies could survive without accepting the government’s offer); *cf. Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) (noting that, with respect to Congress’s spending powers, “the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions”). Put differently, the nonfederal actor must make a voluntary decision, which it cannot do if there is only one realistic option. *See BMR Gold Corp. v. United States*, 41 Fed. Cl. 277, 282 (1998) (finding that the “the necessary element of coerciveness” for a taking was missing because the plaintiff granted the military permission to cross his land); *accord Henn v. Nat’l Geographic Soc.*, 819 F.2d

824, 826 (7th Cir. 1987) (noting that hard choices remain voluntary when they are not akin to “Don Corleone’s ‘[m]ake him an offer he can’t refuse’”). In sum, the FHFA-C was not coerced if it voluntarily chose to enter into the PSPA Amendments.

**b. Plaintiff has not established that Treasury coerced the FHFA-C into approving the PSPA Amendments.**

In support of its contention that Treasury coerced the FHFA-C into approving the PSPA Amendments, plaintiff alleges that Treasury proposed the terms of the amendments and used its influence over the FHFA-C to ensure compliance with Treasury’s wishes. Those allegations are not enough to establish coercion. First, given the Enterprises’ improving financial condition and Treasury’s existing funding commitment, the FHFA-C’s decision to execute the PSPA Amendments was voluntary because it could reject the deals without imperiling the Enterprises. The facts here, therefore, are diametrically opposed to the circumstances in *A & D Auto* that the Federal Circuit suggested may support coercion because the automobile dealers faced insolvency if they did not accede to the financing terms. *See* 748 F.3d at 1145. Second, the FHFA-C’s lack of protestation is informative. “[T]he very fact that FHFA[-C] itself [did] not br[ing] suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA[-C] was an independent, willing participant in its negotiations with the Treasury.” *Robinson v. Fed. Hous. Fin. Agency*, 223 F. Supp. 3d 659, 668 (E.D. Ky. 2016), *aff’d*, 876 F.3d 220 (6th Cir. 2017). The court’s conclusion is bolstered by the fact that another court has held that materially similar allegations to those

at issue here did not “come close to a reasonable inference that [the] FHFA[-C] considered itself bound to do whatever Treasury ordered.” *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) (“*Perry I*”), *aff’d in part, rev’d in part sub nom. Perry II*, 864 F.3d at 591. This court agrees with the reasoning in *Perry I*: the PSPA Amendments were executed by sophisticated parties, and many agreements arise from a party’s proposal being accepted by the other party. *Id.* Plaintiff has not established that the FHFA-C was coerced into approving the PSPA Amendments by Treasury.

### **3. The FHFA-C is not Treasury’s agent.**

Plaintiff further argues that the FHFA-C’s actions are attributable to the United States because the FHFA-C is Treasury’s agent. Defendant counters that plaintiff has not pleaded an agency relationship because Treasury does not control the FHFA-C’s operations. Indeed, defendant notes that Treasury is statutorily barred from exercising such control.

The United States is subject to claims in this court for the actions of a third party “if [that] party is acting as the government’s agent . . . .” *A & D Auto*, 748 F.3d at 1154. “An essential element of agency is the principal’s right to control the agent’s actions.” *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01 cmt. f (Am. Law. Inst. 2005)); *accord O’Neill v. Dep’t of Hous. & Urban Dev.*, 220 F.3d 1354, 1360 (Fed. Cir. 2000) (acknowledging that the common-law meaning of agency requires, among other things, that the principal has the right to control the agent’s conduct); *see also Preseault v. United States*, 100 F.3d 1525,

1537 (Fed. Cir. 1996) (concluding that a state's actions were attributable to the United States when the state acted pursuant to the Interstate Commerce Commission's order); *Hendler v. United States*, 952 F.2d 1364, 1378–79 (Fed. Cir. 1991) (attributing a state's actions to the United States when the state acted under authority flowing from an Environmental Protection Agency order). The facts, as alleged, do not reflect that Treasury controlled the FHFA-C's actions because Congress explicitly precluded the FHFA-C from being subservient to another agency, 12 U.S.C. § 4617(a)(7) (providing that the FHFA-C cannot be subject to the “direction or supervision” of any other agency), and plaintiff has not alleged facts indicating that Treasury exercised such control notwithstanding the statutory bar. Although the FHFA-C was required by the PSPAs to obtain Treasury's approval for certain actions (e.g., issuing dividends), the PSPAs did not provide Treasury with the right to unilaterally order amendments. Moreover, plaintiff describes an FHFA-C that made decisions independently: Treasury sought to influence the opinions of the FHFA-C's senior officials; Treasury “push[ed]” for the PSPA Amendments; and the FHFA-C agreed to the PSPA Amendments. 1st Am. Compl. ¶¶ 2, 62, 64. Simply stated, plaintiff has not alleged facts establishing that Treasury exercised the control over the FHFA-C that is necessary for an agency relationship.

**4. The FHFA-C is the United States because the FHFA-C retains the FHFA's governmental character.**

In addition, plaintiff contends that the FHFA-C is itself a government actor.<sup>14</sup> Defendant disagrees. First, relying on *O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 412 U.S. 79 (1994), defendant argues that the FHFA-C is not the United States because the FHFA-C stands in the Enterprises' shoes. Specifically, defendant asserts that Congress's decision to have the FHFA-C succeed to the Enterprises' rights reflects that Congress intended that the FHFA-C step into the Enterprises' private shoes and shed its government character. Second, defendant argues that the FHFA-C's exercise of nontraditional conservatorship powers is immaterial because Congress can expand the conservator's role without transforming it into a government actor. Third, defendant argues that the Enterprises are not government instrumentalities—which means that the FHFA did not step into the shoes of a government actor when it became the Enterprises' conservator—because the government does not retain permanent authority to appoint the Enterprises' directors. Defendant contends that the government only has temporary, albeit indefinite, control over the Enterprises because the conservatorships are not permanent.

---

<sup>14</sup> To determine whether this action is against the United States, the court need not reach plaintiff's argument that Treasury and the FHFA-C formed a "control group." See Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 22–26.

In response, plaintiff disputes the premise of defendant's argument that, pursuant to *O'Melveny*, the FHFA becomes the Enterprises when acting as conservator. Plaintiff asserts that *O'Melveny* does not concern whether an entity is the United States or, if the decision can be read as addressing that issue, is distinguishable because it concerns receivers or is limited to conservators exercising traditional conservator powers. Second, plaintiff argues that the FHFA has not shed its government status, even if it has stepped into the Enterprises' shoes, when it acts as conservator. Specifically, plaintiff asserts that the FHFA-C retains the FHFA's government status because (1) the FHFA-C has acted beyond the traditional conservator powers and (2) Congress expressed its intention for that result by precluding the conservator from being subject to the supervision of "any *other* agency." 12 U.S.C. § 4617 (emphasis added). Third, plaintiff argues that its claims are against the United States, even if the FHFA-C steps into the shoes of the Enterprises, because the Enterprises are government instrumentalities.

In short, the parties disagree over the government status of the FHFA-C. The FHFA is indisputably the United States, *see id.* § 4511(a) (establishing the FHFA as an "independent agency of the Federal Government"), and so the only question is whether the FHFA sheds that status when it acts as conservator. In other jurisdictions, courts have held (with near unanimity) that the FHFA loses its government status pursuant to *O'Melveny*. In *O'Melveny*, the United States Supreme Court ("Supreme Court") explained that the Federal Deposit Insurance Corporation ("FDIC") "steps into [the] shoes" of a

private company when acting as receiver and sheds its government character because the FDIC “succeed[s] to . . . all rights, titles, powers, and privileges of the [entity in receivership] . . .” 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); *see also AG Route Seven P’ship v. United States*, 57 Fed. Cl. 521, 534 (2003) (citing *O’Melveny* for the proposition that the FDIC as receiver is a “private party, and not the government *per se*” because it “is merely standing in the shoes . . . of the defunct thrift”). The courts drawing from *O’Melveny* have concluded that the FHFA steps into the shoes of the Enterprises and sheds its government character when acting as conservator because Congress provided that the FHFA-C exercises the same rights with respect to the Enterprises as Congress granted to the FDIC as receiver. *See, e.g., Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017); *cf. Ameristar Fin. Servicing Co. v. United States*, 75 Fed. Cl. 807, 811 (2007) (concluding, with respect to the FDIC, that the step-into-the-shoes principle set forth in *O’Melveny* also applies in the conservator context).

**a. The FHFA-C is not the United States if the FHFA steps into the Enterprises’ shoes when acting as conservator.**

Plaintiff initially contends that defendant’s reliance on *O’Melveny* is erroneous because, assuming that *O’Melveny* applies, the FHFA-C is the United States even though it steps into the Enterprises’ shoes. Specifically, plaintiff asserts that the FHFA-C is the United States under the facts alleged because (1) the FHFA-C exercises nontraditional conservator powers, (2) Congress intended that the FHFA-C retain the FHFA’s government status, and (3) the FHFA-C steps



into the shoes of a government instrumentality. The court addresses each assertion in turn.

First, the FHFA-C did not become a government actor by exercising powers beyond those traditionally afforded to a conservator. As a threshold matter, plaintiff has not alleged facts reflecting that the FHFA-C used such powers; the execution of the PSPA Amendments was a “quintessential conservatorship” function. *Perry II*, 864 F.3d at 607. More importantly, however, plaintiff would not prevail even if the FHFA-C exercised nontraditional conservatorship powers in agreeing to the PSPA Amendments. When this argument was pressed in other jurisdictions, it was rejected:

It may well be true that FHFA’s actions would not be allowed under traditional principles of corporate or conservatorship law, but it does not follow that those actions are therefore governmental. Legislatures can expand conservatorship and similar powers without transforming conservators into agents of the government. *Cf. Pegram v. Herdrich*, 530 U.S. 211, 225–26 (2000) (explaining that the Employee Retirement Income Security Act altered the common law of trusts to permit certain actions that would otherwise violate the trustee’s fiduciary duties).

*Bhatti v. Fed. Hous. Fin. Agency*, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (footnote omitted). The court agrees with that reasoning, and plaintiff provides no authority that supports a contrary result. Although plaintiff states that the United States Court of Appeals for the District of Columbia Circuit (“D.C.

Circuit”) decision in *Waterview Management Co. v. FDIC*, 105 F.3d 696 (D.C. Cir. 1997), supports its position, it is mistaken. *Waterview* is not on point because the D.C. Circuit did not hold that a conservator is *per se* the United States when acting pursuant to a congressional grant of broad powers. Rather, it held that, as a matter of statutory interpretation, the existence of a receivership did not preempt a prereceivership contract. *Id.* at 699–702.

Second, Congress’s instruction that the FHFA-C is not subject to the supervision of any other agency does not reflect congressional intent for the FHFA to retain its government status when acting as conservator even if it steps into the shoes of the Enterprises. Because the court only reaches this issue by assuming that *O’Melveny* is instructive, the statutory language concerning supervision of the FHFA-C does not support a finding of jurisdiction because the same language is present in the statute that the Supreme Court addressed in *O’Melveny*. See 512 U.S. at 85–86 (discussing 12 U.S.C. § 1821). Compare 12 U.S.C. § 1821(c)(3)(C) (“When acting as conservator or receiver . . . , [the FDIC] shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC’s] rights, powers, and privileges.”), with *id.* § 4617(a)(7) (“When acting as conservator or receiver, the [FHFA] 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 [FHFA].”).

The third argument advanced by plaintiff—that the FHFA-C is the United States because it steps into the

shoes of a government instrumentality—also is not meritorious. A government instrumentality’s actions are attributable to the United States for purposes of the Tucker Act. *See Corr v. Metro. Wash. Airports Auth.*, 702 F.3d 1334, 1336 (Fed. Cir. 2012) (noting that a claim against a government instrumentality is a claim against the United States for purposes of the Little Tucker Act, 28 U.S.C. § 1346(a)(2)). The Supreme Court established in *Lebron v. National Railroad Passenger Corp.* that a company is a government instrumentality when (1) it is created by “special law,” (2) it is established “for the furtherance of governmental objectives,” and (3) the federal government “retains for itself permanent authority to appoint a majority of the [company’s] directors . . . .” 513 U.S. 374, 400 (1995). After *Lebron*, the Supreme Court clarified that, for purposes of the instrumentality test, “the practical reality of federal control and supervision prevails over Congress’ disclaimer of the [the entity’s] governmental status.” *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1233 (2015).

There is no dispute that the Enterprises satisfy the first two prongs of the *Lebron* test; Congress created the Enterprises by special law to achieve governmental objectives related to the housing market. *See* 12 U.S.C. § 4501; *see also Herron*, 861 F.3d at 167 (addressing claims involving Fannie and noting that “[t]his case satisfies the first two *Lebron* criteria”); *Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1406–07 (9th Cir. 1996) (reaching same conclusion for Freddie). The status of the Enterprises, therefore, turns on the third prong: whether the government retains permanent

authority to appoint a majority of the Enterprises' directors.

The Federal Circuit has not addressed the government-control prong with respect to the Enterprises, but courts in other jurisdictions have done so. Those decisions provide a starting point for the court. It appears that every court to consider the issue, with the exception of one district court, has held that the government does not exercise permanent control over the Enterprises. *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 279 (D.R.I. 2018) (concluding that the government retains permanent authority to control the Enterprises after noting that “[t]he non-controlling precedent to date” has reached the opposite conclusion). Most of the courts that concluded that the government lacks permanent control over the Enterprises issued their decisions before the Supreme Court in *Association of American Railroads* emphasized the importance of evaluating the practical reality over nomenclature, and the other courts focused on the statutory purpose for the conservatorships rather than the Enterprises' actual situation. *E.g., Herron*, 861 F.3d at 169 (relying on the notion that a conservatorship is fundamentally temporary). In other words, the courts adopting the prevailing view considered the issue of control without regard for the Supreme Court's instruction to focus on the practical reality. The court, therefore, does not find those decisions persuasive.

The crux of the inquiry, as the Supreme Court mandates, is on the practical reality of the government's control over the Enterprises. *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1233. It is of no import that Congress nominally authorized a facially temporary

conservatorship, *see* 12 U.S.C. § 4617(a) (permitting the FHFA to act as conservator to “reorganiz[e]” or “rehabilitat[e]” the Enterprises), because Congress’s disclaimers are no substitute for the court’s obligation to assess the government’s actual control, *Ass’n of Am. R.Rs.*, 135 S. Ct. at 1233. The court focuses on the length of the conservatorship because the FHFA-C wields complete control over the Enterprises so long as they are in conservatorship. *See generally* 12 U.S.C. § 4617.

Plaintiff alleges that the Enterprises will remain undercapitalized—and thus subject to conservatorship pursuant to 12 U.S.C. § 4617(a)(3)(J)—until the PSPAs, in their current form, are changed because the Enterprises cannot accumulate any capital under the existing terms of the PSPAs. Although the PSPAs could be further amended, plaintiff’s allegations reflect that Treasury and the FHFA-C will not do so because the purpose of the PSPA Amendments is to prevent the Enterprises from accumulating the necessary capital to become independent companies. Plaintiff, in short, has alleged that the government intended, and has taken steps to ensure, that the conservatorships never end. Those facts, viewed in isolation, would support a conclusion that the practical reality is that the Enterprises are under permanent government control. The court’s inquiry, however, is not limited to plaintiff’s allegations because it has taken judicial notice of relevant facts reflecting that the status quo has changed: the Treasury Secretary and the FHFA Director are now both committed to ending the conservatorships. Moreover, the idea that the Enterprises are permanently subject to government

control because they can never accumulate the capital needed to exit the conservatorships is undermined by recent developments. Indeed, Treasury proposed amending the Net Worth Sweep to allow the Enterprises to retain more capital, and the FHFA Director testified during his confirmation hearing that, if confirmed, he would seek to increase the amount of capital that the Enterprises retain. Simply stated, the practical reality is that the Enterprises are not subject to permanent government control because the relevant parties are working to terminate the conservatorships.<sup>15</sup>

In sum, the FHFA-C does not become the United States if the FHFA steps into the Enterprises' shoes when serving as conservator.

**b. The FHFA-C retains the FHFA's government character because the FHFA-C does not step into the Enterprises' shoes.**

The key inquiry, therefore, is whether the FHFA steps into the shoes of the Enterprises when acting as

---

<sup>15</sup> Plaintiff may disagree with the court's conclusion that events occurring after the PSPA Amendments are relevant to determining whether the Enterprises were under permanent government control during the events discussed in plaintiff's complaint. Even if the court agreed that events occurring after the PSPA Amendments are not germane, plaintiff still would not prevail because it alleges that the conservatorships began as temporary measures. *See* 1st Am. Compl. ¶ 7 (noting the temporary nature of the conservatorships and quoting an FHFA publication stating that the conservatorships would be terminated once the Enterprises had been restored "to a safe and solvent condition"); *id.* (noting that the FHFA reassured the market that the Enterprises would return to normal business operations). Thus, the Enterprises were not under permanent government control before the PSPA Amendments.

conservator. Defendant argues that the FHFA-C sheds its government character and assumes the identity of the Enterprises based on the reasoning in *O'Melveny*. Defendant's reliance on *O'Melveny* is misplaced. *O'Melveny* concerns a receiver stepping into the shoes of a failed bank. 512 U.S. at 86. The roles of a conservator and receiver are meaningfully different. In a recent decision, the United States District Court for the District of Rhode Island artfully explained the differences and their import for assessing whether the FHFA-C is the government:

The *O'Melveny* Court held that FDIC, when acting as a receiver for a private entity, steps into the shoes of that private entity for state law claims. This holding makes sense given the purpose of receivership: "to preserve a company's assets, for the benefit of creditors, in the face of bankruptcy." When FDIC is appointed receiver, it must dispose of the received entity's assets, resolving obligations and claims made against the entity. Notably, "[i]n receivership, the receiver owes fiduciary duties to the creditors, which the corporation would otherwise owe to creditors during a period of insolvency." It logically follows, then, that the receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity.

Conservatorship, in contrast, serves a different function. FHFA has described the purpose of conservatorship is "to establish control and oversight of a company to put it in a sound and solvent condition." Conservators, unlike receivers, have a fiduciary duty running to the corporation itself.

This is “critically distinct” from the fiduciary duties owed as a receiver—the receiver does indeed “step into the shoes” of the entity by assuming the fiduciary duties *of* the entity, but the conservator does not: it remains distinct, and rather owes a duty *to* the entity. Given the difference in fiduciary duties, *O’Melveny’s* “steps into the shoes” holding makes sense in the context of receivership, but not in the context of conservatorship.

*Sisti*, 324 F. Supp. 3d at 282–83 (citations and footnotes omitted). *See generally* Brian Taylor Goldman, *The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State-Action*, 17 J. Bus. & Sec. L. 11, 23–30 (2016). The district court, relying on the above analysis, declined to treat the FHFA-C as a private actor. *Sisti*, 324 F. Supp. 3d at 284. This court agrees with the reasoning and conclusion in *Sisti*: the FHFA does not shed its government character when acting as conservator because it does not step into the shoes of the Enterprises. Otherwise stated, the FHFA-C is the United States because it retains the FHFA’s government character. Plaintiff’s claims, therefore, are against the United States for purposes of the Tucker Act.

**B. The court lacks jurisdiction over plaintiff’s claim that sounds in tort.**

**1. Plaintiff’s fiduciary duty claim sounds in tort.**

Defendant next argues that the court lacks jurisdiction over plaintiff’s fiduciary duty claim because the United States does not owe to each Enterprise’s shareholders a fiduciary duty that is



grounded in a statute or contract. Defendant asserts that such a fiduciary duty cannot be based on (1) HERA because, pursuant to the statute, the FHFA-C is only required to act in the government's and the Enterprises' best interests; or (2) the PSPAs because plaintiff is not a party to those contracts. Plaintiff, in its opposition to defendant's motion to dismiss, counters that its claim is based on a fiduciary duty rooted in both HERA and the PSPAs. As to HERA, plaintiff asserts that Congress made the FHFA-C a fiduciary by authorizing it to control the Enterprises, entrusting it with duties that are at the core of what it means to be a fiduciary, and using terminology—"conservator"—associated with a fiduciary. With respect to the PSPAs, plaintiff argues that Treasury owes a fiduciary duty to the shareholders because it, acting with the FHFA-C, acquired control rights under the contract.

The court, pursuant to the Tucker Act, lacks jurisdiction over tort claims. 28 U.S.C. § 1491(a)(1). A breach of fiduciary duty is generally classified as a tort. *Newby v. United States*, 57 Fed. Cl. 382, 294 (2003). A fiduciary duty claim, however, does not sound in tort for purposes of the Tucker Act when the fiduciary relationship is founded on a money-mandating statute or a contractual provision between the claimant and United States. *See Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (statute); *Cleveland Chair Co. v. United States*, 557 F.2d 244, 246 (Ct. Cl. 1977) (contract); *see also* 28 U.S.C. § 1491(a)(1) (providing jurisdiction over claims "founded upon . . . any Act of Congress . . . or contract with the United States").

The initial issue is whether HERA establishes a fiduciary relationship between the FHFA-C and the Enterprises' shareholders. The court begins with the language of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). "If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect." *Rosete v. Office of Pers. Mgmt.*, 48 F.3d 514, 517 (Fed. Cir. 1995); *accord Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Congress provided in HERA that the FHFA-C is only required to act in the interests of itself or the Enterprises. 12 U.S.C. § 4617(b)(2)(J). That statement reflects a clear intent: the FHFA-C does not owe a fiduciary duty to shareholders because the conservator is not required to consider shareholders' interests.<sup>16</sup> *See id.*; *see also Collins v. Mnuchin*, 938 F.3d 553, 580 (5th Cir. 2019) (en banc) (noting that HERA "may permit" the FHFA-C to pursue actions that are "inconsistent with

---

<sup>16</sup> The court's interpretation of HERA's plain language is buttressed by the fact that Congress seemingly made a deliberate decision to exclude shareholder interests from the FHFA-C's considerations. Congress modeled HERA on the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). *Jacobs v. Fed. Hous. Fin. Agency*, 908 F.3d 884, 893 (3d Cir. 2018). Under FIRREA, Congress permitted the FDIC as conservator to consider the best interests of a bank, its depositors, or the FDIC. 12 U.S.C. § 1821(d)(2)(J)(ii). Although Congress permitted the FDIC to take into consideration the interests of its depositors, Congress omitted the analogue of depositors—shareholders—from the list of germane interests that the conservator can consider when acting pursuant to HERA. *Compare id.* (FIRREA), *with* 12 U.S.C. § 4617(b)(2)(J) (HERA). The omission is telling.

fiduciary duties”), *petitions for cert. filed*, 88 U.S.L.W. 3114 (U.S. Sept. 25, 2019) (No. 19-422), 88 U.S.L.W. 3146 (U.S. Oct. 25, 2019) (No. 19-563). The plain language controls, and therefore the court does not consider the peripheral considerations urged by plaintiff such as the implications of the word “conservator,” the FHFA-C’s control over the Enterprises, or the FHFA-C’s other powers. In sum, plaintiff cannot establish jurisdiction for its fiduciary duty claim by relying on HERA.

Next, the court turns to whether Treasury, acting together with the FHFA-C, owed a fiduciary duty to the Enterprises’ other shareholders because it acquired control rights by agreeing to the PSPAs. Plaintiff’s argument is premised on the state-law principle (which it terms “general corporate law”) that a controlling shareholder owes a fiduciary duty to the minority shareholders. The court is not convinced. First, plaintiff’s allegation of a fiduciary relationship is not founded on a contract within the meaning of the Tucker Act. Plaintiff is not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs. It invokes the contracts solely to establish that Treasury, with the assistance of the FHFA-C, is a controlling shareholder and relies on that conclusion to argue that Treasury has a fiduciary duty based on state law. The contract, otherwise stated, is one step removed from the purported genesis of the fiduciary duty—the application of state-law principles. That gap is too much in light of the court’s obligation to narrowly construe the Tucker Act’s waiver of sovereign immunity. *See Smith*, 855 F.2d at 1552 (noting that the Tucker Act is narrowly construed); *see also Perry II*, 864 F.3d at 619–20 (rejecting the legal

theory that the Enterprises' shareholders' need to reference the PSPAs for their fiduciary duty claim was enough to conclude that the claim was rooted in a contract for purposes of the Tucker Act).

Second, plaintiff fails to demonstrate the applicability of the state-law principles underlying its theory for why Treasury assumed fiduciary duties. Federal law governs the obligations Treasury incurred by entering into the PSPAs. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 519 (1988) ("The proposition that federal common law continues to govern the 'obligations to and rights of the United States under its contracts' is nearly as old as *Erie [v. Tompkins]*, 304 U.S. 64 (1938),] itself."). Although courts may shape federal law by drawing from state-law principles, plaintiff does not explain why doing so is appropriate in this instance.

Third, plaintiff does not prevail even if its fiduciary duty claim could be founded on a contract and federal common law incorporates the state-law principles regarding controlling shareholders' fiduciary obligations. Under Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders. *See Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1344 (Del. 1987); *Parsch v. Massey*, 79 Va. Cir. 446 (2009); *see also Quadrant Structured Prod. Co. v. Vertin*, 102 A.3d 155, 183 (Del. Ch. 2014) (acknowledging that those "who effectively control a corporation" owe a fiduciary duty to others).<sup>17</sup> To have the requisite level of control, the

---

<sup>17</sup> The court refers to Delaware and Virginia law because Fannie is a Delaware corporation, and Freddie is a Virginia corporation. When evaluating Virginia law, the court also looks

controlling shareholder must (1) be able to exercise a majority of the corporation's voting power or (2) direct the corporation without owning a majority of stock. *Kahn v. Lynch Commc'n Sys.*, 638 A.2d 1110, 1113 (Del. 1994). The latter, effective exercise of control, "is not an easy test to satisfy"; the individual or group must be, "as a practical matter, . . . no differently situated than if they had majority voting control." *In re PNB Holding Co. S'holders Litig.*, No. CIV.A. 28-N, 2006 WL 2403999, at \*9 (Del. Ch. Aug. 18, 2006).

Plaintiff has not established that Treasury meets either control test. First, plaintiff does not allege that Treasury owns any of the Enterprises' voting stock. Treasury purchased preferred stock and acquired the right to buy common (i.e., voting) stock, but there is no indication that Treasury exercised its warrants or otherwise acquired common stock.<sup>18</sup> Second, plaintiff does not demonstrate that Treasury exercised effective control over the Enterprises or was, in plaintiff's terms, a "dominant shareholder." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 29 (quoting *Sisti*, 324 F. Supp. 3d at 283 n.9). Although Treasury acquired the right to preclude the

---

to Delaware state court decisions because Virginia courts do so to resolve unsettled issues in the Commonwealth. *E.g.*, *U.S. Inspect Inc. v. McGreevy*, No. 160966, 2000 WL 33232337, at \*4 (Va. Cir. Ct. Nov. 27, 2000).

<sup>18</sup> Even if Treasury had exercised its option to buy a majority of the voting stock, it would not be a controlling shareholder because the FHFA-C succeeded to all of the shareholders' rights. *See* 12 U.S.C. § 4617(b)(2)(A) (noting that the FHFA-C, by operation of law, succeeds to all rights and powers of any Enterprise shareholder). Treasury, therefore, would have no voting power.

Enterprises from taking certain actions, Treasury did not control the Enterprises because it could not direct any action—it could only respond to certain requests made by the Enterprises. As a practical matter, therefore, Treasury is situated differently than if it had majority voting power.

Having rejected the contentions advanced by plaintiff in its opposition brief, the court turns to an argument that appears for the first time in plaintiff's supplemental brief, which was filed at the court's request after the initial round of briefing on defendant's omnibus motion to dismiss was complete, *Fairholme II* was decided, and the court held a status conference regarding further proceedings in the related cases.<sup>19</sup> In its supplemental brief, plaintiff contends that its fiduciary duty claim was founded on a contention that Treasury and the FHFA-C acted as a "control group," that this contention was set forth in its opposition brief in the section addressing the court's jurisdiction over its fiduciary duty claim, and that the court did not, in *Fairholme II*, consider this contention. But no such contention was made in plaintiff's opposition brief.

In its opposition brief, plaintiff explained that under state law, multiple shareholders who are legally connected can form a "control group" and be "deemed a single, majority shareholder," and then asserted that Treasury and the FHFA-C were such a control group, acting in concert as the United States. *See* Pls.' Corrected Combined Opp'n to Def.'s Omnibus

---

<sup>19</sup> As defendant notes, the court did not invite plaintiff, after the status conference held March 5, 2020, to relitigate issues already decided in *Fairholme II*.

Mot. to Dismiss 22–26. In other words, plaintiff advanced its control group contention solely to establish that its suit was against the United States. In the portion of its opposition devoted to countering defendant’s jurisdictional attack on its fiduciary duty claim, plaintiff asserted only two bases for a fiduciary duty; each one was treated separately as governing the conduct of either Treasury or the FHFA-C. It did not argue that the fiduciary duty arose from Treasury and the FHFA-C acting as a control group. Accordingly, the court did not consider plaintiff’s control group allegation as a foundation for any fiduciary duty claim in *Fairholme II*, among the arguments raised by the plaintiffs in these related cases.

Because plaintiff’s control group contention was not raised in its opposition brief in support of its fiduciary duty claim, it is waived. See *United States v. Ford Motor Co.*, 463 F.3d 1267, 1277 (Fed. Cir. 2006) (explaining that “[a]rguments raised for the first time in a reply brief are not properly before this court”); *Ironclad/EEI v. United States*, 78 Fed. Cl. 351, 358 (2007) (noting that “under the law of this circuit, arguments not presented in a party’s principal brief to the court are typically deemed to have been waived”). But even if plaintiff’s argument were not waived, it is not persuasive. In *Fairholme II*, the court explained why neither Treasury nor the FHFA-C owed a fiduciary duty to the shareholders of Fannie and Freddie. 147 Fed. Cl. at 37–40. The court is not persuaded that a control group composed of two entities, neither of which was bound by the fiduciary duty posited by plaintiff, would be bound by a fiduciary duty simply because the entities are alleged

to have worked in concert against the interests of the other shareholders of the Enterprises. Plaintiff's attempt to graft a state law concept of a control group of shareholders onto a Tucker Act jurisdictional inquiry is not anchored in binding or even persuasive precedent, as explained in *Fairholme II*. *Id.* at 39–40. Having considered the allegations in plaintiff's amended complaint, the timely arguments set forth in plaintiff's opposition brief, and the untimely argument raised in plaintiff's supplemental brief, the court concludes that it lacks jurisdiction over plaintiff's fiduciary duty claim because it sounds in tort. Therefore, it dismisses count III of plaintiff's amended complaint.

**2. Plaintiff's takings and illegal-exaction claims do not sound in tort.**

Defendant also argues that plaintiff's Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the FHFA-C. Plaintiff counters that it has pleaded the predicates for takings and illegal-exaction claims, which means that it is irrelevant whether it also alleged facts that are germane to tortious actions.

When a party pleads the predicates for a takings claim or illegal-exaction claim, the court possesses jurisdiction to entertain such claims. *See Hansen v. United States*, 65 Fed. Cl. 76, 8081 (2005) (“[S]o long as there is some material evidence in the record that establishes the predicates for a [claim covered by the Tucker Act,] . . . a plaintiff succeeds in demonstrating subject matter jurisdiction in this court . . .”). Those claims, at a basic level, are contentions that the



government expropriated private property lawfully (takings) or unlawfully (illegal exaction). *See Orient Overseas Container Line (UK) Ltd. v. United States*, 48 Fed. Cl. 284, 289 (2000) (“Takings claims arise because of a deprivation of property that is authorized by law. Illegal exactions arise when the government requires payment in violation of the Constitution, a statute, or a regulation.” (citing *Dureiko v. United States*, 209 F.3d 1345, 1359 (Fed. Cir. 2000); *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007–08 (Ct. Cl. 1967))). If a party alleges the necessary predicates for these claims, the court is not deprived of jurisdiction even if the complaint contains allegations that could support a tort claim. *See El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1353 (Fed. Cir. 2004) (“That the complaint suggests the United States may have acted tortiously towards the appellants does not remove it from the jurisdiction of the Court of Federal Claims.”); *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (explaining that this court has jurisdiction over a takings claim “even if the government’s action was subject to legal challenge on some other ground”). Here, plaintiff pleads the predicates for takings and illegal-exaction claims by alleging, in essence, that it was forced to give its property to the government because of lawful or unlawful government conduct. Therefore, it is of no import to the court’s jurisdiction whether plaintiff has alleged facts that would also support a tort claim.

**C. The court lacks jurisdiction over  
plaintiff's implied-in-fact-contract claim  
because plaintiff is not a third-party  
beneficiary of such a contract.**

Defendant argues next that the court lacks jurisdiction to entertain plaintiff's implied-in-fact-contract claim because plaintiff is not a third-party beneficiary of such a contract. Specifically, defendant asserts that plaintiff has not established that it is an intended beneficiary independent of its status as a shareholder and that any benefit that is related to its status as a shareholder is insufficient for jurisdiction. Plaintiff counters that it is an intended third-party beneficiary of implied contracts, between the FHFA and each Enterprise's board, in which the boards consented to the conservatorships in exchange for the FHFA-C operating the Enterprises as a fiduciary and returning them to sound condition. Specifically, plaintiff asserts that the intent to benefit the shareholders is evident from (1) the boards' consent to the conservatorships because shareholders would benefit from a conservator focused on returning the Enterprises to a better condition, and (2) the government acknowledging that the Enterprises' stock would remain outstanding while the Enterprises were in conservatorship.

The court's jurisdiction over contract claims is limited by the Tucker Act. *Ransom v. United States*, 900 F.2d 242, 244 (Fed. Cir. 1990). Of particular import here, ordinarily, a plaintiff must be in privity of contract with the United States to invoke this court's jurisdiction over a contract claim against the government. *Fid. & Guar. Ins. Underwriters, Inc. v. United States*, 805 F.3d 1082, 1087 (Fed. Cir. 2015).

But privity is not required if “the plaintiff can demonstrate that it was an intended third-party beneficiary under the contract.” *Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1361 (Fed. Cir. 2016).

“Third party beneficiary status is an ‘exceptional privilege.’” *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (quoting *German All. Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912)). The conditions for attaining such status are “stringent.” *Anderson v. United States*, 344 F.3d 1343, 1352 (Fed. Cir. 2003). “[S]hareholders seeking status to sue as third-party beneficiaries of an allegedly breached contract must ‘demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party *directly*.’” *Castle v. United States*, 301 F.3d 1328, 1338 (Fed. Cir. 2002) (quoting *Glass*, 258 F.3d at 1354). Specifically, “the contract must express the intent of the promissor to benefit the shareholder personally, independently of his or her status as shareholder.” *Glass*, 258 F.3d at 1353–54. As a practical matter, the shareholder does not personally benefit independent of its status as a shareholder when the contractual promises pertain only to the treatment of the company. *See FDIC v. United States*, 342 F.3d 1313, 1320 (Fed. Cir. 2003) (noting that the broken promises concerned the treatment of the company such that the plaintiffs did not benefit independent of their status as shareholders); *accord Maher v. United States*, 314 F.3d 600, 605 (Fed. Cir. 2002) (concluding that the plaintiffs were not third-party beneficiaries when they failed to “establish[] that the government took on any obligations in the merger agreement for [the plaintiffs] personal benefit, or even that the merger

agreement contains any provisions pertaining to [the plaintiffs] personally”).

As plaintiff is not a party to the alleged implied contracts between the FHFA and the Enterprises, the relevant issue is whether plaintiff is a third-party beneficiary of those agreements. It is not. First, it is of no import that the Enterprises, as plaintiff argues, purportedly agreed to the conservatorships because that would serve the interests of shareholders. Indeed, “every action of a corporation is supposed to benefit its shareholders,” but the “law has not viewed this general benefit as making every shareholder a third-party beneficiary.” *Suess v. United States*, 33 Fed. Cl. 89, 94 (1995). Second, plaintiff’s allegations reflect that it only benefits from the alleged implied contracts by virtue of its shareholder status. The relevant promises concerned how the FHFA-C would operate the Enterprises; the crux of the purported agreements was the FHFA-C promising to operate the Enterprises as a fiduciary to preserve their assets and return them to sound condition. Because the promises in the alleged implied contracts were directed at the Enterprises, plaintiff cannot be a third-party beneficiary of the alleged contract. *See FDIC*, 342 F.3d at 1320. Third, plaintiff has not demonstrated that the FHFA intended that plaintiff would benefit independently of its status as a shareholder even if it did so benefit. Plaintiff relies on the FHFA’s statements that private stock would remain outstanding and shareholders would continue to hold an economic interest in their stock. Those factual statements, however, do not reflect that the FHFA intended to confer any specific benefit on plaintiff independent of its role as a shareholder. Because

plaintiff has not alleged facts reflecting that the FHFA intended to confer a personal benefit on it, it is not a third-party beneficiary. *See Glass*, 258 F.3d at 1353–54. In sum, the court lacks jurisdiction to entertain plaintiff’s implied-in-fact-contract claim because plaintiff is neither a party to a contract with the government nor a third-party beneficiary of any such agreement. Therefore, the court dismisses count IV of its amended complaint.

## V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiff’s claims, defendant challenges plaintiff’s standing to pursue its claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. *Starr Int’l Co. v. United States*, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is “assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties.” *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that controls. *See Allen v. Wright*, 468 U.S. 737, 752 (1984) (“[T]he standing inquiry requires careful examination of a complaint’s allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted.”), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Thus, in a suit brought by a shareholder, it is the substance of the allegations and not the label assigned to the allegations—i.e., direct or derivative—that matters. *See Starr*, 856 F.3d at 966–67; *see also In re Sunrise Sec. Litig.*, 916 F.2d 874, 882 (3d Cir. 1990)

(“Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties.”). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based on the rights of the company. *See Starr*, 856 F.3d at 966–67; *see also Weir v. Stagg*, No. 09-21745-CIV, 2011 WL 13174531, at \*9 (S.D. Fla. Feb. 7, 2011) (“Shareholders do not have standing to bring a direct action for injuries suffered by a corporation, but rather, must bring a derivative action.”). A shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the corporation’s injuries—to have standing to litigate those claims. *See Starr*, 856 F.3d at 966–67.

Defendant argues that plaintiff lacks standing because its claims, pled as direct claims, actually belong to the Enterprises and are therefore derivative in nature. The parties in this case and the related cases fully briefed and argued this issue prior to the court issuing the *Fairholme II* decision. The court concluded in *Fairholme II* that Fannie and Freddie shareholders lack standing to pursue direct claims that are derivative in nature. Thereafter, the court solicited short supplemental briefs from plaintiff and defendant regarding the applicability of the holdings in *Fairholme II* to this case. In its supplemental brief, plaintiff suggests that its allegations are materially different from those asserted in *Fairholme* for purposes of standing, while defendant contends in its supplemental brief that there are no material

differences. All of the parties' arguments are addressed below.

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

As an initial matter, plaintiff contends that its allegations are materially different from those advanced in *Fairholme* in two respects, such that the standing inquiry would be affected. Plaintiff first argues that the type of harm it has suffered and the type of relief it has requested distinguish its claims from the direct claims in *Fairholme*. In essence, plaintiff attempts to distinguish what it characterizes as the *Fairholme* plaintiffs' allegation of the expropriation of the Enterprises' assets from its allegation of the expropriation of its economic interests. As defendant points out, however, the direct claims in *Fairholme* and the claims in this case are virtually indistinguishable in nature. All four counts of the amended complaint in this case mirror, in every essential way, the direct takings, illegal-exaction, fiduciary duty, and breach-of-implied-contract claims in *Fairholme*. Expropriation of the shareholders' economic interests was alleged in *Fairholme*, just as it is alleged in the first amended complaint in this case. *Compare Fairholme II*, 147 Fed. Cl. at 20, 46–47, with 1st Am. Compl. ¶¶ 88, 105–107. Thus, the standing analysis in *Fairholme II* is fully applicable to the claims presented here.

Plaintiff next invokes its reliance on the allegation of the existence of a “control group,” formed by Treasury and the FHFA-C, that dominated the Enterprises and injured it. In its view, this factual distinction in its first amended complaint is

significant because it was not discussed in *Fairholme II*. Plaintiff fails to explain, however, how this factual distinction gives it standing to bring its direct claims. Plaintiff apparently infers a logical connection between a control group of shareholders and a controlling shareholder, but the connection is not explained in a way that is helpful to the court. Indeed, in its supplemental brief plaintiff cites primarily to a section of its opposition brief that does not address the topic of standing at all. If plaintiff wished to advance a standing argument that specifically relied on the state law concept of a control group of shareholders and cases discussing such a phenomenon, no such argument was made in its opposition brief. Thus, any such standing argument that plaintiff may be attempting to make in its supplemental brief, to the extent that one could be discerned, is waived as untimely.<sup>20</sup> See *Ironclad/EEI*, 78 Fed. Cl. at 358.

**B. Plaintiff's claims actually belong  
to the Enterprises.**

Having determined that plaintiff's allegations do not differ materially from those advanced in *Fairholme*, the court turns to defendant's contention that plaintiff lacks standing to litigate its claims. Defendant's standing argument is premised on its assertion that plaintiff's claims actually belong to the Enterprises—and are therefore derivative in nature—

---

<sup>20</sup> Even if this argument were not waived, the court agrees with defendant that the control group scenario alleged by plaintiff also fails to satisfy the criteria for dual-natured claims that might provide standing to a shareholder plaintiff asserting direct claims. See Section V.B, *infra* (discussing the criteria for dual-natured claims).



because, to prevail, plaintiff would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises. Plaintiff counters that it asserts direct claims because the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises' capital structure to plaintiff's detriment, which renders the claims for such conduct both direct and derivative under the dual-nature exception.<sup>21</sup> Defendant replies that the Federal Circuit rejected the notion that a plaintiff states a direct claim by alleging it was targeted by the challenged action. Defendant also contends that the dual-nature exception is not applicable because Treasury was not a controlling shareholder, the Enterprises did not issue new shares, and the PSPA Amendments did not involve the reallocation of power.

Neither theory plaintiff advances for why its claims are substantively direct, rather than derivative, is persuasive. First, it is of no import whether the government targeted shareholders with the PSPA Amendments. *See Starr*, 856 F.3d at 973 (noting that the plaintiffs did not "sufficiently explain why the Government's subjective motivations are relevant to the inquiry into direct standing"). The direct-versus-derivative inquiry "turns on the plaintiff's injury, not the defendant's motive." *Pagan v. Calderon*, 448 F.3d

---

<sup>21</sup> The plaintiffs in the related cases also asserted that their claims must be construed as direct claims to vindicate important federal policies if shareholders cannot assert derivative claims because of HERA. But as this court held in *Fairholme II*, the shareholders of the Enterprises, notwithstanding HERA, have standing to assert derivative claims because of the FHFA-C's conflict of interest. 147 Fed. Cl. at 49–51.

16, 30 (1st Cir. 2006). Second, plaintiff has not asserted claims that qualify as both direct and derivative based on the dual-nature exception. The Federal Circuit explained that, pursuant to this exception, shareholder claims may be both direct and derivative “when a ‘reduction in [the] economic value and voting power affected the minority stockholders uniquely . . . .’” *Starr*, 856 F.3d at 968 (quoting *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006)). Specifically, shareholder claims are both direct and derivative if

“(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.”

*Id.* (quoting *Gentile*, 906 A.2d at 100). The exception does not apply here because Treasury was not a controlling shareholder at the time the PSPA Amendments were executed,<sup>22</sup> the PSPA Amendments did not involve the issuance of new shares, and shareholder voting power was not reallocated under the PSPA Amendments. It is not enough, contrary to plaintiff’s contention, that the government allegedly exacted economic value from the other shareholders by rearranging the corporate structure. See *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016) (applying *Gentile* and

---

<sup>22</sup> Treasury is not a controlling shareholder for the reasons set forth in Section IV.B.1, *supra*.

holding a plaintiff does not state a direct claim under the dual-nature exception by pleading the “extraction of solely economic value from the minority by a controlling stockholder”). Because plaintiff has not established that its claims are substantively direct in nature, it cannot demonstrate that it has standing to litigate those claims.

Plaintiff fares no better if the court moves beyond its arguments for why its claims are substantively direct in nature. Federal law governs whether plaintiff's claims are direct or derivative. *See Starr*, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. *Id.*; *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 (1991) (noting the “presumption that state law should be incorporated into federal common law”). Under Delaware law, the test for whether a shareholder's claim is derivative or direct depends on the answers to two questions: “(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?” *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (en banc). “Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow.” *Gentile*, 906 A.2d at 99, *discussed in Starr*, 856 F.3d at 965. Such claims are derivative even “though the overpayment may diminish the value of the corporation's stock or deplete corporate assets that

might otherwise be used to benefit the stockholders, such as through a dividend.” *Protas v. Cavanagh*, No. CIV.A. 6555-VCG, 2012 WL 1580969, at \*6 (Del. Ch. May 4, 2012); *see also Hometown Fin. Inc. v. United States*, 56 Fed. Cl. 477, 486 (2003) (“[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to nothing more than a diminution in stock value or a loss of dividends.”).

Plaintiff focuses on the expropriation of the Enterprises’ assets via compulsory payments of all profits. The gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury. Regardless of plaintiff’s label (direct) or theory (taking, illegal exaction, breach of fiduciary duty, or breach of implied contract) for its claims, the claims are substantively derivative in nature because they are premised on allegations of overpayment.<sup>23</sup> *See Gentile*, 906 A.2d at

---

<sup>23</sup> Plaintiff would remain unsuccessful if its allegations of waste and mismanagement (styled as self dealing, overreach, or abuse of discretion) were construed to be indicative of some action other than overpayment. Any claims premised on waste and mismanagement are derivative in nature. *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) (noting that “mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature”). Plaintiff’s claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. *See Hometown*, 56 Fed. Cl. at 486 (stock prices); *In re Straight Path Commc’ns Inc. Consol. S’holder Litig.*, No. CV 2017-0486-SG, 2017 WL 5565264, at \*4 (Del. Ch. Nov. 20, 2017) (“Sale of

99; *see also Roberts*, 889 F.3d at 409 (explaining that the plaintiffs asserted “classic derivative claims” when they alleged that “the [PSPA Amendments] illegally dissipated corporate assets by transferring them to Treasury”). Plaintiff cannot transform its substantively derivative claims into direct claims by merely alleging that, as a result of overpayments, it was deprived of its stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiff’s purported “harms are ‘merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.’” *Protas*, 2012 WL 1580969, at \*6 (quoting *Gentile*, 906 A.2d at 99); *see also Agostino v. Hicks*, 845 A.2d 1110, 1122 (Del. Ch. 2004) (“[T]he inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation.”). Because plaintiff’s claims are derivative in nature, plaintiff lacks standing to pursue those claims on its own behalf.

**C. Plaintiff’s claims are direct claims, as pled, and cannot be deemed to be derivative claims.**

Plaintiff, while acknowledging that it asserts only direct claims,<sup>24</sup> attempts to avoid a dismissal of those

---

corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . .”).

<sup>24</sup> Indeed, there is no dispute that the four claims plaintiff asserts in its amended complaint are direct claims. In each count plaintiff emphasizes that the harm to plaintiff is direct. 1st Am. Compl. ¶¶ 108, 112, 118, 134. In addition, the relief requested by plaintiff is for monetary relief payable to it, not to the Enterprises. *Id.* at 47; *see also* Pls.’ Suppl. Br. on Outstanding Mot. to Dismiss 3–4 (arguing that payments to the Enterprises would be of no use to plaintiff). Finally, the amended complaint

claims for lack of standing by contending that “[e]ven if [its] direct claims were deemed derivative, [it] still may assert them, under circuit precedent, because the [FHFA-C] as conservator has a manifest conflict of interest.” Pls.’ Corrected Combined Opp’n to Def.’s Omnibus Mot. to Dismiss 39. The precedent upon which plaintiff relies is the Federal Circuit’s decision in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999).

Once defendant challenged the standing of plaintiffs in these related cases to bring direct claims, the opposition brief filed in this case raised a novel standing argument. Although plaintiff continues to argue that its claims are direct, and that it has standing to bring direct claims, it posits that “[e]ven if plaintiffs’ direct claims [in these five cases] were deemed derivative, they still may assert them, under circuit precedent, because the [FHFA-C] as conservator has a manifest conflict of interest.” Pls.’ Corrected Combined Opp’n to Def.’s Omnibus Mot. to Dismiss 39. The precedent upon which plaintiff relies is the Federal Circuit’s decision in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999).

In *First Hartford*, the Federal Circuit held that a shareholder of a company could bring a derivative claim, notwithstanding a succession clause, if the company was controlled by an entity with a conflict of interest. *Id.* at 1283; *accord id.* at 1295 (remarking

---

contains a statement that plaintiff’s claims are direct in nature. See 1st Am. Compl. ¶ 102 (“[A]ny claim raised by Akanthos that might be considered derivative on behalf of the Company is in fact direct, on behalf of Akanthos itself.”).

that the purpose of derivative suits was to “permit shareholders to file suit on behalf of a corporation when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation”). The court in *Fairholme II* concluded that pursuant to *First Hartford*, the plaintiff who asserted derivative claims in *Fairholme* had standing to litigate those claims due to the FHFA-C’s conflict of interest. 147 Fed. Cl. at 49–51.

If plaintiff had asserted derivative claims in its amended complaint, the “conflict of interest” holding in *First Hartford* would have aided plaintiff in its quest to establish standing. But it did not do so. Thus, its reliance on this holding in *First Hartford* is misplaced.

As for plaintiff’s suggestion that its direct claims could be deemed derivative, it identifies no authority for that recharacterization of its claims, even though it had the opportunity to do so in its opposition brief and its supplemental brief. The court finds plaintiff’s “direct claims deemed derivative” argument, Pls.’ Suppl. Br. on Outstanding Mot. to Dismiss 5 (emphasis removed), to be unsupported by authority and unpersuasive for the purpose of establishing plaintiff’s standing to bring the claims in its amended complaint.<sup>25</sup>

---

<sup>25</sup> As defendant notes, claims brought on behalf of the Enterprises are asserted in numerous shareholder derivative claims in these related cases.

**D. Plaintiff's standing to bring direct claims  
is not established by another holding in  
*First Hartford*.**

Finally, the court addresses an assertion in plaintiff's opposition brief that was not explicitly addressed in *Fairholme II*. Only one sentence of that sixty-page brief was devoted to the following contention included among plaintiff's standing arguments: "[T]he Federal Circuit has repeatedly recognized a direct claim where a shareholder alleged deprivation of a contingent property interest in a bank." Pls.' Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss 38 (citing *First Hartford*, 194 F.3d at 1296; *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 957 n.2 (Fed. Cir. 1992)). Defendant, in support of its challenge to plaintiff's standing to bring its claims, relied on more recent precedent, the Federal Circuit's decision in *Starr*, to argue that plaintiff's claims were derivative claims, not direct claims. Plaintiff, notwithstanding its citation to *First Hartford* and a footnote in a case discussed in *First Hartford*, did not attempt, in any meaningful way, to explain why *Starr* should not be applied and followed in this case. Because plaintiff's reliance on *First Hartford* as support for a shareholder's standing to bring direct claims is cursory and undeveloped, the court is within its discretion to deem this argument waived. See *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (noting that the court has discretion on whether to consider undeveloped arguments).

Even if this argument were not waived, the Federal Circuit's *Starr* decision remains the binding precedent most on point. In *Starr*, the distinction between direct



and derivative claims brought by shareholders is the focus of the Federal Circuit's standing analysis. 856 F.3d at 963–73. Just as here, the plaintiffs brought takings and illegal-exaction claims related to a government intervention, during a financial crisis, affecting the future of a corporation in which they owned shares. *Id.* at 958–61. *Starr* provides the test for determining whether such claims are direct or derivative in nature and requires that nominally direct claims—that are actually derivative claims—be dismissed for lack of standing. *Id.* at 973.

In the face of this binding precedent, the court cannot conclude that the holding in *First Hartford*, which concerns direct Fifth Amendment takings claims, is more relevant. It is true that in *First Hartford* shareholders of a bank in receivership could pursue their takings claims as direct claims against the United States. 194 F.3d at 1287. However, *First Hartford* does not address the distinction between direct and derivative claims. When faced with binding precedent that addresses a crucial distinction, such as *Starr*, and one that does not, such as *First Hartford*, the court follows the precedent most on point. *Cf. Union Elec. Co. v. United States*, 363 F.3d 1292, 1297 (Fed. Cir. 2004) (“[W]e have repeatedly held that the disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue.” (citing *Boeing N. Am., Inc. v. Roche*, 298 F.3d 1274, 1282 (Fed. Cir. 2002))).

In sum, plaintiff has not established that it has standing to litigate its claims because it does not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court

dismisses plaintiff's claims on standing grounds to the extent that it has subject-matter jurisdiction over those claims.<sup>26</sup>

## VI. CONCLUSION

For the reasons stated above, the court **GRANTS** defendant's motion to dismiss and **DISMISSES** plaintiff's complaint because the court lacks jurisdiction to entertain its fiduciary duty and implied-in-fact-contract claims, and plaintiff lacks standing to pursue any of its claims. The clerk shall enter judgment accordingly. No costs.

**IT IS SO ORDERED.**

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

---

<sup>26</sup> As explained above, the court lacks jurisdiction over plaintiff's claims for breach of fiduciary duty and breach of implied contract. *See supra* Sections IV.B.1 (fiduciary duty), IV.C (contract). In addition, because all of plaintiff's claims must be dismissed for lack of standing, the court need not reach defendant's remaining arguments that these claims should be dismissed for failure to state a claim upon which relief can be granted.

---

APPENDIX H

---

**In the United States Court of Federal Claims**

No. 13-466C

(Filed: June 26, 2020)

\*\*\*\*\*

JOSEPH CACCIAPALLE	* Motion to Dismiss;
et al.,	* RCFC 12(b)(1);
Plaintiffs,	* RCFC 12(b)(6);
v.	* Jurisdiction;
THE UNITED STATES,	* Standing; Direct
Defendant.	* Claims;
	* Instrumentalities;
	* Coercion; Agent;
	* Conservators;
	* Conflict of Interest;
	* Stock;
	* Shareholders;
	* Judicial Taking;
	* Privity of Contract;
	* Fannie; Freddie;
	* FHFA

\*\*\*\*\*

*Hamish P.M. Hume*, Washington, DC, and  
*Eric L. Zagar*, Radnor, PA, for plaintiffs.

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

**OPINION AND ORDER****SWEENEY, Chief Judge**

Plaintiffs in this case challenge the actions of the United States during the conservatorships of the Federal National Mortgage Association (“Fannie”) and the Federal Home Loan Mortgage Corporation (“Freddie”). Specifically, plaintiffs take issue with the conservator for Fannie and Freddie (collectively, the “Enterprises”) amending a funding agreement between the Enterprises and the United States Department of the Treasury (“Treasury”). Based on the revisions to that agreement, plaintiffs seek the return of money illegally exacted; damages for breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty; and compensation for two types of takings claims pursuant to the Fifth Amendment to the United States Constitution (“Constitution”). Defendant moves to dismiss plaintiffs’ complaint, arguing that the court lacks subject-matter jurisdiction over plaintiffs’ claims, plaintiffs lack standing to pursue their claims, and plaintiffs fail to state a claim upon which relief may be granted. For the reasons stated below, the court grants defendant’s motion to dismiss.

**I. BACKGROUND****A. The Enterprises are private companies that are under the control of a conservator.****1. The Enterprises operated independently before the financial crisis.**

Congress created the Enterprises to help the housing market; the Enterprises purchase and guarantee mortgages originated by private banks before bundling those mortgages into securities that

are sold to investors.<sup>1</sup> 1st Am. Consol. Class Action Compl. (“1st Am. Compl.”) ¶ 19. Congress chartered Fannie in 1938 and established Freddie in 1970. *Id.* Both Enterprises were initially part of the federal government before Congress reorganized them into for-profit companies owned by private shareholders. *Id.* Freddie is organized under Virginia law, and Fannie is organized under Delaware law. *Id.* ¶ 106. The Enterprises, consistent with the applicable state laws, issued their own common and preferred stock. *Id.* ¶¶ 102–106; *Fairholme II*, 147 Fed. Cl. at 15. Common shareholders obtained the right to receive dividends, collect any residual value, and vote on various corporate matters. *Fairholme II*, 147 Fed. Cl. at 15. Those owning preferred stock acquired the right to receive dividends and a liquidation preference. 1st Am. Compl. ¶¶ 104–105.

The Enterprises, up until the financial crisis in the late 2000s, were consistently profitable; Fannie had not reported a full-year loss since 1985, and Freddie had not reported such a loss since becoming privately owned. *Id.* ¶ 22. Although the Enterprises recorded losses in 2007 and the first two quarters of 2008, the Enterprises continued to generate sufficient cash to pay their debts and retained sufficient capital to operate. *Fairholme II*, 147 Fed. Cl. at 15. Otherwise stated, the Enterprises were not in any apparent

---

<sup>1</sup> This background section is a less comprehensive version of the court’s recitation of facts in a related case, *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1 (2019) (“*Fairholme I*”), *interlocutory appeals docketed*, Nos. 20-121, 20-122 (Fed. Cir. June 18, 2020).

financial distress or otherwise at risk of insolvency.  
1st Am. Compl. ¶¶ 24, 26.

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

In the midst of the financial crisis during the summer of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 (“HERA”), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.). In that statute, Congress created the Federal Housing Finance Agency (“FHFA”) and provided it with supervisory and regulatory authority over the Enterprises. *See* 12 U.S.C. § 4511(a)–(b) (2018).<sup>2</sup> Congress further authorized the FHFA Director to, in limited circumstances, appoint the FHFA as the conservator (“FHFA-C”) for each Enterprise to reorganize, rehabilitate, or wind up its affairs.<sup>3</sup> *Id.* § 4617(a)(2). Specifically, the Director is authorized to appoint a conservator if, among other things, an Enterprise consents, is undercapitalized, or lacks sufficient assets to pay its obligations. *Id.* § 4617(a)(3).<sup>4</sup> The

---

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

<sup>3</sup> To avoid any ambiguity, the court reiterates that it is using “FHFA” to refer to the agency acting in its regulatory role and “FHFA-C” when discussing the agency acting as a conservator.

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

conservator, once appointed, functions independently; it is not “subject to the direction or supervision of any other agency of the United States or any State in the exercise of [its] rights, powers, and privileges . . . .” *Id.* § 4617(a)(7).

Congress also delineated the scope of the FHFA-C’s powers in HERA. *See generally id.* § 4617. As soon as it is appointed, the FHFA-C “immediately succeed[s] to . . . all rights, titles, powers, and privileges of the [Enterprise], and of any stockholder, officer, or director of such [Enterprise] with respect to the [Enterprise] and the assets of the [Enterprise] . . . .” *Id.* § 4617(b)(2)(A). Congress also conferred the conservator with the power to “[o]perate the [Enterprise].” *Id.* § 4617(b)(2)(B). Pursuant to that power, the conservator “may,” among other things, “perform all functions of the [Enterprise],” “preserve and conserve the assets and property of the [Enterprise],” and “provide by contract for assistance in fulfilling any function . . . of the [conservator].” *Id.* The conservator “may” also “take such action as may be . . . necessary to put the [Enterprise] in a sound and solvent condition; . . . and appropriate to carry on the business of the [Enterprise] and preserve and conserve the assets and property of the [Enterprise].” *Id.* § 4617(b)(2)(D). Rounding out the panoply of powers, Congress also provided that the conservator “may . . . exercise . . . such incidental powers as shall be necessary to carry out [its enumerated powers]” and “take any action authorized by [12 U.S.C. § 4617(b)], which [it] determines is in the best interest of the [Enterprise] or the [FHFA].” *Id.* § 4617(b)(2)(J). By describing the FHFA-C’s role primarily in terms of what powers it “may” exercise, *see generally id.*

§ 4617, Congress provided the FHFA-C with significant discretion on when or how it uses its powers, *see United States v. Rodgers*, 461 U.S. 677, 706 (1983) (“The word ‘may,’ when used in a statute, usually implies some degree of discretion.”). Simply stated, the FHFA has “extraordinarily broad flexibility to carry out its role as conservator.” *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 606 (D.C. Cir. 2017) (“*Perry II*”), *cert. denied*, 138 S. Ct. 978 (2018).

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

At the same time that it established the FHFA, Congress authorized the Treasury Secretary to buy securities issued by the Enterprises in limited circumstances. 12 U.S.C. §§ 1455(*l*) (Freddie), 1719(g) (Fannie). Congress included a sunset clause on this power; the Secretary could not purchase securities after December 31, 2009. *Id.* §§ 1455(*l*)(4), 1719(g)(4). Until that date, the Secretary was permitted to purchase the securities if he determined that doing so was necessary to provide stability to the financial markets, prevent disruptions in the availability of mortgage finance, and protect taxpayers. *Id.* §§ 1455(*l*)(1)(B), 1719(g)(1)(B). As part of his obligation to protect taxpayers, the Secretary could only purchase securities after considering:

- (i) The need for preferences or priorities regarding payments to the Government.
- (ii) Limits on maturity or disposition of obligations or securities to be purchased.
- (iii) The [Enterprise’s] plan for the orderly resumption of private market funding or capital market access.



(iv) The probability of the [Enterprise] fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the [Enterprise's] status as a private shareholder-owned company.

(vi) Restrictions on the use of [Enterprise] resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

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

#### **4. The FHFA became the conservator for each Enterprise.**

After Congress enacted HERA, Treasury decided that the FHFA should place each Enterprise into conservatorship. 1st Am. Compl. ¶ 30. The conservatorships became effective on September 6, 2008. *Id.* ¶ 27. The conservatorships were permissible under HERA once consent had been obtained from the boards of directors of the Enterprises. *See* 12 U.S.C. § 4617(a)(3)(I) (permitting the FHFA Director to appoint a conservator when “[t]he [Enterprise], by resolution of its board of directors or its shareholders or members, consents to the appointment”).

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

On September 7, 2008, the FHFA-C entered into a Preferred Stock Purchase Agreement (“PSPA”) with Treasury for each Enterprise. 1st Am. Compl. ¶¶ 5, 38; *Fairholme II*, 147 Fed. Cl. at 17. Treasury entered into the agreements pursuant to its authority under

HERA to buy the Enterprises' securities. 1st Am. Compl. ¶ 40. The PSPA for each Enterprise is materially identical. *Id.* ¶ 38. Under the PSPAs, Treasury committed to provide up to \$100 billion to each Enterprise to ensure that the Enterprises maintained a positive net worth. *Fairholme II*, 147 Fed. Cl. at 17. If an Enterprise's liabilities exceeded its assets, then the Enterprise could draw on Treasury's funding commitment in an amount equal to the difference between the Enterprise's liabilities and assets. *Id.*

In return for Treasury's funding commitment, the Enterprises surrendered stock, dividends, commitment fees, and control. First, with respect to the stock, Treasury acquired one-million shares of preferred stock in each Enterprise and warrants to purchase 79.9% of their respective common stock at a nominal price. *Id.*; 1st Am. Compl. ¶ 38. Treasury's preferred stock had an initial liquidation preference of \$1 billion, but the amount increased dollar-for-dollar when an Enterprise drew on Treasury's funding commitment. 1st Am. Compl. ¶ 38; *Fairholme II*, 147 Fed. Cl. at 17. In the event of a liquidation, Treasury was entitled to recover the full liquidation value of its shares before any other shareholder would receive compensation. 1st Am. Compl. ¶ 38. Second, Treasury bargained for the right to a quarterly cash dividend equal to 10% of its liquidation preference. *Id.* An Enterprise that decided against paying a cash dividend in a specific quarter could make an in-kind payment: the value of the dividend would be added to the liquidation preference, and the dividend rate would increase to 12%. *Id.* Those in-kind payments, however, did not count as a draw from Treasury's

funding commitment. *Fairholme II*, 147 Fed. Cl. at 18. Third, Treasury received the right to a quarterly commitment fee from each Enterprise, but Treasury could waive the fee each year. 1st Am. Compl. ¶ 38. If Treasury did not waive the fee, the Enterprise could elect to pay the amount in cash or make an in-kind payment by increasing the liquidation preference. *Fairholme II*, 147 Fed. Cl. at 18. Fourth, Treasury obtained de facto control over various aspects of each Enterprise; the Enterprises needed to obtain Treasury's consent before awarding dividends, issuing stock, transferring assets, incurring certain types of debt, and making certain organizational changes. *Id.*

The FHFA-C and Treasury amended each Enterprise's PSPA in May 2009, to increase Treasury's funding commitment to each Enterprise from \$100 billion to \$200 billion. 1st Am. Compl. ¶ 45. On December 24, 2009, the FHFA-C and Treasury executed another amendment to the PSPAs; they abolished the specific dollar cap and replaced it with a formula to allow Treasury's total commitment to each Enterprise to exceed \$200 billion. *Id.*; *Fairholme II*, 147 Fed. Cl. at 18.

## **6. The Enterprises' finances improved during their conservatorships.**

In the early stages of the conservatorships, each Enterprise's net worth decreased as it reported losses. *Fairholme II*, 147 Fed. Cl. at 18. The bulk of the losses resulted from the FHFA-C writing down the value of deferred tax assets and designating large loan loss reserves.<sup>5</sup> 1st Am. Compl. ¶ 42. Notwithstanding

---

<sup>5</sup> A loan loss reserve is an entry on a company's balance sheet that reduces its net worth to reflect anticipated losses on

those on-paper losses, the Enterprises' cash receipts consistently exceeded their expenses; they maintained net operating revenue in excess of their net operating expenses from the onset of the conservatorships under the PSPAs and through the first two amendments to the agreements. *Fairholme II*, 147 Fed. Cl. at 18.

By 2012, the Enterprises' financial outlooks were promising. In addition to an improvement in the housing market, the Enterprises began generating consistent profits and anticipated losing less money on their newer mortgages. *Id.* They were positioned to further improve their financial condition by settling lawsuits brought by each Enterprise and revising their valuations of (1) deferred tax assets because of growing profits and (2) loan loss reserves because losses were less than expected. *Id.* The FHFA-C and Treasury were aware of those forthcoming changes and the Enterprises' improving outlooks. 1st Am. Compl. ¶ 54. By August 2012, the Enterprises were expected to experience record profitability. *Id.* ¶ 55. The Enterprises received projections reflecting that they would have positive comprehensive income between 2012 and 2022. *Id.* ¶ 52. The FHFA-C had similar information; in July 2012, it circulated, within the FHFA, comparable projections and a prediction that the next eight years were likely to be the "golden years of [the Enterprises'] earnings." *Id.* (quoting the

---

mortgages that it owns. 1st Am. Compl. ¶ 42. A deferred tax asset is an asset that may be used to offset future tax liability. *Id.* A company must write down the value of that deferred asset if it is unlikely to be used to offset future taxable profits. *Id.* This write down occurs, for example, if a company predicts it will not be profitable in the future. *Id.*

document) (emphasis omitted). Otherwise stated, the FHFA-C and Treasury knew, by the summer of 2012, that the Enterprises were poised to generate profits in excess of their respective dividend obligations to Treasury. *Id.* ¶ 54.

**7. Treasury and the FHFA-C agreed to a third amendment to the PSPAs.**

At an unspecified time prior to August 2012, the Treasury and the FHFA-C began considering a third amendment to each PSPA. Treasury wanted to reap all of the benefits of the Enterprises’ return to profitability; Treasury’s goal was the driving force behind the third amendment. *Id.* ¶ 12. Treasury and the FHFA-C decided to announce the changed terms in mid-August 2012 because, according to Treasury, the Enterprises would be reporting earnings exceeding their dividend obligation at the beginning of that month. *Fairholme II*, 147 Fed. Cl. at 19.

On August 17, 2012, Treasury and the FHFA-C executed the third amendment to each PSPA (“PSPA Amendment”). 1st Am. Compl. ¶ 56. A key component of the amended PSPAs is the requirement—referred to as the “Net Worth Sweep”—that each Enterprise pay Treasury a quarterly dividend equal to 100% of each Enterprise’s net worth (except for a small capital reserve amount) rather than a dividend based on a set percentage of the liquidation preference.<sup>6</sup> *Id.* ¶¶ 56, 59. Additionally,

---

<sup>6</sup> The capital reserve for each Enterprise started at \$3 billion and was set to decrease to \$0 by January 2018, but the Enterprises and Treasury agreed in December 2017 to reset the capital reserve amount to \$3 billion in the first quarter of 2018. *Fairholme II*, 147 Fed. Cl. at 19 n.5.

under the amended PSPAs, the Enterprises are not obligated to pay a periodic commitment fee. *Fairholme II*, 147 Fed. Cl. at 19.

**a. Treasury wanted to ensure that it benefited from the new terms.**

With the PSPAs, Treasury sought to secure a more beneficial arrangement for itself, as a representative for taxpayers. During the lead-up to the PSPA Amendments, a Treasury official acknowledged in a December 2010 memorandum to the Treasury Secretary that the government was “committ[ed] to ensur[ing] existing common equity holders will not have access to any positive earnings from the [Enterprises] in the future.” 1st Am. Compl. ¶ 61 (quoting the memorandum). Treasury recognized its goal of obtaining all of the Enterprises’ profits by executing the PSPA Amendments; when the changes were announced, it noted that the Net Worth Sweep would “make sure that every dollar of earnings [each Enterprise] generates is used to benefit taxpayers.” *Id.* ¶ 65 (quoting a Treasury press release).

**b. The FHFA-C agreed to changes that benefit Treasury.**

For its part, the FHFA-C was operating under the belief that Treasury would benefit from the PSPA Amendments. Treasury anticipated that its receipts under the PSPA Amendments would exceed those under the prior scheme and would lead to a better outcome for taxpayers. *Fairholme II*, 147 Fed. Cl. at 19. Moreover, Mel Watt—a former FHFA Director—confirmed that he was concerned with how decisions affect the taxpayers. *Id.*

**c. Treasury and the FHFA understood that the PSPA Amendments would not facilitate the Enterprises exiting conservatorship.**

Treasury was aware that the new terms of the PSPAs were not conducive to the Enterprises exiting conservatorship. When announcing the PSPA Amendments, Treasury openly acknowledged that the new terms would expedite the winding down of Fannie and Freddie. 1st Am. Compl. ¶ 65. Treasury further explained that the new deal would ensure that the Enterprises “will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form.” *Id.* (quoting a press release). Indeed, a White House official sent a message to a Treasury official when the deal was announced noting that Treasury was “clos[ing] off [the] possibility that [Fannie and Freddie] ever[] go (pretend) private again.” *Id.* ¶ 69 (alterations in original) (quoting the message).

The FHFA shared the goal of winding down the Enterprises. *Id.* ¶ 63. Numerous statements of FHFA officials confirm that Fannie and Freddie were not intended to return to private corporate status. *Fairholme II*, 147 Fed. Cl. at 20. Indeed, the FHFA did not expect the Enterprises to exit conservatorship, or that they would survive to continue to play a role in the housing finance market. *Id.*

**d. Treasury has benefited from the PSPA Amendments at the expense of the Enterprises and other shareholders.**

There are four significant effects that flowed from the PSPA Amendments. First, plaintiffs lost their economic interests in the Enterprises because, under

the new terms, private shareholders can never receive dividends or liquidation distributions. 1st Am. Compl. ¶¶ 56, 58, 73. Second, Treasury acquired plaintiffs’ economic interests in the Enterprises because Treasury has now transferred all of those economic interests to itself. *Id.* ¶¶ 82–87. Third, Treasury reaped a windfall of \$125.5 billion in comparison to what it would have received absent changes to the PSPAs. *Id.* ¶ 70. Fourth, the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink of insolvency. *Id.* ¶ 97.

**8. Treasury and the FHFA are committed to ending the conservatorships.**

On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the Treasury Secretary to develop, “as soon as practicable,” a plan for “[e]nding the conservatorships of the [Enterprises] upon the completion of specified reforms . . . .”<sup>7</sup> Memorandum on Federal Housing

---

<sup>7</sup> The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source, the Federal Register. *See Murakami v. United States*, 46 Fed. Cl. 731, 739 (2000) (noting that the court may take judicial notice of government documents), *aff’d*, 398 F.3d 1342, 1354–55 (Fed. Cir. 2005); *see also Democracy Forward Found. v. White House Office of Am. Innovation*, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) (“[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum.”). *See generally* Fed. R. Evid. 201 (discussing judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the court may consider facts derived from sources subject to judicial notice without converting the motion into one for summary



Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must include proposals for “[s]etting the conditions necessary for the termination of the conservatorships” and outlined some of those conditions. *Id.* at 12,480. Subsequently, Treasury issued a plan in which it advocated for “begin[ning] the process of ending the [Enterprises’] conservatorships.”<sup>8</sup> U.S. Dep’t of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), <https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf> [<https://perma.cc/RGH8-N385>]; *accord id.* at 26 (“It is, after 11 years, time to bring the conservatorships to an end.”). As part of the plan to end the conservatorships, Treasury proposed that it and the FHFA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. *Id.* at 26–27.

The FHFA shares Treasury’s goals with respect to the conservatorships. Mark Calabria, the current FHFA Director, testified during his confirmation hearing that he wanted to end the conservatorships.<sup>9</sup> 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony).

---

judgment. *Sebastian v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

<sup>8</sup> The court takes judicial notice of Treasury’s reform plan because it is a government record available from a reliable source, Treasury’s website. *See supra* note 7.

<sup>9</sup> The court takes judicial notice of the relevant testimony because the statements are recorded in government documents. *See supra* note 7.

See generally *Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 116th Cong. 10–40, 74–75, 148–85 (2019) [hereinafter *Calabria Testimony*] (documenting Mr. Calabria’s testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that each Enterprise retains. *Calabria Testimony, supra*, at 150; see also *id.* at 25 (“I support the idea of having significantly more capital at the [Enterprises].”).

#### **B. Plaintiffs own Fannie and/or Freddie stock.**

There are two categories of plaintiffs in this litigation brought as a class action. One putative class of plaintiffs consists of holders of Fannie preferred stock, except the United States, and the other putative class is composed of holders of Freddie preferred stock, except the United States. 1st Am. Compl. ¶¶ 15–16, 115. The class members purchased their stock before the Net Worth Sweep. *Id.* Class members may hold stock in just one of the Enterprises, or both. *Id.*

### **II. PROCEDURAL HISTORY**

Plaintiffs filed their complaint on July 10, 2013.<sup>10</sup> After jurisdictional discovery proceeded in *Fairholme*,

---

<sup>10</sup> This is a consolidated case composed of three putative class actions (*Cacciapalle v. United States*, No. 13-466C; *American European Insurance Co. v. United States*, No. 13-496C; and *Dennis v. United States*, No. 13-542C) with two designated class representative plaintiffs (Joseph Cacciapalle and the American European Insurance Company). *Cacciapalle* is the lead case and

a related case, *see supra* note 1, plaintiffs filed their first amended consolidated class action complaint in this case on March 8, 2018.<sup>11</sup> In their amended complaint, plaintiffs plead six direct claims brought in their individual capacities as shareholders.

Plaintiffs first assert that the Net Worth Sweep constitutes a Fifth Amendment taking of their economic interests in their stock (count I). Next, plaintiffs assert a different takings claim based on any judicial interpretation of HERA that precludes them from recovering just compensation for their property interest in certain causes of action, including derivative claims on behalf of the Enterprises (count II). Plaintiffs further assert that the Net Worth Sweep constitutes an illegal exaction (count III) of their economic interests in their stock because (1) the FHFA-C was operating against its statutory mandate to preserve the Enterprises' assets; (2) the FHFA-C repudiated the Enterprises' contractual obligations to their shareholders outside of the permissible statutory time-frame; and (3) Treasury entered into the PSPA Amendments after the statutory time frame for entering into such contracts had expired.

Plaintiffs also plead two breach-of-contract claims. In the first, they allege that their stock certificates bind the Enterprises in contract, and that these contracts were breached by the FHFA-C when it entered into the PSPA Amendments, depriving plaintiffs of the benefits of those contracts (count IV).

---

the original *Cacciapalle* complaint was designated as the operative complaint for the consolidated case.

<sup>11</sup> A fuller recitation of the procedural history of this case and related cases is provided in *Fairholme II*, 147 Fed. Cl. at 21–23.

In the second breach-of-contract claim, founded again on plaintiffs’ stock certificates, they allege that the FHFA-C breached the Enterprises’ implied covenant of good faith and fair dealing vis-à-vis plaintiffs (count V). Lastly, plaintiffs allege that the FHFA-C, as a conservator pursuant to HERA, owes a fiduciary duty to plaintiffs. The breach-of-fiduciary-duty claim (“fiduciary duty claim”) is premised on the Net Worth Sweep being unfair; constituting waste, self-dealing, gross overreach, and gross abuse of discretion; and failing to further a valid business purpose or reflect a good faith business judgment (count VI).

On October 1, 2018, defendant moved to dismiss—in a single, omnibus motion—the claims in this case and eleven related cases before the undersigned.<sup>12</sup> The plaintiffs in each of the twelve cases filed a response brief on their respective dockets; some of the plaintiffs relied on a joint brief, while others, as is the case here, filed a joint brief and a supplemental response brief.<sup>13</sup> Defendant filed its omnibus reply

---

<sup>12</sup> The eleven related cases are *Washington Federal v. United States*, No. 13-385C; *Fairholme Funds, Inc. v. United States*, No. 13-465C; *Fisher v. United States*, No. 13-608C; *Arrowood Indemnity Company v. United States*, No. 13-698C; *Reid v. United States*, No. 14-152C; *Rafter v. United States*, No. 14-740C; *Owl Creek Asia I, L.P. v. United States*, No. 18-281C; *Akanthos Opportunity Master Fund, L.P. v. United States*, No. 18-369C; *Appaloosa Investment Limited Partnership I v. United States*, No. 18-370C; *CSS, LLC v. United States*, No. 18-371C; and *Mason Capital L.P. v. United States*, No. 18-529C.

<sup>13</sup> The court addresses in this opinion some arguments that were made primarily by the plaintiffs in the related cases to provide context for the resolution of defendant’s motion to dismiss. In addition, to the extent that any of plaintiffs’ less-

brief in each of the cases on May 6, 2019. The parties have fully briefed defendant's motion, and the court held a single oral argument on November 19, 2019, involving the plaintiffs from each of the twelve cases that defendant moved to dismiss. The plaintiffs in those cases collaborated during argument; each plaintiff argued some of the issues. Thus, the court infers that the plaintiffs in this case have adopted the favorable arguments made by the plaintiffs in the related cases to the extent that such arguments are relevant.<sup>14</sup> Defendant's motion to dismiss is now ripe for adjudication.

### III. STANDARD OF REVIEW

In ruling on a motion to dismiss a complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), the court generally assumes that the allegations in the complaint are true and construes those allegations in the plaintiff's favor. *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011). With respect to RCFC 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of the evidence, that the court possesses subject-matter jurisdiction. *Id.* The allegations in the complaint must include "the facts essential to show jurisdiction." *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

---

developed arguments are not discussed in this opinion, the court found such arguments to be unpersuasive.

<sup>14</sup> Given that plaintiffs here allege six direct claims, the court does not infer that they adopted the *Reid* and *Fisher* plaintiffs' argument that shareholder claims regarding the PSPA Amendments are derivative claims brought on behalf of the Enterprises.

And, if such jurisdictional facts are challenged in a motion to dismiss, the plaintiff “must support them by competent proof.” *Id.*; accord *Land v. Dollar*, 330 U.S. 731, 735 & n.4 (1947) (“[W]hen a question of the District Court’s jurisdiction is raised, . . . the court may inquire by affidavits or otherwise, into the facts as they exist.” (citations omitted)). If the court finds that it lacks subject-matter jurisdiction, it must, pursuant to RCFC 12(h)(3), dismiss the complaint.

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

#### IV. SUBJECT-MATTER JURISDICTION

The court begins with jurisdiction because it is a “threshold matter.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998). Subject-matter jurisdiction cannot be waived or forfeited because it “involves a court’s power to hear a case.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United*

*States v. Cotton*, 535 U.S. 625, 630 (2002)). “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Ex parte McCardle*, 74 U.S. (7 Wall) 506, 514 (1868). Therefore, it is “an inflexible matter that must be considered before proceeding to evaluate the merits of a case.” *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006); *accord K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1004–05 (Fed. Cir. 2015). Either party, or the court *sua sponte*, may challenge the court’s subject-matter jurisdiction at any time. *Arbaugh*, 546 U.S. at 506; *see also Jeun v. United States*, 128 Fed. Cl. 203, 209–10 (2016) (collecting cases).

The ability of the United States Court of Federal Claims (“Court of Federal Claims”) to entertain suits against the United States is limited. “The United States, as sovereign, is immune from suit save as it consents to be sued.” *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The waiver of immunity “may not be inferred, but must be unequivocally expressed.” *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). Any such waiver must be narrowly construed. *Smith v. Orr*, 855 F.2d 1544, 1552 (Fed. Cir. 1988). The Tucker Act, the principal statute governing the jurisdiction of this court, waives sovereign immunity for claims against the United States, not sounding in tort, that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (2018); *White Mountain*, 537 U.S. at 472. However, the Tucker Act is merely a

jurisdictional statute and “does not create any substantive right enforceable against the United States for money damages.” *United States v. Testan*, 424 U.S. 392, 298 (1976). Instead, the substantive right must appear in another source of law, such as a “money-mandating constitutional provision, statute or regulation that has been violated, or an express or implied contract with the United States.” *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc).

Defendant challenges the court’s jurisdiction to entertain plaintiffs’ claims on a number of bases. Specifically, defendant argues that 28 U.S.C. § 1500 bars plaintiffs’ claims, that plaintiffs have not asserted claims against the United States, and that the court lacks jurisdiction over the subject matter of certain claims. The court addresses each of these bases in turn.<sup>15</sup>

**A. Plaintiffs are not barred by 28 U.S.C. § 1500 from litigating their claims in this court.**

The court first addresses defendant’s argument that the court lacks jurisdiction to consider plaintiffs’ claims because plaintiffs initiated lawsuits in other courts after filing their complaint in this court. Specifically, defendant asserts that the claims are barred by 28 U.S.C. § 1500, which provides:

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect

---

<sup>15</sup> In *Fairholme II*, the court addressed an additional jurisdictional concern that was not raised in this case. See generally 147 Fed. Cl. at 34–37 (rejecting the contention of a putative intervenor that the Court of Federal Claims lacks jurisdiction to entertain Fifth Amendment takings claims).



to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Defendant acknowledges that, under binding precedent, § 1500 is not a bar in this case because the limitation only applies “when the suit shall have been commenced in the other court before the claim was filed in [the Court of Federal Claims].” *Tecon Eng’rs, Inc. v. United States*, 343 F.2d 943, 949 (Ct. Cl. 1965). Nonetheless, defendant asserts that the court should reinterpret § 1500 as creating a jurisdictional bar regardless of the timing of the filings. Plaintiffs counter that the court cannot disregard the binding precedent.

As defendant acknowledges, its argument is foreclosed by binding precedent: The jurisdictional limitation in § 1500 does not apply in this case because plaintiffs filed their complaint in this court before seeking redress in other jurisdictions. See *Tecon*, 343 F.2d at 949; see also *Res. Invs., Inc. v. United States*, 785 F.3d 660, 670 (Fed. Cir. 2015) (noting that *Tecon* remains good law in this circuit). Compare Class Action Compl. (filed July 10, 2013), with Class Action Compl., *Cacciapelle v. Fed. Nat’l Mortg. Ass’n*, No. 13-1149 (D.D.C. July 29, 2013). Although defendant urges the court to reconsider the rule set forth in *Tecon*, the court cannot do so because it is bound by that precedent. See *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1353 (Fed. Cir. 2006) (“There can be no question that the Court of Federal

Claims is required to follow the precedent of . . . our court, and our predecessor court, the Court of Claims.”). Plaintiffs’ claims, therefore, are not barred by § 1500.

**B. Plaintiffs have asserted claims against the United States.**

The court next considers whether plaintiffs have asserted claims against the United States, a necessary element of jurisdiction in the Court of Federal Claims. As set forth in their amended complaint, plaintiffs premise two of their claims on actions taken by the FHFA-C and Treasury. Specifically, the Fifth Amendment takings claim in count I and the illegal-exaction claim in count III both reference the FHFA-C and Treasury.<sup>16</sup> 1st Am. Compl. ¶¶ 129, 145. Plaintiffs’ breach-of-contract and fiduciary duty claims (counts IV, V, and VI) rely on the duties and responsibilities allegedly assumed by the FHFA-C. *Id.* ¶¶ 153, 161, 167. Finally, the judicial takings claim in count II is premised on actions taken by any court, and in particular the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”), which would impede plaintiffs from pursuing derivative claims on behalf of the Enterprises, or from pursuing injunctive or declaratory relief, in response to the Net Worth

---

<sup>16</sup> Although plaintiffs use “FHFA” in counts I and III of their amended complaint, 1st Am. Compl. ¶¶ 129, 145, the basis of those counts—the Net Worth Sweep—was executed by the FHFA in its role as conservator, *see supra* Section I.A.7 (describing the genesis and execution of the Net Worth Sweep); *see also* Pls.’ Omnibus Resp. to Def.’s Mot. to Dismiss 10–13, 19–21 (arguing that actions taken by Treasury and the FHFA-C were actions taken by the United States).

Sweep. *Id.* ¶¶ 136–137. Because the judicial takings claim does not concern the actions of Treasury or the FHFA-C, it will be addressed separately in Section IV.C, *infra*.

Defendant argues that the court lacks jurisdiction to consider any claims premised on the FHFA-C’s or Treasury’s conduct. In response, plaintiffs contend that they have asserted claims against the government because (1) Treasury was involved in the challenged conduct, (2) the FHFA-C exercised nontraditional conservator powers such that its actions must be deemed those of the government, (3) the FHFA-C was coerced by the government, (4) the FHFA-C was the government’s agent, and (5) the FHFA-C is a government actor. The court addresses each contention in turn.<sup>17</sup>

**1. The court cannot exercise jurisdiction based on allegations of Treasury’s involvement.**

Plaintiffs initially argue that the court has jurisdiction over their Fifth Amendment takings and illegal-exaction claims because they have alleged the involvement of Treasury—indisputably a part of the federal government—in the action underlying these claims, i.e., the Net Worth Sweep. Defendant counters that Treasury alone could not have implemented the PSPA Amendments, and Treasury’s role as a counterparty to the voluntary agreement with the Enterprises is not sufficient to establish jurisdiction over plaintiffs’ takings claims. Defendant further asserts that the court’s order allowing

---

<sup>17</sup> The remainder of this section, Section IV.B, is almost identical to the corresponding jurisdictional analysis section of *Fairholme II*, 147 Fed. Cl. at 25–34.

jurisdictional discovery reflects that plaintiffs' allegations concerning Treasury alone are insufficient to confer jurisdiction.

The parties' dispute on the import of allegations concerning Treasury is ultimately immaterial in light of the court's determination, explained below, that the FHFA-C—the other party involved in the PSPA Amendments—is the United States. Nonetheless, the court notes, as defendant asserts, that it implicitly acknowledged in its February 26, 2014 discovery order, issued in *Fairholme* and related cases, that the allegations concerning Treasury alone were insufficient to support jurisdiction. In that order, the court permitted the plaintiffs in those related cases to conduct fact discovery on whether the FHFA-C was “the ‘United States’ for purposes of the Tucker Act.” *Fairholme Funds, Inc. v. United States*, 114 Fed. Cl. 718, 721 (2014). The aforementioned discovery would have been unnecessary (and unwarranted) if, as plaintiffs assert, the court has jurisdiction over plaintiffs' claims based on their allegations concerning Treasury.

**2. The FHFA-C exercised its statutory conservatorship powers when it approved the PSPA Amendments for each Enterprise.**

Plaintiffs next argue that the FHFA-C must be considered the United States because the FHFA-C acted beyond its authority when it expropriated the Enterprises' assets for the government's benefit. Defendant counters that, irrespective of the “expropriation” label assigned by plaintiffs, the FHFA-C's execution of the PSPA Amendments was consistent with its statutory authority and purpose.

The FHFA-C is the United States for any claims challenging the conservator’s conduct that exceeded the applicable statutory authority. *Cf. Slattery v. United States*, 583 F.3d 800, 827–28 (Fed. Cir. 2009) (noting that the Federal Deposit Insurance Corporation (“FDIC”) as receiver is the United States for claims premised on allegations that the receiver failed to distribute funds as required by statute), *modified*, 635 F.3d 1298 (Fed. Cir. 2011) (en banc). Thus, resolving the parties’ dispute requires determining whether the FHFA-C had statutory authority to enter into the PSPA Amendments. The answer depends on HERA. Under HERA, the FHFA-C has exceptionally broad powers. *See Jacobs v. Fed. Hous. Fin. Agency*, 908 F.3d 884, 889 (3d Cir. 2018) (noting that the FHFA-C’s “powers are many and mostly discretionary”); *see also Saxton v. Fed. Hous. Fin. Agency*, 901 F.3d 954, 960 (8th Cir. 2018) (Stras, J., concurring) (“Congress came close to handing a blank check to the FHFA.”). The FHFA-C wields complete control over the Enterprises; it succeeds to the rights and powers of the Enterprises as well as their shareholders, directors, and officers. 12 U.S.C. § 4617(b)(2)(A)(i). The FHFA-C may (but is not required to) use that power to, among other things, further the FHFA’s interests, carry on the Enterprises’ business, preserve and conserve the Enterprises’ assets, and place the Enterprises in sound and solvent condition.<sup>18</sup> *Id.* § 4617(b)(2)(B), (D),

---

<sup>18</sup> The conclusion that the FHFA-C has some discretionary powers is buttressed by the fact that Congress stated the conservator “may” do certain things but “shall” do others. *See Huston v. United States*, 956 F.2d 259, 262 (Fed. Cir. 1992) (“When, within the same statute, Congress uses both ‘shall’ and

(J) (noting actions that the FHFA-C “may” undertake); *see also Roberts v. Fed. Hous. Fin. Agency*, 889 F.3d 397, 403 (7th Cir. 2018) (explaining that Congress’s use of “may” reflects that the FHFA-C has discretionary authority).

Congress’s broad grant of power to the FHFA-C colors the analysis of whether the FHFA-C became the United States by approving the PSPA Amendments. As an initial matter, plaintiffs’ contention that the FHFA-C exceeded its statutory authority by expropriating the Enterprises’ assets for the government is unavailing because the FHFA-C is authorized to act in its own interest without regard for the effects on the Enterprises. Moreover, the FHFA-C’s approval of the PSPA Amendments is in accordance with its authority to operate the Enterprises and preserve their assets. As operating businesses, the Enterprises needed to “secure ongoing access to capital, manage debt loads, control cash flow, and decide whether and how to pay dividends.” *Jacobs*, 908 F.3d at 890. The FHFA-C achieved those goals with the PSPA Amendments, which are, “in essence[,] a renegotiation of an existing lending agreement.” *Id.* By agreeing to the PSPA Amendments, the FHFA-C eliminated the risk of the Enterprises consuming all of their financial lifeline

---

‘may,’ it is differentiating between mandatory and discretionary tasks.”). *Compare* 12 U.S.C. § 4617(b)(2)(D) (“The [FHFA] *may*, as conservator, take such action as may be . . . necessary to put the regulated entity in sound and solvent condition . . . .” (emphasis added)), *with id.* § 4617(b)(14)(A) (“The [FHFA] as conservator or receiver *shall* . . . maintain a full accounting of each conservatorship and receivership or other disposition of a[n Enterprise] in default.” (emphasis added)).

(Treasury's funding commitment) through cash-dividend payments or entering a cycle of an ever-increasing liquidation preference.<sup>19</sup> *Roberts*, 889 F.3d at 404–05; *see also Jacobs*, 908 F.3d at 890 (noting that the Enterprises increased their future obligations and reduced their available funds by drawing funds from Treasury to pay the dividend); *Saxton*, 901 F.3d at 962 (Callas, J., concurring) (“Crushing dividend payments could have led the entities toward insolvency.”). The FHFA-C, with the amendments, also protected the Enterprises against future financial downturns.<sup>20</sup> *See Jacobs*, 908 F.3d at 890 (“The [PSPA Amendments] insured the [Enterprises] against downturns and ‘death spirals,’ preventing unpayable dividends from ratcheting up their debt loads to unsustainable levels.”); *see also Roberts*, 889 F.3d at 405 (noting that the Enterprises fared better in some years and worse in other years

---

<sup>19</sup> If, under the terms of the PSPAs before the PSPA Amendments, the Enterprises chose to make their dividend payment by increasing Treasury's liquidation preference, the future dividends would be more expensive because the dividends were a set percentage of the liquidation preference. Making future dividends more expensive would, in turn, increase the likelihood that the Enterprises would again need to rely on increasing Treasury's liquidation preference rather than making a cash payment. The end result is a cycle in which the Enterprises continue to increase Treasury's liquidation preference.

<sup>20</sup> Although the FHFA-C anticipated continued profitability for the Enterprises in the near term, this fact does not undermine the propriety of the PSPA Amendments because ensuring the continued functioning of a company includes guarding against long-term risks. These long-term outlooks are especially important given the indefinite nature of the FHFA-C's role.

under the terms of the PSPA Amendments as compared to the previous agreements).

In light of the above, the FHFA-C's execution of the PSPA Amendment for each Enterprise was a "quintessential conservatorship task[]" that is appropriate under HERA. *Perry II*, 864 F.3d at 607. Although "stockholders no doubt disagree about the necessity and fiscal wisdom of the [PSPA Amendments] . . . , Congress could not have been clearer about leaving those hard operational calls to the FHFA's managerial judgment." *Id.* In sum, the court joins the growing consensus that the FHFA-C acted within its statutory authority when it entered into the PSPA Amendments. *See Jacobs*, 908 F.3d at 894; *Saxton*, 901 F.3d at 963; *Roberts*, 889 F.3d at 403; *Robinson v. Fed. Hous. Fin. Agency*, 876 F.3d 220, 231 (6th Cir. 2017); *Perry II*, 864 F.3d at 606. *But see Collins v. Mnuchin*, 938 F.3d 553, 582 (5th Cir. 2019) (en banc) (holding, over the dissent of seven judges, that the plaintiffs stated a plausible claim that the FHFA-C exceeded its statutory authority), *petitions for cert. filed*, 88 U.S.L.W. 3114 (U.S. Sept. 25, 2019) (No. 19-422), 88 U.S.L.W. 3146 (U.S. Oct. 25, 2019) (No. 19-563). Thus, plaintiffs' theory that the FHFA-C is the United States because the FHFA-C exceeded its statutory authority is not persuasive.

### **3. The FHFA-C was not coerced into approving the PSPA Amendments.**

Plaintiffs also argue that the FHFA-C is the United States because the FHFA-C was coerced into approving the PSPA Amendments by Treasury. Plaintiffs assert that Treasury coerced the FHFA-C into approving the PSPA Amendments because (1)



Treasury drove the amendment process, (2) Treasury did not plan for the possibility that the FHFA-C would reject the amendments, and (3) the FHFA-C did not propose any alternatives to the amendments. In the alternative, plaintiffs contend that the FHFA, in its role as regulator, coerced the FHFA-C to approve the amendments because the two entities were not acting independently. Specifically, plaintiffs aver that the lines between the FHFA and the FHFA-C were blurred because (1) the FHFA's consent was required for any dividend payment and (2) the FHFA-C approved the amendments to achieve governmental objectives.

Defendant counters that the FHFA-C was not coerced by Treasury because the FHFA-C had a choice of whether to accept or reject the PSPA Amendments. Defendant asserts that there is no coercion if a party has a choice, regardless of how difficult refusal of a particular option may be. With respect to Treasury's involvement, defendant contends that plaintiffs fail to proffer any allegations that Treasury required the FHFA-C to enter into the agreements against its will. Defendant further asserts that other courts have declined to conclude that the FHFA-C felt compelled to follow Treasury based on allegations that Treasury invented the amendment concept or led the process. Defendant also argues that the FHFA-C was not coerced by the FHFA in the latter's role as regulator because there were clear statutory lines delineating the FHFA's authority in each role.<sup>21</sup>

---

<sup>21</sup> Defendant frames its argument as addressing whether the FHFA-C acted as an agent for the FHFA in its role as regulator, but defendant is responding to plaintiffs' coercion argument.

**a. The court has jurisdiction over claims based on actions that resulted from government coercion.**

The court has jurisdiction over claims premised on the FHFA-C's actions if Treasury's "influence over the" FHFA-C "was coercive rather than merely persuasive." *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154 (Fed. Cir. 2014). The line between coercion and persuasion "is highly fact-specific." *Id.* Precedent from the United States Court of Appeals for the Federal Circuit ("Federal Circuit") frames the contours of the inquiry. In *Langenegger v. United States*, the plaintiffs pleaded that the United States coerced El Salvador by threatening to withhold financial and military assistance unless El Salvador passed legislation expropriating private property. 756 F.2d 1565, 1567 (Fed. Cir. 1985). The Federal Circuit disagreed with the plaintiffs' characterization of the threats because "[d]iplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of [coercion], however difficult refusal may be as a practical matter." *Id.* at 1572. Similarly, the Federal Circuit concluded in *B & G Enterprises, Ltd. v. United States* that California was not coerced into enacting restrictions on smoking, notwithstanding the federal government conditioning grants on states enacting such limits. 220 F.3d 1318, 1321, 1325 (Fed. Cir. 2000); *see also A & D Auto*, 748 F.3d at 1155 (explaining that "coercion was not established" in *B & G*). The court explained that "it was California's decision to create [the] restrictions[;] . . . Congress may have provided the bait, but California decided to bite." *B & G*, 220 F.3d at 1325. In *A & D Auto*, the

Federal Circuit addressed coercion in the context of the government allegedly conditioning vital financial assistance to bankrupt automobile companies on those companies terminating some of their franchise agreements. 748 F.3d at 1145. Unable to resolve the issue due to gaps in the record, the court noted in dicta that a relevant consideration was “whether the government financing was essential to the companies.” *Id.*

A common thread runs through the Federal Circuit’s decisions: the importance of choice. A nonfederal actor is not coerced when it can choose to go against the wishes of the United States, even if doing so will cause significant hardships, *Langenegger*, 756 F.2d at 1567, or result in a loss of prospective benefits, *id.*; *B & G*, 220 F.3d at 1325. But there is no choice, in any meaningful sense, when there is only one realistic option. *A & D Auto*, 748 F.3d at 1145 (noting the importance of considering whether the companies could survive without accepting the government’s offer); *cf. Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) (noting that, with respect to Congress’s spending powers, “the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions”). Put differently, the nonfederal actor must make a voluntary decision, which it cannot do if there is only one realistic option. *See BMR Gold Corp. v. United States*, 41 Fed. Cl. 277, 282 (1998) (finding that the “the necessary element of coerciveness” for a taking was missing because the plaintiff granted the military permission to cross his land); *accord Henn v. Nat’l*

*Geographic Soc.*, 819 F.2d 824, 826 (7th Cir. 1987) (noting that hard choices remain voluntary when they are not akin to “Don Corleone’s ‘[m]ake him an offer he can’t refuse’”). In sum, the FHFA-C was not coerced if it voluntarily chose to enter into the PSPA Amendments.

**b. Plaintiffs have not established that Treasury coerced the FHFA-C into approving the PSPA Amendments.**

In support of their contention that Treasury coerced the FHFA-C into approving the PSPA Amendments, plaintiffs allege that Treasury proposed the terms of the amendments, and the FHFA-C did not make a counteroffer. Those allegations are not enough to establish coercion. First, given the Enterprises’ improving financial condition and Treasury’s existing funding commitment, the FHFA-C’s decision to execute the PSPA Amendments was voluntary because it could reject the deals without imperiling the Enterprises. The facts here, therefore, are diametrically opposed to the circumstances in *A & D Auto* that the Federal Circuit suggested may support coercion because the automobile dealers faced insolvency if they did not accede to the financing terms. *See* 748 F.3d at 1145. Second, the FHFA-C’s lack of protestation is informative. “[T]he very fact that FHFA[-C] itself [did] not br[ing] suit to enjoin the Treasury from the alleged coercion it was subjected to suggest[s] that FHFA[-C] was an independent, willing participant in its negotiations with the Treasury.” *Robinson v. Fed. Hous. Fin. Agency*, 223 F. Supp. 3d 659, 668 (E.D. Ky. 2016), *aff’d*, 876 F.3d at 220. The court’s conclusion is bolstered by the fact that another court has held that materially similar allegations to

those at issue here did not “come close to a reasonable inference that [the] FHFA[-C] considered itself bound to do whatever Treasury ordered.” *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 226 (D.D.C. 2014) (“*Perry I*”), *aff’d in part, rev’d in part sub nom. Perry II*, 864 F.3d at 591. This court agrees with the reasoning in *Perry I*: the PSPA Amendments were executed by sophisticated parties, and many agreements arise from a party’s proposal being accepted by the other party. *Id.*

**c. Plaintiffs have not established that the FHFA coerced the FHFA-C into approving the PSPA Amendments.**

Plaintiffs also have not alleged facts reflecting that the FHFA coerced the FHFA-C into agreeing to the PSPA Amendments. As an initial matter, plaintiffs have not alleged that the FHFA unduly influenced the FHFA-C’s decision-making process with respect to the proposed agreements. They merely allege that the FHFA did not silo its regulatory and conservator roles. The lack of a firewall (without more), however, does not indicate that the FHFA deprived the FHFA-C of meaningful choice. Moreover, plaintiffs’ focus on the FHFA-C allegedly pursuing government objectives when it approved the PSPA Amendments is a red herring. The purported pursuit of government objectives is not germane to the coercion inquiry because it does not suggest that the FHFA-C lacked any choice in the matter. Even if it was relevant to coercion (or to some other theory for jurisdiction), plaintiffs would not prevail because Congress permitted the FHFA-C to act in the interests of the government. *See* 12 U.S.C. § 4617(b)(2)(J) (allowing the FHFA-C to “take any action” that “is in the

interests of the [Enterprises] or the [FHFA]”). The mere pursuit of government objectives, therefore, would not reflect a blending of any roles but rather the FHFA-C using powers afforded to it by Congress.

In conclusion, plaintiffs have not established that the FHFA-C was coerced into approving the PSPA Amendments by Treasury or the FHFA.

#### **4. The FHFA-C is not Treasury’s agent.**

Plaintiffs further argue that the FHFA-C’s actions are attributable to the United States because the FHFA-C is Treasury’s agent. Plaintiffs assert that the FHFA-C is a government agent because (1) Treasury, by virtue of the PSPAs, had a major role in conservator decisions; (2) the FHFA-C approved the PSPA Amendments for the taxpayers’ benefit; and (3) the FHFA-C could not have approved the amendments absent statutory authority. Defendant counters that plaintiffs have not pleaded an agency relationship because Treasury does not control the FHFA-C’s operations and is statutorily barred from exercising such control.

The United States is subject to claims in this court for the actions of a third party “if [that] party is acting as the government’s agent . . . .” *A & D Auto*, 748 F.3d at 1154. “An essential element of agency is the principal’s right to control the agent’s actions.” *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013) (quoting Restatement (Third) of Agency § 1.01 cmt. f (Am. Law. Inst. 2005)); accord *O’Neill v. Dep’t of Hous. & Urban Dev.*, 220 F.3d 1354, 1360 (Fed. Cir. 2000) (acknowledging that the common-law meaning of agency requires, among other things, that the principal has the right to control the agent’s conduct);

*see also Preseault v. United States*, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (concluding that a state's actions were attributable to the United States when the state acted pursuant to the Interstate Commerce Commission's order); *Hendler v. United States*, 952 F.2d 1364, 1378–79 (Fed. Cir. 1991) (attributing a state's actions to the United States when the state acted under authority flowing from an Environmental Protection Agency order). The facts, as alleged, do not reflect that Treasury controlled the FHFA-C's actions because Congress explicitly precluded the FHFA-C from being subservient to another agency, 12 U.S.C. § 4617(a)(7) (providing that the FHFA-C cannot be subject to the “direction or supervision” of any other agency), and plaintiffs have not alleged facts indicating that Treasury exercised such control notwithstanding the statutory bar. Although the FHFA-C was required by the PSPAs to obtain Treasury's approval for certain actions (e.g., issuing dividends), the PSPAs did not provide Treasury with the right to unilaterally order amendments. Moreover, plaintiffs describe an FHFA-C that made decisions independently, even though it shared Treasury's goals: Treasury and the FHFA-C “act[ed] in concert”; the FHFA-C, like Treasury, “also determined to ‘wind down’” the Enterprises; and Treasury and the FHFA-C agreed on specific terms of the PSPS Amendments. 1st Am. Compl. ¶¶ 56, 62, 76. Simply stated, plaintiffs have not alleged facts establishing that Treasury exercised the control over the FHFA-C that is necessary for an agency relationship.

**5. The FHFA-C is the United States  
because the FHFA-C retains the FHFA's  
governmental character.**

Finally, plaintiffs contend that the FHFA-C is itself a government actor. Defendant disagrees. First, relying on *O'Melveny & Myers v. FDIC*, 412 U.S. 79 (1994), defendant argues that the FHFA-C is not the United States because the FHFA-C stands in the Enterprises' shoes. Specifically, defendant asserts that Congress's decision to have the FHFA-C succeed to the Enterprises' rights reflects that Congress intended that the FHFA-C step into the Enterprises' private shoes and shed its government character. Second, defendant argues that the FHFA-C's exercise of nontraditional conservatorship powers is immaterial because Congress can expand the conservator's role without transforming it into a government actor. Third, defendant argues that the Enterprises are not government instrumentalities—which means that the FHFA did not step into the shoes of a government actor when it became the Enterprises' conservator—because the government does not retain permanent authority to appoint the Enterprises' directors. Defendant contends that the government only has temporary, albeit indefinite, control over the Enterprises because the conservatorships are not permanent.

In response, plaintiffs dispute the premise of defendant's argument that, pursuant to *O'Melveny*, the FHFA becomes the Enterprises when acting as conservator. Plaintiffs assert that *O'Melveny* does not concern whether an entity is the United States or, if the decision can be read as addressing that issue, is distinguishable because it concerns receivers or is



limited to conservators exercising traditional conservator powers. Second, plaintiffs argue that the FHFA has not shed its government status, even if it has stepped into the Enterprises' shoes, when it acts as conservator. Specifically, plaintiffs assert that the FHFA-C retains the FHFA's government status because (1) the FHFA-C has acted beyond the traditional conservator powers and (2) Congress expressed its intention for that result by precluding the conservator from being subject to the supervision of "any *other* agency." 12 U.S.C. § 4617 (emphasis added). Third, plaintiffs argue that their claims are against the United States, even if the FHFA-C steps into the shoes of the Enterprises, because the Enterprises are government instrumentalities.

In short, the parties disagree over the government status of the FHFA-C. The FHFA is indisputably the United States, *see id.* § 4511(a) (establishing the FHFA as an "independent agency of the Federal Government"), and so the only question is whether the FHFA sheds that status when it acts as conservator. In other jurisdictions, courts have held (with near unanimity) that the FHFA loses its government status pursuant to *O'Melveny*. In *O'Melveny*, the United States Supreme Court ("Supreme Court") explained that the FDIC "steps into [the] shoes" of a private company when acting as receiver and sheds its government character because the FDIC "succeed[s] to . . . all rights, titles, powers, and privileges of the [entity in receivership] . . . ." 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); *see also AG Route Seven P'ship v. United States*, 57 Fed. Cl. 521, 534 (2003) (citing *O'Melveny* for the proposition that the FDIC as receiver is a "private party, and not the government

*per se*” because it “is merely standing in the shoes . . . of the defunct thrift”). The courts drawing from *O’Melveny* have concluded that the FHFA steps into the shoes of the Enterprises and sheds its government character when acting as conservator because Congress provided that the FHFA-C exercises the same rights with respect to the Enterprises as Congress granted to the FDIC as receiver. *See, e.g., Herron v. Fannie Mae*, 861 F.3d 160, 169 (D.C. Cir. 2017); *cf. Ameristar Fin. Servicing Co. v. United States*, 75 Fed. Cl. 807, 811 (2007) (concluding, with respect to the FDIC, that the step-into-the-shoes principle set forth in *O’Melveny* also applies in the conservator context).

**a. The FHFA-C is not the United States if the FHFA steps into the Enterprises’ shoes when acting as conservator.**

Plaintiffs initially contend that defendant’s reliance on *O’Melveny* is a red herring because, assuming that *O’Melveny* applies, the FHFA-C is the United States even though it steps into the Enterprises’ shoes. Specifically, plaintiffs assert that the FHFA-C is the United States under the facts alleged because (1) the FHFA-C exercises nontraditional conservator powers, (2) Congress intended that the FHFA-C retain the FHFA’s government status, and (3) the FHFA-C steps into the shoes of a government instrumentality. The court addresses each assertion in turn.

First, the FHFA-C did not become a government actor by exercising powers beyond those traditionally afforded to a conservator. As a threshold matter, plaintiffs have not alleged facts reflecting that the FHFA-C used such powers; the execution of the PSPA

Amendments was a “quintessential conservatorship” function. *Perry II*, 864 F.3d at 607; *see also supra* Section IV.B.2 (discussing the FHFA-C’s exercise of its powers). More importantly, however, plaintiffs would not prevail even if the FHFA-C exercised nontraditional conservatorship powers in agreeing to the PSPA Amendments. When this argument was pressed in other jurisdictions, it was rejected:

It may well be true that FHFA’s actions would not be allowed under traditional principles of corporate or conservatorship law, but it does not follow that those actions are therefore governmental. Legislatures can expand conservatorship and similar powers without transforming conservators into agents of the government. *Cf. Pegram v. Herdrich*, 530 U.S. 211, 225–26 (2000) (explaining that the Employee Retirement Income Security Act altered the common law of trusts to permit certain actions that would otherwise violate the trustee’s fiduciary duties).

*Bhatti v. Fed. Hous. Fin. Agency*, 332 F. Supp. 3d 1206, 1226 (D. Minn. 2018) (footnote omitted). The court agrees with that reasoning, and plaintiffs provide no authority that supports a contrary result. Although plaintiffs state that the D.C. Circuit’s decision in *Waterview Management Co. v. FDIC*, 105 F.3d 696 (D.C. Cir. 1997), supports their position, they are mistaken. *Waterview* is not on point because the D.C. Circuit did not hold that a conservator is *per se* the United States when acting pursuant to a congressional grant of broad powers. Rather, it held that, as a matter of statutory interpretation, the

existence of a receivership did not preempt a prereceivership contract. *Id.* at 699–702.

Second, Congress’s instruction that the FHFA-C is not subject to the supervision of any other agency does not reflect congressional intent for the FHFA to retain its government status when acting as conservator even if it steps into the shoes of the Enterprises. Because the court only reaches this issue by assuming that *O’Melveny* is instructive, the statutory language concerning supervision of the FHFA-C does not support a finding of jurisdiction because the same language is present in the statute that the Supreme Court addressed in *O’Melveny*. See 512 U.S. at 85–86 (discussing 12 U.S.C. § 1821). Compare 12 U.S.C. § 1821(c)(3)(C) (“When acting as conservator or receiver . . . , [the FDIC] shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC’s] rights, powers, and privileges.”), with *id.* § 4617(a)(7) (“When acting as conservator or receiver, the [FHFA] 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 [FHFA].”).

The third argument advanced by plaintiffs—that the FHFA-C is the United States because it steps into the shoes of a government instrumentality—also is not meritorious. A government instrumentality’s actions are attributable to the United States for purposes of the Tucker Act. See *Corr v. Metro. Wash. Airports Auth.*, 702 F.3d 1334, 1336 (Fed. Cir. 2012) (noting that a claim against a government instrumentality is a claim against the United States

for purposes of the Little Tucker Act, 28 U.S.C. § 1346(a)(2)). The Supreme Court established in *Lebron v. National Railroad Passenger Corp.* that a company is a government instrumentality when (1) it is created by “special law,” (2) it is established “for the furtherance of governmental objectives,” and (3) the federal government “retains for itself permanent authority to appoint a majority of the [company’s] directors . . . .” 513 U.S. 374, 400 (1995). After *Lebron*, the Supreme Court clarified that, for purposes of the instrumentality test, “the practical reality of federal control and supervision prevails over Congress’ disclaimer of [the entity’s] governmental status.” *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 55 (2015).

There is no dispute that the Enterprises satisfy the first two prongs of the *Lebron* test; Congress created the Enterprises by special law to achieve governmental objectives related to the housing market. See 12 U.S.C. § 4501; see also *Herron*, 861 F.3d at 167 (addressing claims involving Fannie and noting that “[t]his case satisfies the first two *Lebron* criteria”); *Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1406–07 (9th Cir. 1996) (reaching same conclusion for Freddie). The status of the Enterprises, therefore, turns on the third prong: whether the government retains permanent authority to appoint a majority of the Enterprises’ directors.

The Federal Circuit has not addressed the government-control prong with respect to the Enterprises, but courts in other jurisdictions have done so. Those decisions provide a starting point for the court. It appears that every court to consider the

issue, with the exception of one district court, has held that the government does not exercise permanent control over the Enterprises. *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 279 (D.R.I. 2018) (concluding that the government retains permanent authority to control the Enterprises after noting that “[t]he non-controlling precedent to date” has reached the opposite conclusion). Most of the courts that concluded that the government lacks permanent control over the Enterprises issued their decisions before the Supreme Court in *Association of American Railroads* emphasized the importance of evaluating the practical reality over nomenclature, and the other courts focused on the statutory purpose for the conservatorships rather than the Enterprises’ actual situation. *E.g.*, *Herron*, 861 F.3d at 169 (relying on the notion that a conservatorship is fundamentally temporary). In other words, the courts adopting the prevailing view considered the issue of control without regard for the Supreme Court’s instruction to focus on the practical reality. The court, therefore, does not find those decisions persuasive.

The crux of the inquiry, as the Supreme Court mandates, is on the practical reality of the government’s control over the Enterprises. *Ass’n of Am. R.Rs.*, 575 U.S. at 55. It is of no import that Congress nominally authorized a facially temporary conservatorship, *see* 12 U.S.C. § 4617(a) (permitting the FHFA to act as conservator to “reorganiz[e]” or “rehabilitat[e]” the Enterprises), because Congress’s disclaimers are no substitute for the court’s obligation to assess the government’s actual control, *Ass’n of Am. R.Rs.*, 575 U.S. at 55. The court focuses on the length of the conservatorship because the FHFA-C wields

complete control over the Enterprises so long as they are in conservatorship. *See generally* 12 U.S.C. § 4617.

Plaintiffs allege that the Enterprises will remain undercapitalized—and thus subject to conservatorship pursuant to 12 U.S.C. § 4617(a)(3)(J)—until the PSPAs, in their current form, are changed because the Enterprises cannot accumulate any capital under the existing terms of the PSPAs. Although the PSPAs could be further amended, plaintiffs' allegations reflect that Treasury and the FHFA-C will not do so because the purpose of the PSPA Amendments is to prevent the Enterprises from accumulating the necessary capital to become independent companies. Plaintiffs, in short, have alleged that the government intended, and has taken steps to ensure, that the conservatorships never end. Those facts, viewed in isolation, would support a conclusion that the practical reality is that the Enterprises are under permanent government control. The court's inquiry, however, is not limited to plaintiffs' allegations because it has taken judicial notice of relevant facts reflecting that the status quo has changed: The Treasury Secretary and the FHFA Director are now both committed to ending the conservatorships. Moreover, the idea that the Enterprises are permanently subject to government control because they can never accumulate the capital needed to exit the conservatorships is undermined by recent developments. Indeed, Treasury proposed amending the Net Worth Sweep to allow the Enterprises to retain more capital, and the FHFA Director testified during his confirmation hearing that, if confirmed, he would seek to increase the

amount of capital that the Enterprises retain. Simply stated, the practical reality is that the Enterprises are not subject to permanent government control because the relevant parties are working to terminate the conservatorships.<sup>22</sup>

In sum, the FHFA-C does not become the United States if the FHFA steps into the Enterprises' shoes when serving as conservator.

**b. The FHFA-C retains the FHFA's government character because the FHFA-C does not step into the Enterprises' shoes.**

The key inquiry, therefore, is whether the FHFA steps into the shoes of the Enterprises when acting as conservator. Defendant argues that the FHFA-C sheds its government character and assumes the identity of the Enterprises based on the reasoning in *O'Melveny*. Defendant's reliance on *O'Melveny* is misplaced. *O'Melveny* concerns a receiver stepping

---

<sup>22</sup> Plaintiffs may disagree with the court's conclusion that events occurring after the PSPA Amendments are relevant to determining whether the Enterprises were under permanent government control during the events discussed in plaintiffs' complaint. Even if the court agreed that events occurring after the PSPA Amendments are not germane, plaintiffs still would not prevail because they allege that the conservatorships began as temporary measures. See 1st Am. Compl. ¶¶ 28 (noting that FHFA publicly announced that the conservatorships would be terminated once the Enterprises were stabilized), 29 (noting that, when the conservatorships were imposed, the FHFA announced that the Enterprises would be returned to their shareholders, once stabilized), 55 (noting that FHFA's director had "vowed" in 2008 that the Enterprises would exit conservatorship and return to normal operations). Thus, the Enterprises were not under permanent government control before the PSPA Amendments.



into the shoes of a failed bank. 512 U.S. at 86. The roles of a conservator and receiver are meaningfully different. In a recent decision, the United States District Court for the District of Rhode Island artfully explained the differences and their import for assessing whether the FHFA-C is the government:

The *O'Melveny* Court held that FDIC, when acting as a receiver for a private entity, steps into the shoes of that private entity for state law claims. This holding makes sense given the purpose of receivership: “to preserve a company’s assets, for the benefit of creditors, in the face of bankruptcy.” When FDIC is appointed receiver, it must dispose of the received entity’s assets, resolving obligations and claims made against the entity. Notably, “[i]n receivership, the receiver owes fiduciary duties to the creditors, which the corporation would otherwise owe to creditors during a period of insolvency.” It logically follows, then, that the receiver steps into the shoes of the private entity, because it assumes the fiduciary duties of that entity.

Conservatorship, in contrast, serves a different function. FHFA has described the purpose of conservatorship is “to establish control and oversight of a company to put it in a sound and solvent condition.” Conservators, unlike receivers, have a fiduciary duty running to the corporation itself.

This is “critically distinct” from the fiduciary duties owed as a receiver—the receiver does indeed “step into the shoes” of the entity by assuming the fiduciary duties *of* the entity, but

the conservator does not: it remains distinct, and rather owes a duty *to* the entity. Given the difference in fiduciary duties, *O'Melveny's* “steps into the shoes” holding makes sense in the context of receivership, but not in the context of conservatorship.

*Sisti*, 324 F. Supp. 3d at 282–83 (citations and footnotes omitted). *See generally* Brian Taylor Goldman, *The Indefinite Conservatorship of Fannie Mae and Freddie Mac Is State-Action*, 17 J. Bus. & Sec. L. 11, 23–30 (2016). The district court, relying on the above analysis, declined to treat the FHFA-C as a private actor. *Sisti*, 324 F. Supp. 3d at 284. This court agrees with the reasoning and conclusion in *Sisti*: The FHFA does not shed its government character when acting as conservator because it does not step into the shoes of the Enterprises. Otherwise stated, the FHFA-C is the United States because it retains the FHFA's government character. Plaintiffs' claims, therefore, are against the United States for purposes of the Tucker Act.

### **C. The court lacks jurisdiction over plaintiffs' judicial takings claim.**

The court now turns to defendant's challenge to the plausibility of plaintiffs' judicial takings claim, which, in the court's view, raises a jurisdictional question. Plaintiffs allege in count II of their amended complaint that they possess a property interest in certain causes of action which were foreclosed by the D.C. Circuit's interpretation of HERA. As explained below, however, there is no jurisdiction in this court over plaintiffs' takings claim that collaterally attacks the rulings of another federal court.

In their amended complaint, plaintiffs allege that they possess a property interest in shareholder derivative claims, as well as claims presenting requests for declaratory or injunctive relief, regarding the Net Worth Sweep: “As holders of Preferred Stock, Plaintiffs had the right to protect their investment by filing certain causes of action, including derivative lawsuits and claims seeking injunctive and declaratory relief.” 1st Am. Compl. ¶ 134. According to plaintiffs, this property right is “protected by the Fifth Amendment.” *Id.* ¶ 135. Plaintiffs further argue that in *Perry II* the D.C. Circuit’s interpretation of HERA—so as to block such relief—took their property right in these causes of action. *Id.* ¶¶ 91, 136. Plaintiffs also argue that any other court ruling that has a similar effect on their causes of action would constitute a taking. *Id.* ¶ 137.

Plaintiffs acknowledge that their petition for certiorari challenging *Perry II* was denied by the Supreme Court. *Id.* ¶ 91. Nonetheless, plaintiffs ask this court to entertain their challenge to *Perry II*, and to any similar court rulings, because

to the extent that any courts continue to hold that such derivative claims are not possible and thereby block the shareholders in Fannie and Freddie from obtaining a full and just recovery for the loss of their shareholder rights, we assert that such an interpretation of HERA, as applied to the facts of these cases and the [PSPA] Amendment[s], is itself a Taking without just compensation.

*Id.* ¶ 92. Unfortunately for plaintiffs, the Federal Circuit does not consider collateral attacks on the

judgments of other federal courts to be cognizable under this court’s jurisdiction over takings claims.

As the Federal Circuit noted recently: “It is well established that the Claims Court ‘cannot entertain a taking[s] claim that requires the court to scrutinize the actions of another tribunal.’” *Campbell v. United States*, 932 F.3d 1331, 1340 (Fed. Cir. 2019) (alteration in original) (citing *Petro-Hunt, L.L.C. v. United States*, 862 F.3d 1370, 1386 (Fed. Cir. 2017); *Allustiarte v. United States*, 256 F.3d 1349, 1351–52 (Fed. Cir. 2001)). In *Campbell*, the appellants attempted to challenge the bases of rulings by a bankruptcy court and a federal district court. *Id.* Their takings claim could not proceed, however, because it was a “collateral attack on the decisions of the bankruptcy court and district court on a takings theory.” *Id.* The Federal Circuit held that “[t]he proper forum for such a challenge is the judicial appellate process.” *Id.*

Following *Campbell* and the precedent cited in *Campbell*, the court concludes that there is no jurisdiction in this court for plaintiffs’ takings claim attacking the holdings of *Perry II* that were adverse to plaintiffs, and attacking similar court rulings, if any.<sup>23</sup> The court, therefore, dismisses count II—plaintiffs’ judicial takings claim—because it lacks jurisdiction over that claim. The court now turns to the remaining jurisdictional issues raised by defendant’s motion to dismiss.

---

<sup>23</sup> The court notes that in *Fairholme II* it interpreted HERA to permit derivative claims related to the Net Worth Sweep. 147 Fed. Cl. at 49–51.

**D. The court lacks jurisdiction over plaintiffs’ claim that sounds in tort.**

**1. Plaintiffs’ fiduciary duty claim sounds in tort.**

Defendant argues that the court lacks jurisdiction over plaintiffs’ fiduciary duty claim because the United States does not owe to each Enterprise’s shareholders a fiduciary duty that is grounded in a statute or contract. Defendant asserts that such a fiduciary duty cannot be based on (1) HERA because, pursuant to the statute, the FHFA-C is only required to act in the government’s and the Enterprises’ best interests; or (2) the PSPAs because plaintiffs are not parties to those contracts. Plaintiffs counter that their claim is based on a fiduciary duty rooted in both HERA and the PSPAs. As to HERA, plaintiffs assert that Congress made the FHFA-C a fiduciary by authorizing it to control the Enterprises, entrusting it with duties that are at the core of what it means to be a fiduciary, and using terminology—“conservator”—associated with a fiduciary. Additionally, plaintiffs contend that recognizing that Treasury owes a fiduciary duty to shareholders is the only way to give meaning to Congress’s mandate in HERA that Treasury protect taxpayers by considering, before purchasing securities, the need to maintain the Enterprises as privately owned entities. With respect to the PSPAs, plaintiffs argue that Treasury owes a fiduciary duty to the shareholders because it acquired control rights under the contract.

The court, pursuant to the Tucker Act, lacks jurisdiction over tort claims. 28 U.S.C. § 1491(a)(1). A breach of fiduciary duty is generally classified as a

tort. *Newby v. United States*, 57 Fed. Cl. 382, 294 (2003). A fiduciary duty claim, however, does not sound in tort for purposes of the Tucker Act when the fiduciary relationship is founded on a money-mandating statute or a contractual provision between the claimant and United States. *See Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (statute); *Cleveland Chair Co. v. United States*, 557 F.2d 244, 246 (Ct. Cl. 1977) (contract); *see also* 28 U.S.C. § 1491(a)(1) (providing jurisdiction over claims “founded upon . . . any Act of Congress . . . or contract with the United States”).

The initial issue is whether HERA establishes a fiduciary relationship between the FHFA-C and the Enterprises’ shareholders. The court begins with the language of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). “If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect.” *Rosete v. Office of Pers. Mgmt.*, 48 F.3d 514, 517 (Fed. Cir. 1995); *accord Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”). Congress provided in HERA that the FHFA-C is only required to act in the interests of itself or the Enterprises. 12 U.S.C. § 4617(b)(2)(J). That statement reflects a clear intent: the FHFA-C does not owe a fiduciary duty to shareholders because the conservator is not required to consider shareholders’ interests.<sup>24</sup> *See id.*; *see also*

---

<sup>24</sup> The court’s interpretation of HERA’s plain language is buttressed by the fact that Congress seemingly made a deliberate decision to exclude shareholder interests from the FHFA-C’s considerations. Congress modeled HERA on the Financial

*Collins*, 938 F.3d at 580 (noting that HERA “may permit” the FHFA-C to pursue actions that are “inconsistent with fiduciary duties”). The plain language controls, and therefore the court does not consider the peripheral considerations urged by plaintiffs such as the implications of the word “conservator,” the FHFA-C’s control over the Enterprises, or the FHFA-C’s other powers. In sum, plaintiffs cannot establish jurisdiction for their fiduciary duty claim by relying on HERA.

The next issue is whether Treasury owes a fiduciary duty to shareholders because it purchased securities pursuant to HERA.<sup>25</sup> Plaintiffs contend that

---

Institutions Reform, Recovery, and Enforcement Act (“FIRREA”). *Jacobs*, 908 F.3d at 893. Under FIRREA, Congress permitted the FDIC as conservator to consider the best interests of a bank, its depositors, or the FDIC. 12 U.S.C. § 1821(d)(2)(J)(ii). Although Congress permitted the FDIC to take into consideration the interests of its depositors, Congress omitted the analogue of depositors—shareholders—from the list of germane interests that the conservator can consider when acting pursuant to HERA. *Compare id.* (FIRREA), with 12 U.S.C. § 4617(b)(2)(J) (HERA). The omission is telling.

<sup>25</sup> The gravamen of plaintiffs’ direct fiduciary duty claim is that the FHFA-C owed a fiduciary duty to plaintiffs. *See* 1st Am. Compl. ¶¶ 166–167. Indeed, plaintiffs state in their complaint that the “FHFA violated its fiduciary duty to Plaintiffs,” *id.* ¶ 172, and make no similar allegation with regard to Treasury. Although plaintiffs have not alleged that their direct fiduciary duty claim is premised on Treasury’s actions in particular, the court nonetheless considers the parties’ arguments on whether such a claim would be within the court’s jurisdiction for two reasons. First, the parties have fully briefed the issue without noting the discrepancy between plaintiffs’ arguments and the allegations in their complaint. Second, the court’s resolution of the issue is immaterial to the ultimate outcome because, as

Treasury assumed such a duty when it agreed to the PSPAs because of the determinations that Congress required the Treasury Secretary to make prior to buying the securities. Before purchasing securities pursuant to HERA, the Secretary is required to determine that the purchase is necessary to protect taxpayers and evaluate various considerations in connection with protecting the taxpayers. 12 U.S.C. §§ 1455(l)(1)(B)–(C), 1719(g)(1)(B)–(C). One of those considerations is the need to maintain the Enterprises as privately owned companies. *Id.* §§ 1455(l)(1)(C), 1719(g)(1)(C). At no point, however, did Congress direct (or even suggest) that the Secretary must protect the shareholders. The court declines to stretch the statutory language to support a fiduciary relationship based on any incidental benefit shareholders may derive from the Secretary considering the need to keep the Enterprises privately owned in the context of protecting taxpayers. Simply stated, Treasury did not assume any fiduciary obligations to the Enterprises’ shareholders by virtue of HERA.

Finally, the court turns to whether Treasury owed a fiduciary duty to the Enterprises’ other shareholders because it acquired control rights by agreeing to the PSPAs. Plaintiffs’ argument is premised on the state-law principle (which they term “general corporate law”) that a controlling shareholder owes a fiduciary duty to the minority shareholders. The court is not convinced. First, plaintiffs’ allegation of a fiduciary relationship is not founded on a contract within the

---

discussed below, plaintiffs lack standing to pursue their direct claims in counts I, III, and VI.



meaning of the Tucker Act. Plaintiffs are not attempting to enforce any duty imposed on Treasury that is specified in the PSPAs. They invoke the contracts solely to establish that Treasury is a controlling shareholder and rely on that conclusion to argue that it has a fiduciary duty based on state law. The contract, otherwise stated, is one step removed from the purported genesis of the fiduciary duty—the application of state-law principles. That gap is too much in light of the court’s obligation to narrowly construe the Tucker Act’s waiver of sovereign immunity. *See Smith*, 855 F.2d at 1552 (noting that the Tucker Act is narrowly construed); *see also Perry II*, 864 F.3d at 619–20 (rejecting the legal theory that the Enterprises’ shareholders’ need to reference the PSPAs for their fiduciary duty claim was enough to conclude that the claim was rooted in a contract for purposes of the Tucker Act).

Second, plaintiffs fail to demonstrate the applicability of the state-law principles underlying their theory for why Treasury assumed fiduciary duties. Federal law governs the obligations Treasury incurred by entering into the PSPAs. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 519 (1988) (“The proposition that federal common law continues to govern the ‘obligations to and rights of the United States under its contracts’ is nearly as old as *Erie [v. Tompkins]*, 304 U.S. 64 (1938),] itself.”). Although courts may shape federal law by drawing from state-law principles, plaintiffs do not explain why doing so is appropriate in this instance.

Third, plaintiffs do not prevail even if their fiduciary duty claim could be founded on a contract and federal common law incorporates the state-law

principles regarding controlling shareholders' fiduciary obligations. Under Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders. *See Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1344 (Del. 1987); *Parsch v. Massey*, 79 Va. Cir. 446 (2009); *see also Quadrant Structured Prod. Co. v. Vertin*, 102 A.3d 155, 183 (Del. Ch. 2014) (acknowledging that those "who effectively control a corporation" owe a fiduciary duty to others).<sup>26</sup> To have the requisite level of control, the controlling shareholder must (1) be able to exercise a majority of the corporation's voting power or (2) direct the corporation without owning a majority of stock. *Kahn v. Lynch Commc'n Sys.*, 638 A.2d 1110, 1113 (Del. 1994). The latter, effective exercise of control, "is not an easy test to satisfy; the individual or group must be, "as a practical matter, . . . no differently situated than if they had majority voting control." *In re PNB Holding Co. S'holders Litig.*, No. CIV.A. 28-N, 2006 WL 2403999, at \*9 (Del. Ch. Aug. 18, 2006). Plaintiffs have not established that Treasury meets either control test. First, plaintiffs do not allege that Treasury owns any of the Enterprises' voting stock. Treasury purchased preferred stock and acquired the right to buy common (i.e., voting) stock, but there is no indication that Treasury exercised its

---

<sup>26</sup> The court refers to Delaware and Virginia law because Fannie is a Delaware corporation, and Freddie is a Virginia corporation. When evaluating Virginia law, the court also looks to Delaware state court decisions because Virginia courts do so to resolve unsettled issues in the Commonwealth. *E.g., U.S. Inspect Inc. v. McGreevy*, No. 160966, 2000 WL 33232337, at \*4 (Va. Cir. Ct. Nov. 27, 2000).

warrants or otherwise acquired common stock.<sup>27</sup> Second, plaintiffs do not demonstrate that Treasury exercised effective control over the Enterprises. Although Treasury acquired the right to preclude the Enterprises from taking certain actions, Treasury did not control the Enterprises because it could not direct any action—it could only respond to certain requests made by the Enterprises. As a practical matter, therefore, Treasury is situated differently than if it had majority voting power.

In sum, plaintiffs' fiduciary duty claim is a tort claim because plaintiffs have not established that the FHFA-C or Treasury owed shareholders a fiduciary duty based on a statute or contract. The court, therefore, dismisses count VI—breach of fiduciary duty—because it lacks jurisdiction over tort claims.

## **2. Plaintiffs' takings and illegal-exaction claims do not sound in tort.**

Defendant also argues that plaintiffs' Fifth Amendment takings and illegal-exaction claims sound in tort because they are premised on purported misconduct by the FHFA-C. Plaintiffs counter that they have pleaded the predicates for takings and illegal-exaction claims, which means that it is irrelevant whether they also alleged facts that are germane to tortious actions.

---

<sup>27</sup> Even if Treasury had exercised its option to buy a majority of the voting stock, it would not be a controlling shareholder because the FHFA-C succeeded to all of the shareholders' rights. *See* 12 U.S.C. § 4617(b)(2)(A) (noting that the FHFA-C, by operation of law, succeeds to all rights and powers of any Enterprise shareholder). Treasury, therefore, would have no voting power.

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

import to the court’s jurisdiction whether plaintiffs have alleged facts that would also support a tort claim.

## V. STANDING

In addition to asserting that the court lacks subject-matter jurisdiction to entertain plaintiffs’ claims, defendant challenges plaintiffs’ standing to pursue their claims. A plaintiff bears the burden of demonstrating that it has standing for each claim. *Starr Int’l Co. v. United States*, 856 F.3d 953, 964 (Fed. Cir. 2017). It must establish, among other things, that it is “assert[ing its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties.” *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). Further, the label assigned to a claim is irrelevant; it is the substance of the allegations that controls. *See Allen v. Wright*, 468 U.S. 737, 752 (1984) (“[T]he standing inquiry requires careful examination of a complaint’s allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claim asserted.”), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Thus, in a suit brought by shareholders, it is the substance of the allegations and not the label assigned to the allegations—i.e., direct or derivative—that matters. *See Starr*, 856 F.3d at 966–67; *see also In re Sunrise Sec. Litig.*, 916 F.2d 874, 882 (3d Cir. 1990) (“Whether a claim is [direct] or derivative is determined from the body of the complaint rather than from the label employed by the parties.”). A shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature because its personal request for relief would be based

on the rights of the company. *See Starr*, 856 F.3d at 966–67; *see also Weir v. Stagg*, No. 09-21745-CIV, 2011 WL 13174531, at \*9 (S.D. Fla. Feb. 7, 2011) (“Shareholders do not have standing to bring a direct action for injuries suffered by a corporation, but rather, must bring a derivative action.”). A shareholder, therefore, must establish that the claims it labeled as direct are substantively direct in nature—i.e., premised on its injuries rather than the corporation’s injuries—to have standing to litigate those claims. *See Starr*, 856 F.3d at 966–67.

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

Thereafter, the court solicited short supplemental briefs from plaintiffs and defendant regarding the applicability of the holdings in *Fairholme II* to this case. In their supplemental brief, plaintiffs suggest that their allegations in support of counts I and III of the amended complaint, for purposes of establishing standing, are materially different from the allegations regarding the takings and illegal-exaction claims asserted in *Fairholme*, while defendant contends in its supplemental brief that there are no material

differences.<sup>28</sup> Defendant also argues that plaintiffs cannot assert their contract-based claims in counts IV and V because they have no contract with the United States. The court addresses each of these standing issues in turn.

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

As an initial matter, plaintiffs contend that their allegations are materially different from those advanced in *Fairholme*, such that the standing inquiry would be affected. Specifically, plaintiffs argue that their case does not focus on overpayments taken from the Enterprises, but on a direct appropriation of plaintiffs' property rights in their stock and their rights to distributions from the Enterprises. In essence, plaintiffs attempt to distinguish what they characterize as the *Fairholme* plaintiffs' allegation of indirect harm to the shareholders from their own allegation of the expropriation of their economic interests.

As defendant points out, however, the direct claims in *Fairholme* and the claims that rely on the same legal theories in this case are virtually indistinguishable in nature. Counts I, III, and VI of the amended complaint in this case mirror, in every essential way, the direct takings, illegal-exaction, and fiduciary duty claims in *Fairholme*. Expropriation of the shareholders' economic interests, by means of the Net Worth Sweep, was alleged in *Fairholme*, just as it

---

<sup>28</sup> Plaintiffs concede that their allegations in support of the fiduciary duty claim in count VI of the amended complaint are indistinguishable from those supporting the same type of claim in *Fairholme*.

is alleged in the amended complaint in this case. *Compare Fairholme II*, 147 Fed. Cl. at 20, 46–47, *with* 1st Am. Compl. ¶¶ 10, 13, 57, 70, 73, 87, 128, 144, 168. Thus, the standing analysis in *Fairholme II* is fully applicable to the claims presented here in counts I, III, and VI of the amended complaint.

**B. Plaintiffs’ claims actually belong to the Enterprises.**

Having determined that plaintiffs’ allegations in counts I, III, and VI do not differ materially from those advanced in *Fairholme*, the court turns to defendant’s contention that plaintiffs lack standing to litigate these claims. Defendant’s standing argument is premised on its assertion that plaintiffs’ claims actually belong to the Enterprises—and are therefore derivative in nature—because, to prevail, plaintiffs would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises. Plaintiffs counter that they assert direct claims because the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises’ capital structure to plaintiffs’ detriment, which renders the claims for such conduct both direct and derivative under the dual-nature exception.<sup>29</sup> Defendant replies that the Federal Circuit rejected the notion that a plaintiff states a direct claim by alleging it was targeted by the

---

<sup>29</sup> The plaintiffs in the related cases also asserted that their claims must be construed as direct claims to vindicate important federal policies if shareholders cannot assert derivative claims because of HERA. But as this court held in *Fairholme II*, the shareholders of the Enterprises, notwithstanding HERA, have standing to assert derivative claims because of the FHFA-C’s conflict of interest. 147 Fed. Cl. at 49–51.



challenged action. Defendant also contends that the dual-nature exception is not applicable because Treasury was not a controlling shareholder, the Enterprises did not issue new shares, and the PSPA Amendments did not involve the reallocation of power.

Neither theory plaintiffs advance for why their claims are substantively direct, rather than derivative, is persuasive. First, it is of no import whether the government targeted shareholders with the PSPA Amendments. *See Starr*, 856 F.3d at 973 (noting that the plaintiffs did not “sufficiently explain why the Government’s subjective motivations are relevant to the inquiry into direct standing”). The direct-versus-derivative inquiry “turns on the plaintiff’s injury, not the defendant’s motive.” *Pagan v. Calderon*, 448 F.3d 16, 30 (1st Cir. 2006). Second, plaintiffs have not asserted claims that qualify as both direct and derivative based on the dual-nature exception. The Federal Circuit explained that, pursuant to this exception, shareholder claims may be both direct and derivative “when a ‘reduction in [the] economic value and voting power affected the minority stockholders uniquely . . . .’” *Starr*, 856 F.3d at 968 (quoting *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006)). Specifically, shareholder claims are both direct and derivative if

“(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.”

*Id.* (quoting *Gentile*, 906 A.2d at 100). The exception does not apply here because Treasury was not a controlling shareholder at the time the PSPA Amendments were executed,<sup>30</sup> the PSPA Amendments did not involve the issuance of new shares, and shareholder voting power was not reallocated under the PSPA Amendments. It is not enough, contrary to plaintiffs’ contention, that the government allegedly exacted economic value from the other shareholders by rearranging the corporate structure. See *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016) (applying *Gentile* and holding a plaintiff does not state a direct claim under the dual-nature exception by pleading the “extraction of solely economic value from the minority by a controlling stockholder”). Because plaintiffs have not established that their “direct” claims are substantively direct in nature, they cannot demonstrate that they have standing to litigate those claims.

Plaintiffs fare no better if the court moves beyond their arguments for why their “direct” claims are substantively direct in nature. Federal law governs whether plaintiffs’ claims are direct or derivative. See *Starr*, 856 F.3d at 965. But, as the parties acknowledge, federal law in this area is informed by Delaware law. *Id.*; see also *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 (1991) (noting the “presumption that state law should be incorporated

---

<sup>30</sup> Treasury is not a controlling shareholder for the reasons set forth in Section IV.D.1, *supra*.

into federal common law”). Under Delaware law, the test for whether a shareholder’s claim is derivative or direct depends on the answers to two questions: “(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?” *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (en banc). “Normally, claims of corporate overpayment are . . . regarded as derivative [because] . . . the corporation is both the party that suffers the injury (a reduction in its assets or their value) as well as the party to whom the remedy (a restoration of the improperly reduced value) would flow.” *Gentile*, 906 A.2d at 99, *discussed in Starr*, 856 F.3d at 965. Such claims are derivative even “though the overpayment may diminish the value of the corporation’s stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend.” *Protas v. Cavanagh*, No. CIV.A. 6555-VCG, 2012 WL 1580969, at \*6 (Del. Ch. May 4, 2012); *see also Hometown Fin. Inc. v. United States*, 56 Fed. Cl. 477, 486 (2003) (“[C]ourts have consistently held that shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to nothing more than a diminution in stock value or a loss of dividends.”).

In their complaint, plaintiffs focus on the expropriation of the Enterprises’ assets via compulsory payments of all profits. The gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury. Regardless of plaintiffs’ label

(direct) or theory (taking, illegal exaction, or breach of fiduciary duty) for their claims, the claims are substantively derivative in nature because they are premised on allegations of overpayment.<sup>31</sup> See *Gentile*, 906 A.2d at 99; see also *Roberts*, 889 F.3d at 409 (explaining that the plaintiffs asserted “classic derivative claims” when they alleged that “the [PSPA Amendments] illegally dissipated corporate assets by transferring them to Treasury”). Plaintiffs cannot transform their substantively derivative claims into direct claims by merely alleging that, as a result of overpayments, they were deprived of their stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiffs’ purported “harms are ‘merely the unavoidable result . . . of the reduction in the value of the entire corporate entity.’” *Protas*, 2012 WL 1580969, at \*6 (quoting *Gentile*, 906 A.2d at 99); see

---

<sup>31</sup> Plaintiffs would remain unsuccessful if their allegations of waste and mismanagement (styled as self-dealing, overreach, or abuse of discretion) were construed to be indicative of some action other than overpayment. Any claims premised on waste and mismanagement are derivative in nature. *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) (noting that “mismanagement resulting in corporate waste, if proven represents a direct wrong to the corporation . . . [that] is entirely derivative in nature”). Plaintiffs’ claims are also derivative in nature to the extent that they are premised on (1) a purported reduction in share price as a consequence of the Enterprises losing assets or (2) the FHFA-C acting unfairly by agreeing to transfer profits pursuant to the PSPA Amendments. See *Hometown*, 56 Fed. Cl. at 486 (stock prices); *In re Straight Path Commc’ns Inc. Consol. S’holder Litig.*, No. CV 2017-0486-SG, 2017 WL 5565264, at \*4 (Del. Ch. Nov. 20, 2017) (“Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . .”).

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

In sum, plaintiffs have not established that they have standing to litigate three of their claims (counts I, III, and VI) because they do not, and cannot, demonstrate that those claims are substantively direct claims. Therefore, the court dismisses these claims on standing grounds to the extent that it has subject-matter jurisdiction over those claims.<sup>32</sup>

**C. Plaintiffs lack standing to bring their contract claims because they are not in privity with the United States.**

Finally, the court turns to plaintiffs’ claims founded on the stock certificates issued by each Enterprise, which are alleged to be contracts under relevant state law. The key issue is whether the United States is a party to these contracts so that plaintiffs are in privity with the United States and thus have standing for the claims set forth in counts IV and V of the amended complaint. It is well established that “[a] plaintiff must be in privity with the United States to have standing to sue the sovereign on a contract claim.” *Sullivan v. United States*, 625 F.3d 1378, 1379–80 (Fed. Cir. 2010) (citing *Anderson v. United States*, 344 F.3d 1343, 1351 (Fed. Cir. 2003)); accord *Fid. & Guar.*

---

<sup>32</sup> As explained above, the court lacks jurisdiction over plaintiffs’ fiduciary duty claim. See *supra* Section IV.D.1.

*Ins. Underwriters, Inc. v. United States*, 805 F.3d 1082, 1087 (Fed. Cir. 2015).

Plaintiffs argue that once the FHFA-C became the conservator for the Enterprises, the contracts, which were formerly between each Enterprise and the shareholder, became contracts between the United States and the shareholder. According to plaintiffs, “while the initial contracts did not involve the Government, the Government—through [the FHFA-C]—became a party to the contracts by assuming the [Enterprises’] obligations, which it then breached when it [chose] to implement the Net Worth Sweep to further the Government’s interests.” Class Pls.’ Suppl. Opp’n to Def.’s Mot. to Dismiss 7. Plaintiffs’ privity allegation is founded on part of a sentence in the Federal Circuit’s decision in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999), which describes permissible exceptions to the usual privity requirements for suits in contract against the United States. Plaintiffs’ reliance on *First Hartford* is misplaced.

The discussion of privity in *First Hartford* upon which plaintiffs rely began with a statement of the general rule: “[T]he ‘government consents to be sued only by those with whom it has privity of contract.’” *Id.* (quoting *Erickson Air Crane Co. of Wash. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984)). The Federal Circuit also noted a number of exceptions to the general rule and cited cases as examples of these exceptions, none of which apply here. *Id.* It then summarized the principle uniting these exceptions: “[T]he common thread that unites these exceptions is that the party standing outside of privity by contractual obligation stands in the shoes of a party

within privity.” *Id.* According to plaintiffs, the FHFA-C stepped into the shoes of the Enterprises and became a party to the contracts with the shareholders that were expressed in their stock certificates, and the shareholders are now in privity of contract with the United States. Whatever the attractiveness of plaintiffs’ legal construct, the privity analysis in *First Hartford* that is specifically referenced by plaintiffs does not support their thesis.

The plaintiffs in *First Hartford* were shareholders of Dollar Dry Dock Bank of New York (“Dollar”) who attempted to show privity of contract with the United States to support their direct breach-of-contract claims against the United States in this court. 194 F.3d at 1282, 1289. Because they had no contract with the United States, they attempted to stand in the shoes of the bank, which itself had a contract with the FDIC, the alleged breaching party. *Id.* at 1289. In other words, their breach-of-contract claim was founded on the FDIC’s breach of its contract with Dollar. *Id.* The Federal Circuit ruled that the plaintiffs could not stand in the shoes of the bank because, as shareholders of a corporation, they had no contractual obligations vis-à-vis the bank’s contracting partners. *Id.*

Plaintiffs’ reliance on this portion of *First Hartford* is flawed. First, in that case, the plaintiffs attempted to step into the shoes of the bank to establish privity of contract with the United States. Here, however, plaintiffs attempt to force the FHFA-C into the shoes of the Enterprises to establish privity of contract. These are not analogous inquiries as to privity. Put another way, the legal question of whether the shareholders in *First Hartford* could stand in the

shoes of Dollar is materially different from the question of whether the FHFA-C stands in the shoes of the Enterprises. The cited analysis in *First Hartford* does not touch upon the role of a government agency that becomes the conservator of a corporation, and whether that agency, as conservator, steps into the shoes of the corporation.<sup>33</sup>

The question remains, then, whether the FHFA-C steps into the shoes of Fannie and Freddie, for privity-of-contract purposes, because it is the conservator for the Enterprises. As an initial matter, it is plaintiffs' burden to show privity of contract with the United States, and their citation to *First Hartford* is insufficiently persuasive to meet this burden. Also unpersuasive is plaintiffs' attempt to extend the exceptions to the general requirement of privity set forth in *First Hartford*. They argue:

Typically, situations falling within this framework involve a third-party private person stepping into the shoes of private party that is in privity with the Government. There is no reason, however, to treat a third-party Government entity stepping into the shoes of a private party by contract and statute differently than a third-

---

<sup>33</sup> Unlike the parties in this case, who dispute whether the FHFA-C is the United States for jurisdictional purposes, see *supra* Section IV.B, the Federal Circuit in *First Hartford* treated the FDIC as the United States both for jurisdictional purposes and for the privity-of-contract question, without comment. See 194 F.3d at 1288 (finding jurisdiction for a takings claim founded on actions of the FDIC); *id.* at 1284, 1289 (finding no standing for breach-of-contract claims because only Dollar, not the shareholders, was in privity of contract with the FDIC and the United States).



party private entity stepping into those same shoes.

Class Pls.’ Suppl. Opp’n to Def.’s Mot. to Dismiss 7 (citing *First Hartford*, 194 F.3d at 1289). However, they do not supply any authority for the proposition that “a third-party Government entity” (i.e., the FHFA) that purportedly steps into the shoes of a “private party” (i.e., Fannie or Freddie) in a contractual relationship with another private party (i.e., a shareholder) is in privity of contract with that other private party. Accordingly, no argument of plaintiffs convinces the court that plaintiffs have standing for their breach-of-contract claims.<sup>34</sup>

Unmentioned by the parties is a different privity analysis in *First Hartford*, 194 F.3d at 1295–96. In *First Hartford*, one of the plaintiffs’ contract-based claims was for the rescission of their contracts to purchase shares from Dollar, described as “share purchase contracts.” *Id.* at 1296. If these contracts are the equivalent of plaintiffs’ stock certificate contracts with the Enterprises, and if the FDIC’s role as receiver for Dollar could be considered to be equivalent to the FHFA-C’s role as conservator for the Enterprises, the Federal Circuit’s privity analysis of the rescission claim would not support plaintiffs’ standing to bring their contract claims against the

---

<sup>34</sup> Plaintiffs also reference *Slattery*, 583 F.3d at 827–28. There is, however, no analysis of privity of contract, or of the discussion of privity in *First Hartford*, in that opinion. Plaintiffs’ argument based on *Slattery* is undeveloped, cursory, and ultimately unpersuasive.

FHFA-C.<sup>35</sup> In *First Hartford*, the Federal Circuit concluded that

[t]he rescission sought by First Hartford in its complaint is that of the contract under which First Hartford purchased its shares when . . . Dollar converted from mutually-held to stock-form. As noted by the Court of Federal Claims, “[a] ‘rescission’ amounts to the unmaking of a contract or an undoing of it from the beginning and not merely a termination of the contract.” The federal government was not a party to the contracts by which First Hartford and other investors purchased shares in Dollar. Unless both the plaintiff and the defendant are parties to the disputed contract, a rescission claim must be dismissed for failure to state a claim upon which relief can be granted. Accordingly, while we do not foreclose that shareholder capital is perhaps one of several measures of damages that ultimately might be considered on the [derivative] contract counts, the Court of Federal Claims cannot rescind the share purchase contracts to which the federal government was not a party and thus this count was correctly dismissed.

*Id.* at 1295–96 (citation omitted) (quoting *First Hartford Corp. Pension Plan & Tr. v. United States*,

---

<sup>35</sup> For its jurisdictional inquiry, the court concluded that the FHFA-C did not step into the shoes of the Enterprises. See Section IV.B, *supra*. Although the terminology is similar, the guiding precedent for the jurisdictional and standing inquiries is not the same. See *id.*

42 Fed. Cl. 599, 616 n.26 (1998), *aff'd in part, rev'd in part and remanded*, 194 F.3d at 1279).

Having considered plaintiffs' arguments regarding privity and standing, plaintiffs have not met their burden to establish that they have standing to assert the breach-of-contract claim in count IV, or the breach-of-the-covenant-of-good-faith-and-fair-dealing claim in count V. The court therefore dismisses these counts of their amended complaint for lack of standing.

## VI. CONCLUSION

For the reasons stated above, the court dismisses all of plaintiffs' claims. The court lacks jurisdiction to entertain plaintiffs' judicial takings claim and their fiduciary duty claim. Further, plaintiffs lack standing to bring their contract claims due to the absence of privity with the United States, and lack standing to bring their nominally direct takings, illegal-exaction, and fiduciary duty claims because the nature of these claims is derivative, not direct.<sup>36</sup> The court therefore **GRANTS** defendant's motion to dismiss.<sup>37</sup> The clerk is directed to enter judgment in this consolidated case accordingly. No costs.

---

<sup>36</sup> Because all of plaintiffs' claims must be dismissed for lack of jurisdiction or for lack of standing, the court need not reach defendant's remaining arguments that these claims should be dismissed for failure to state a claim upon which relief can be granted.

<sup>37</sup> Plaintiffs' motion to certify a class action is accordingly moot.

562a

**IT IS SO ORDERED.**

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