APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ELECTRICAL WELFARE TRUST FUND,

Plaintiff

OPERATING ENGINEERS TRUST FUND OF WASHINGTON, D.C., STONE & MARBLE MASONS OF METROPOLITAN WASHINGTON, D.C. HEALTH AND WELFARE FUND,

Plaintiffs-Appellants

v.

UNTED STATES,

Defendant-Appellee

2024-1107

Appeal from United States Court of Federal Claims in No. 1:19-cv-00353-EMR, Judge Eleni M. Roumel.

Decided: October 2, 2025

JOSEPH H. MELTZER, Kessler Topaz Meltzer & Check, LLP, Radnor, PA, argued for plaintiffs-appellants. Also represented by MELISSA L. YEATES.

BORISLAV KUSHNER, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, ERIC P. BRUSKIN, PATRICIA M. MCCARTHY.

Before MOORE, *Chief Judge*, STOLL, *Circuit Judge*, and BUMB, *Chief District Judge*.[1]

STOLL, *Circuit Judge*.

Plaintiffs-Appellants[2] brought this action against the United States seeking, among other things, compensation for an alleged Fifth Amendment taking based on mandatory contributions they paid to the Transitional Reinsurance Program as part of the implementation of the Patient Protection and Affordable Care Act of 2010. The

[1] Honorable Renée Marie Bumb, Chief District Judge, United States District Court for the District of New Jersey, sitting by designation.

[2] The Operating Engineers Trust Fund of Washing-ton, D.C. and the Stone & Marble Masons of Metropolitan Washington, D.C. Health and Welfare Fund.

U.S. Court of Federal Claims granted the Government's motion for partial summary judgment on the Fifth Amendment takings claim. For the following reasons, we affirm.

BACKGROUND

As part of the Patient Protection and Affordable Care Act of 2010 (ACA), Congress established a risk mitigation program called the Transitional Reinsurance Program (TRP). *See* 42 U.S.C. § 18061. The TRP required certain entities to pay reinsurance contributions to the Department of Health and Human Services for the 2014, 2015, and 2016 benefit years. This obligation applied to the Plaintiffs-Appellants, who made the TRP contributions as required, but later filed suit in the U.S. Court of Federal Claims ("Claims Court") to recover their contributions.

In their complaint, Plaintiffs-Appellants alleged the TRP contributions they were required to make constituted a taking under the Fifth Amendment. They contended that they possessed "identifiable property interests in specific funds of money protected by the Takings Clause of the Fifth Amendment," namely the "[f]unds held in [their] self-insured health and welfare trust funds." J.A. 120 ¶ 103 (operative complaint).

The Government sought partial summary judgment, arguing that Plaintiffs-Appellants lacked a cognizable property interest in the TRP payments because the payments were not the specifically identifiable funds required for monetary takings liability. Rather, as asserted by the Government, "the requirement to pay TRP contributions imposed only an obligation to pay money." *Elec. Welfare Tr. Fund v. United States*, 166 Fed. Cl. 709, 713 (2023). But Plaintiffs-Appellants pointed out that, as self-insured group health plans, they are required

to hold all assets in trust[3] for the sole purpose of providing health and welfare benefits to covered individuals. Plaintiffs-Appellants contended they possessed an identifiable property interest in their payments because the TRP contributions were effectively required to be paid from a specific account based on the requirement to keep their assets in trust.

Addressing the Government's motion, the Claims Court first explained that, "[w]hile one cannot possess a cognizable property interest in money generally, one's property interest in a *specific fund* of money—e.g., the interest or principal of an identified account—is cognizable under the Takings Clause such that government deprivation can amount to a taking." *Elec. Welfare*, 166 Fed. Cl. at 717. (citing *Webb's Fabulous Pharmacies., Inc. v. Beckwith*, 449 U.S. 155, 160–65 (1980)). The court recognized that it "must therefore first identify what, if anything, was the subject of the alleged taking to determine whether the property at issue actually constituted specific funds of money." *Id.* (internal quotation marks and citations omitted).

The Claims Court determined that "[b]ecause the property Plaintiffs allege Defendant took was simply sums of money, annually calculated, rather than specific funds, Plaintiffs ha[d] not identified a property interest appropriated by Defendant that is cognizable under the Takings Clause." *Id.* at 718. The Claims Court rejected both of Plaintiffs-Appellants counterarguments. First, in response to the argument that "each TRP contribution

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[3] 29 U.S.C. § 1103(a) (ERISA) ("[A]ll assets of an em-ployee benefit plan shall be held in trust . . . ."); 29 U.S.C. § 186(c)(5)(A) (Taft-Hartley) (assets "are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and de-pendents, for medical or hospital care").

was a specific fund of money in which Plaintiffs had a property interest by virtue of the trust agreements establishing their trust funds," the Claims Court explained that the trust agreements "do not resolve the clear conflict between Plaintiffs' argument that an entity may possess a property interest in a sum of money held within a trust account and binding precedent prohibiting a court from finding a cognizable property interest in money alone." *Id.* at 718–19. The Claims Court also rejected Plaintiffs-Appellants' second argument—that the specific funds are actually Plaintiffs' trust accounts, from which Plaintiffs argue they were effectively required to pay their TRP contributions. *Id.* at 721. First, the court held that this argument had been waived. *Id.* It proceeded to address the merits anyway, rejecting this second argument—for essentially the same reason as the first. The Claims Court explained that the "requirement to pay a sum of money cannot be transformed into a taking of a specific fund merely because such payment may be made from a certain account, as one simply cannot have a cognizable property interest in money itself." *Id.* at 721–22.

As an alternative reason for ruling in favor of the Government, the Claims Court held that "a government actor only implicates one's property interest in a specific fund when it appropriates the fund in toto." *Id.* at 717 (citing *Adams v. United States*, 391 F.3d 1212, 1224–25 (Fed. Cir. 2004)). The Claims Court thus reasoned that no taking occurred because the ACA did not "effect de facto appropriations of Plaintiffs' funds *in toto*." *Id.* at 718.

Plaintiffs-Appellants later sought reconsideration of the Claims Court's determination that they had waived the argument that the trust funds themselves were the specific funds at issue, which the Claims Court denied.

Plaintiffs-Appellants appeal. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review "both the [trial court's] grant of summary judgment and all questions of law *de novo*." *Nat'l Austl. Bank v. United States*, 452 F.3d 1321, 1325 (Fed. Cir. 2006). "The nature or scope of a compensable property interest in a takings analysis is a question of law." *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1351 (Fed. Cir. 2013).

Our court has "developed a two-part test to determine whether a taking has in fact occurred." *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004). First, "the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment." *Id.* Second, "after having identified a valid property interest, the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest." *Id.* This appeal involves the first question: whether Plaintiffs-Appellants have a property interest in the funds used to satisfy their TRP obligations.

As a general principle, in the Fifth Amendment takings context, "[u]nlike real or personal property, money is fungible." *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989). In certain limited circumstances, however, the appropriation of money can give rise to takings liability—such as in "interest follows principal" cases. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 165 (1998). One such case is *Webb's Fabulous Pharmacies*, where a county appropriated "the interest accruing on an interpleader fund deposited in the registry of the county court." 449 U.S. at 155. The Supreme Court explained that "[t]he usual and general rule is that any interest on an

interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." *Id.* at 162. Therefore, appropriating the interest generated by the funds was an "appropriation of the beneficial use of the fund . . . analogous to the appropriation of the use of private property." *Id.* at 163–64. In short, the county's retention of the interest that would otherwise belong to the owner of the funds constituted a taking under the Fifth Amendment.

Similarly, in *Phillips*, the Supreme Court explained that the same principle governs when funds were temporarily deposited in an attorney trust account, holding that "the interest income generated by funds held in [Interest on Lawyers' Trust Accounts ('IOLTA')] accounts is the 'private property' of the owner of the principal." 524 U.S. at 172; *see also Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (holding that IOLTA account interest that was transferred to a legal aid fund was taken for a public use).

On the other hand, our precedent recognizes the general principle that "the mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001) (en banc). In *Commonwealth Edison*, we assessed whether the congressional imposition of "special monetary assessments on domestic utilities for the remediation of environmentally contaminated uranium processing facilities owned by the United States" constituted a Fifth Amendment taking. *Id.* at 1329. We held "that requiring plaintiff Commonwealth Edison Company . . . to contribute to the remediation costs does not constitute a Fifth Amendment taking because the

Takings Clause does not apply to legislation requiring the payment of money." *Id.* In so holding, we followed the five justices' view in *Eastern Enterprises* that "regulatory actions requiring the payment of money are not takings." *Id.* at 1339 (citing *E. Enters. v. Apfel*, 524 U.S. 498 (1998)); *see also United States v. Sperry Corp.*, 493 U.S. 52 (1989); *Atlas Corp. v. United States*, 895 F.2d 745 (Fed. Cir. 1990).

As demonstrated by *Sperry*, this principle governs even where the Government deducts money directly rather than requiring it be paid separately. 493 U.S. at 62 n.9. *Sperry* involved legislation to "reimburse[] . . . the United States Government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran . . . and the maintenance of the Security Account." *Id.* at 60. "When the Federal Reserve Bank of New York received Sperry's award [a specific sum of money], it deducted the 2% charge over Sperry's protest, deposited the charge in the Treasury, and paid Sperry the balance of its award." *Id.* at 57. The Supreme Court reasoned that because "money is fungible," "[n]o special constitutional importance attache[d] to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately." *Id.* at 62 n.9. Continuing, the Court explained that "[i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property." *Id.*

Here, we agree with the Claims Court that, under our precedent, this case involves the mere obligation to pay money. Plaintiffs-Appellants contend they were effectively required to pay the TRP contributions from their trust accounts because "[p]ursuant to federal law . . . self-insured group health plans must hold 100% of their assets in trust; and these assets are held in trust funds for a single purpose—to provide health and welfare benefits

to covered workers and their families (e.g., medical, dental, and prescription drug coverage)." Plaintiffs-Appellants' Br. 2. Plaintiffs-Appellants contend they "have a cognizable property interest in their trust funds, which includes the corpus of the trust (i.e., the money they hold)." Plaintiffs-Appellants' Br. 22. Continuing, they assert that because the Government was aware of their obligation to hold assets in trust, this case does not involve a mere obligation to pay money. Plaintiffs-Appellants' Br. 34. We conclude otherwise.

The statutory text here states that Plaintiffs-Appellants, among others, "are required to make payments to an applicable reinsurance entity." 42 U.S.C. § 18061(b)(1)(A). "The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so." *E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring). The separate requirement that Plaintiffs-Appellants must keep their assets in trust does not transform this bare statutory requirement to pay money into a taking because the character of the government action here "neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms." *Id.* at 543 (Kennedy, J., concurring); *Atlas Corp.*, 895 F.2d at 756 ("Requiring money to be spent is not a taking of property."). For example, Congress is likely aware that many taxpayers will pay their taxes out of their checking account, but that practical reality does not transform an obligation to pay into a taking. We are bound by our unambiguous precedent: "[T]he mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Commonwealth Edison*, 271 F.3d at 1340.

Plaintiffs-Appellants argue the alleged taking here is distinguishable from *Commonwealth Edison* because "the TRP Contribution in no way represented a fee for service." Plaintiffs-Appellants' Br. 28. But "[g]iven the propriety of the governmental power to regulate, it cannot be said that the Taking[s] Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 223 (1986) (explaining that "[i]n *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), [the Court] sustained a statute requiring coal mine operators to compensate former employees disabled by pneumoconiosis, even though the operators had never contracted for such liability, and the employees involved had long since terminated their connection with the industry" (cleaned up)); *see also E. Enters.*, 524 U.S. at 517 (explaining that Eastern was assigned "the obligation for Combined Fund premiums respecting over 1,000 *retired* miners" (emphasis added)). We are thus unpersuaded that the lack of a service provided in exchange for the TRP contributions impacts our analysis.

We are convinced, however, that the Claims Court erred in its alternative holding that "a government actor only implicates one's property interest in a specific fund when it appropriates the fund *in toto*." *Elec. Welfare*, 166 Fed. Cl. at 717 (citing *Adams*, 391 F.3d at 1225). The Claims Court misread our precedent in *Adams* as holding that a taking occurs only when a fund is appropriated *in toto*. There, we held no taking had occurred simply because the sum owed was a mere obligation to pay money, not because the property taken was less than *in toto*. *Adams*, 391 F.3d at 1224–25. The Claims Court's reliance on the "interest follows principal" cases is also misplaced. The Claims Court reasoned that in *Webb's*, *Phillips*, and *Brown* "a government actor identif[ied] a

specific type of fund— e.g., interest earned in IOLTAs— and then appropriate[d] that fund in its entirety." *Elec. Welfare*, 166 Fed. Cl. at 720. But the Supreme Court's reasoning in these cases did not turn on a requirement that the property be taken in its entirety. Indeed, in *Brown*, the Supreme Court explained that "the interest earned in the IOLTA accounts is the private property of the owner of the principal . . . [so the] transfer of the interest . . . here seems more akin to the occupation of a small amount of rooftop space in *Loretto [v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)]." *Brown*, 538 U.S. at 235 (internal quotation marks and citation omitted).[4] This reasoning would suggest that appropriating even a portion of the interest can be a taking. As we see no support for the requirement that property be taken *in toto*, we conclude that the court erred in so holding. Such error is harmless, however, as the court properly concluded that the property taken here was simply sums of money.

Finally, we are unpersuaded by Plaintiffs-Appellants' argument that the Claims Court erred in concluding that they waived the argument that they have a property interest in the trust funds, as opposed to the funds used to pay the TRP contributions. Any error in the Claims Court's waiver determination is harmless because the court nevertheless addressed the argument. As the court correctly explained, "Plaintiffs' second argument[] . . . fails" on the merits because the "requirement to pay a sum

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[4] In *Loretto*, New York law required landlords to "permit a cable television company to install its cable facilities upon his property." 458 U.S. at 421. The Supreme Court held this was a taking because when "the government permanently occupies physical property, it effectively destroys" the owner's "rights to possess, use and dispose of it." *Id.* at 435 (quotation marks and citation omitted).

of money cannot be transformed into a taking of a specific fund merely because such payment may be made from a certain account, as one simply cannot have a cognizable property interest in money itself." *Elec. Welfare*, 166 Fed. Cl. at 721–22.

CONCLUSION

We have considered Plaintiffs-Appellants' remaining arguments and find them unpersuasive. For the foregoing reasons, we affirm.

AFFIRMED

COSTS

No costs.

APPENDIX B

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ELETRICAL WELFARE TRUST FUND, *et al.*, Plaintiffs, v. THE UNITED STATES, Defendant.	No. 19-cv-353 Filed: August 18, 2023

MEMORANDUM AND ORDER

On July 7, 2023, this Court granted Defendant's Motion for Partial Summary Judgment concerning Plaintiffs' claims brought pursuant to the Takings Clause of the Fifth Amendment. *Elec. Welfare Trust Fund v. United States*, No. 19-cv-353, 2023 WL 4530118 (Fed. Cl. July 7, 2023) (*EWTF II*).[1] As described more fully below, as part of that opinion this Court held that Plaintiffs had waived a particular argument by initially raising it at oral argument. *Id.* at *10. This Court also held that assuming arguendo Plaintiffs' argument was not waived, the argument would also fail on the merits. *Id.* at *10–*11. On August 7, 2023, Plaintiffs timely filed a Motion for Partial

[1] On July 10, 2023, the Clerk of Court entered partial Judgment for Defendant on Plaintiffs' Takings claims. ECF No. 130.

Reconsideration (Motion), requesting reconsideration of this Court's procedural holding of waiver; Plaintiffs do not move for reconsideration of the Court's alternative merits holding. *See* Plaintiffs' Motion for Partial Reconsideration (ECF No. 133) (Mot.) at 4 (quoting *EWTF II*, 2023 WL 4530118, at *10); Mot. at 7 n.3.[2] On August 7, 2023, this Court ordered Defendant to respond to the Motion, and on August 17, 2023, Defendant filed its response, urging this Court to deny the Motion because this Court's waiver holding did not constitute clear error. Defendant's Response to Plaintiffs' Motion for Partial Reconsideration (ECF No. 135) (Def. Resp.). Having carefully considered the parties' arguments, Plaintiffs' Motion is **DENIED** for the reasons set forth below.

BACKGROUND

This action has a lengthy history, familiarity with which is presumed. *See EWTF II*, 2023 WL 4530118; *Elec. Welfare Trust Fund v. United States*, 155 Fed. Cl. 169 (2021) (*EWTF I*). In summary relevant to this Motion, Plaintiffs Operating Engineers Trust Fund of Washington, D.C. (OETF) and Stone & Marble Masons of Metropolitan Washington, D.C. Health and Welfare Fund (Stone Masons) (collectively, Plaintiffs) are self-insured group health plans seeking just compensation under the Takings Clause of the Fifth Amendment. *See EWTF II*, 2023 WL 4530118, at *1–*2; *see also* Plaintiffs' Second Amended Complaint (ECF No. 59) (2d Am. Compl.) ¶¶ 3, 23–31, 101–15. Specifically, Plaintiffs sought to recover amounts paid under United States Department of Health and Human Services' (HHS's) regulations implementing

[2] Citations throughout this Memorandum and Order reference the ECF-assigned page numbers, which do not always correspond to the pagination within the document.

the Patient Protection and Affordable Care Act of 2010's (ACA's) Transitional Reinsurance Program (TRP) for benefit years 2014 through 2016. *See EWTF II*, 2023 WL 4530118, at *2–*4; 2d Am. Compl. ¶¶ 101–15. Plaintiffs contend Defendant's implementation of the TRP amounted to a Taking under the Fifth Amendment such that Plaintiffs are owed just compensation for their mandatory, paid contributions into the program. *EWTF II*, 2023 WL 4530118, at *1–*5; 2d Am. Compl. ¶¶ 13–14, 101–15.

As noted, this Court previously granted partial summary judgment in favor of Defendant, holding Plaintiffs' Takings claims fail because "the requirement to pay TRP contributions did not implicate a cognizable property interest" under the Fifth Amendment. *EWTF II*, 2023 WL 4530118, at *12.[3] Plaintiffs ultimately

[3] In addition to their Takings Claim, Plaintiffs' original complaint likewise raised an Illegal Exaction Claim. *See EWTF II*, 2023 WL 4530118, at *4; EWTF I, 155 Fed. Cl. at 174, 181–88; Complaint (ECF No. 1) (Compl.) at ¶¶ 11–14. On May 7, 2019, Defendant moved to dismiss Plaintiffs' complaint for lack of jurisdiction and for failure to state a claim, pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims (Rules), and alternatively moved for summary judgment. *See* Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (ECF No. 6). On July 30, 2021, this Court granted in part and denied in part Defendant's Motion to Dismiss, dismissing OETF's and Stone Masons' illegal exaction claims and holding the ACA empowered HHS to collect TRP contributions from entities that used third-party administrators. *EWTF I*, 155 Fed. Cl. at 184–88. However, the Court denied the motion with regard to Plaintiff EWTF—a self-insured, self-administered group health plan—as the plain text of the ACA did not provide HHS the authority to collect TRP contributions from self-insured group health plans that did not use a third-party administrator. *Id.* at 181–84. On April 8, 2022, EWTF moved to certify

advanced two arguments in favor of their claim for just compensation under the Takings Clause. *Id.* at *8. First, Plaintiffs argued "each TRP contribution was a specific fund of money in which Plaintiffs had a property interest by virtue of the trust agreements establishing their trust funds." *Id.*; *see* 2d Am. Compl. ¶ 103; Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment (ECF No. 116) (Opp.) at 20. Plaintiffs directly addressed this argument in summary judgment briefing, and the Court ruled in favor of Defendant on the merits of this argument. *See EWTF II*, 2023 WL 4530118, at *8–*12; Opp. at 20–30. Second, Plaintiffs alleged their respective trust accounts—rather than the assets within the trust accounts—were the relevant "specific funds," from which Plaintiffs "were effectively required to pay their TRP contributions." *Id.* at *10 (citing Transcript of Oral Argument, dated May 11, 2023 (ECF No. 126) (Trans.) at 21:25–22:3, 25:24–26:2, 30:2–10). Plaintiffs initially presented this contention at oral argument; accordingly, this Court held that Plaintiffs had waived this second argument. *Id.* at *10 (citing *CardSoft, LLC v. Verifone, Inc.*, 769 F.3d 1114, 1119 (Fed. Cir. 2014), *vacated on other grounds*, 576 U.S. 1049). Despite such waiver, as an alternative ground this Court also thoroughly explained why Plaintiffs' second argument was incorrect on the merits, *see id.* at *10–*12. Plaintiffs now move for reconsideration of this Court's "procedural finding" regarding waiver. Mot. at 4.

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a class of entities eligible to recover under Illegal Exaction claims (Illegal Exaction Class). *See* Plaintiff EWTF's Motion to Certify Class (ECF No. 53). The Court granted EWTF's motion on June 22, 2022. *See* Memorandum and Order granting Motion to Certify Class (ECF No. 70). The Court entered Judgment in favor of the Illegal Exaction Class on May 12, 2023. *See* ECF Nos. 123, 124.

STANDARD FOR RECONSIDERATION

A motion for reconsideration is governed by Rule 59(a)(1). Pursuant to Rule 59(a)(1), a court, in its discretion, "may grant a motion for reconsideration when there has been an intervening change in the controlling law, newly discovered evidence, or a need to correct clear factual or legal error or prevent manifest injustice." *Biery v. United States*, 818 F.3d 704, 711 (Fed. Cir. 2016) (internal citation and quotation omitted). A motion for reconsideration must also be supported "by a showing of extraordinary circumstances which justify relief." *Id.* (quoting *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004)). Such a motion "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (internal quotations omitted). "The decision whether to grant reconsideration lies largely within the discretion of the [trial] court." *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990).

DISCUSSION

As Plaintiffs acknowledge, this is a "narrow motion." Mot. at 4. Plaintiffs "do not raise any issues" relating to the merits of the Court's decision granting partial summary judgment. *Id.* at 7 n.3. Instead, Plaintiffs request reconsideration of "a single procedural finding." *Id.* at 4. The sole question, therefore, is whether this Court erred by holding Plaintiffs waived their second argument relating to their Takings claim.

A review of the history of the underlying motion for partial summary judgment and the parties' arguments in support of their positions is pertinent to the adjudication of this Motion. According to Plaintiffs, "Defendant's implementation of the TRP amounted to a taking under

the Fifth Amendment such that Plaintiffs are owed just compensation for their mandatory, paid contributions into the program." *EWTF II*, 2023 WL 4530118, at *1 (citing 2d Am. Compl. ¶¶ 13–14); *see id.* at *6 (citing 2d Am. Compl. ¶¶ 108–09); 2d Am. Compl. ¶¶ 101–10. The Takings Clause states "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. As articulated in its decision, this Court must analyze Takings claims via a two-step approach. *See Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004); *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002). First, the court must "determine whether the claimant possessed a cognizable property interest in the subject of the alleged taking for purposes of the Fifth Amendment." *Adams*, 391 F.3d at 1218. This first step necessarily includes identifying "what, if anything, was the subject of the alleged taking." *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 855 (Fed. Cir. 2009).

Normally, "the mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001) (en banc); *see E. Enters. v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring); *see also EWTF II*, 2023 WL 4530118, at *7 n.9 (summarizing *Eastern Enterprises*). However, "one's property interest in a *specific fund* of money—e.g., the interest or principal of an identified account—is cognizable under the Takings Clause." *EWTF II*, 2023 WL 4530118, at *8 (emphasis in original) (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160–65 (1980), *Phillips v. Wash Legal Found.*, 524 U.S. 156, 163–72 (1998), and *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–41 (2003)); *see also Adams*, 391 F.3d at 1224 (characterizing "specific funds" as

"legitimate property interests" under the Takings Clause). Therefore, in situations such as this one, where the subject of the alleged taking is a sum of money, the step one inquiry becomes whether the government appropriated a "specific fund" *in toto*. *See EWTF II*, 2023 WL 4530118, at *8; 2d Am. Compl. ¶¶ 13–14, 103, 110. If the government appropriated a specific fund in its entirety, then a plaintiff's interest in that specific fund may be cognizable under the Takings Clause. *EWTF II*, 2023 WL 4530118, at *8.

Plaintiffs' inconsistent articulation of the "specific fund" at issue in this case underlies Plaintiffs' Motion. Plaintiffs now contest this Court's holding that their second argument—that the relevant "specific funds" were their overall trust accounts from which they were effectively required to pay their TRP contributions—was waived. *See* Mot. at 8–10. Plaintiffs contend they "have maintained during the entirety of this litigation that the 'specific funds of money' at issue here are Plaintiffs' trust accounts." Mot. at 8. Plaintiffs allege this Court committed clear error in holding otherwise. *Id.* at 4, 10.

This Court disagrees. Plaintiffs have consistently argued the "specific funds" in which Plaintiffs have a cognizable property interest were the assets contained in Plaintiffs' respective trust accounts, *not* the trust accounts as a whole. Early in this litigation, this Court denied Defendant's motion to dismiss the complaint but requested the parties provide more information concerning "the nature of plaintiffs' property interest." *EWTF I*, 155 Fed. Cl. at 193; *see also EWTF II*, 2023 WL 4530118, at *8 n.11. Plaintiffs subsequently amended their complaint to clarify that the "[f]unds held in self-insured health and welfare trust funds constitute identifiable property interests in specific funds of money protected by

the Takings Clause of the Fifth Amendment." 2d Am. Compl. ¶ 103; *see id.* ¶¶ 104, 105 ("Plaintiffs . . . had cognizable property interests in the funds held in the self-insured multiemployer health and welfare trust funds at issue . . . ."); *id.* ¶ 108 ("Defendant's requirement that administrators of SMPs relinquish funds held in self-insured health and welfare trust funds to pay the Contribution is akin to the government's own invasion into and taking of the funds and constitutes a *per se* taking."). Plaintiffs' operative complaint consistently reflects that the relevant "specific funds" in which Plaintiffs assert a cognizable property interest are the assets or money "held in" Plaintiffs' respective trust accounts (i.e., their first argument), not the trust accounts themselves (i.e., their second argument). *See* 2d Am. Compl. ¶¶ 103–08.

Defendant's Motion for Partial Summary Judgment likewise defined Plaintiffs' property interest as "tied to the specific amount plaintiffs contributed into the TRP," rather than "a general right to the trust accounts" themselves. Def. Resp. at 4; *see* Defendant's Motion for Partial Summary Judgment (ECF No. 105) at 31–32. If Plaintiffs disputed Defendant's characterization of the relevant property interest, they had an obligation to make a contrary argument in their briefing opposing partial summary judgment. *See Pandrol USA, LP v. Airboss Ry. Prods., Inc.*, 320 F.3d 1354, 1366–67 (Fed. Cir. 2003) (concluding argument "was waived when it was not raised in response to the motion for summary judgment"). Yet, Plaintiffs did not make a different argument. Instead, Plaintiffs simply reiterated that the source of their cognizable property interest was the assets within the trust accounts, rather than the trust accounts themselves. *See* Opp. at 11 ("Plaintiffs have an identifiable property interest in funds held in trust . . . ."); *id.* at 21 ("Plaintiffs have a property interest in the funds held in trust . . . .");

id. ("Plaintiffs' property interest in the 'specific funds of money' held in trust . . . ."); *id.* at 23 ("As soon as funds were transferred to the trusts, Plaintiffs[] had a 'legal interest in th[at] property'" and "[i]t is this property interest that Plaintiffs assert here."); *id.* at 24 ("Under the Trust Agreements, as well as contract and trust law, Plaintiffs have a cognizable property interest in the funds held in trust, which the Government invaded when it required those funds be taken for public use."). These statements clearly evince Plaintiffs' assertion that the relevant "specific funds" are the assets held within the trust accounts, rather than the trust accounts themselves. Curiously, Plaintiffs' Motion cites these same statements to now contend that Plaintiffs have always asserted their second argument, i.e., that the relevant "specific funds" are the respective trust accounts themselves. *See* Mot. at 8–9. However, these statements do not support Plaintiffs' second argument, as each statement references the interest Plaintiffs have in monetary assets held within trust accounts, as opposed to the interest Plaintiffs have in their respective trust accounts as a whole.

In support of their Motion, Plaintiffs cite a single statement from their Opposition in which Plaintiffs argued they "have a property interest in a specific fund of money (i.e., the trusts created by their Trust Agreements)." Mot. at 8 (quoting Opp. at 28) (emphasis removed). While this statement may appear at first to support Plaintiffs' assertion that they advanced their second argument prior to oral argument, this statement is contradicted by numerous other statements and conclusions in the Second Amended Complaint and the Opposition, statements that clearly express a contrary theory. *See* 2d Am. Compl. ¶¶ 103–05, 108–10; Opp. at 11, 21, 23, 24. This single statement in the Opposition, absent from the Second Amended Complaint and at odds with

Plaintiffs' "specific funds" theory presented elsewhere in their Opposition, is therefore insufficient to avoid waiver. *See Pandrol*, 320 F.3d at 1366–67 (concluding argument "was waived when it was not raised in response to the motion for summary judgment"); *CardSoft*, 769 F.3d at 1119 ("Arguments that are not appropriately developed in a party's briefing may be deemed waived."); *Kimble v. United States*, 991 F.3d 1238, 1244 (Fed. Cir. 2021) ("[D]istinct claims are waived if not pled in a complaint."); *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1366 (Fed. Cir. 2002) ("[W]e need not address Casa's agency theory because . . . [n]o mention of this theory appears in Casa's complaint. Under the circumstances, we hold that [plaintiff] waived any claim it may have against the government based on such a theory.").

Accordingly, Plaintiffs have consistently alleged the "specific funds" relevant to the Takings Clause analysis are the assets within Plaintiffs' respective trust accounts. *See* 2d Am. Compl. ¶¶ 103–05, 108; Opp. at 11, 21, 23, 24. Plaintiffs did not raise their distinct second theory until oral argument on Defendant's Motion for Partial Summary Judgment. *See EWTF II*, 2023 WL 4530118, at *10–*11. Claims not presented in the complaint nor developed during briefing are properly deemed waived. *Kimble*, 991 F.3d at 1244; *CardSoft*, 769 F.3d at 1119. Therefore, this Court did not clearly err in holding that Plaintiffs' second argument—that the "specific funds" in which Plaintiffs have a cognizable property interest are the respective trust accounts as a whole—was waived. *See Biery*, 818 F.3d at 711 (stating a court, in its discretion, may grant a motion for reconsideration when there is "a need to correct clear factual or legal error").

Plaintiffs separately argue "the specific points made by counsel at oral argument . . . were made in direct response to new arguments raised by the Government . . . in its Reply." Mot. at 10. In its Reply, Defendant argued that the ACA did not identify "the particular fund of money from which" Plaintiffs must pay the TRP contributions. Defendant's Reply in Support of its Motion for Partial Summary Judgment (ECF No. 121) (Reply) at 12. Defendant thus argued Plaintiffs' case was different than prior "interest follows principal" cases—such as *Webb's*, *Phillips*, and *Brown*—where a statute expressly identified a specific fund of money to appropriate. *Id.* At oral argument, Plaintiffs countered that this case is no different from the "interest follows principal" cases because Plaintiffs were "effectively required to pay their TRP contributions" from their trust accounts based on the structure of the ACA and related federal laws. *See EWTF II*, 2023 WL 4530118, at *10 (citing Trans. at 21:25–22:3, 25:24–26:2, 30:2–10); *see also* 2d Am. Compl. ¶ 36; Mot. at 4 (stating "federal law requires Plaintiffs to hold 100% of their assets in [their] trust accounts"). In their Motion, Plaintiffs now contend that their counterargument made at oral argument was a proper rebuttal argument. Mot. at 12; *see EWTF II*, 2023 WL 4530118, at *10–*11. And because Defendant posed a "new" argument in its Reply, Plaintiffs say, oral argument was Plaintiffs' only opportunity to respond.[4] Mot. at 13.

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[4] In the Motion, Plaintiffs argue that Defendant, "by not presenting this argument until its Reply, . . . waived [the] argument." Mot. at 13. That is not correct. Defendant included this "new" argument in its Reply only to rebut Plaintiffs' argument that the "interest follows principal" line of precedent controls this case. *See* Reply at 11–13; *see also* Opp. at 24–26. Defendant's argument in its

It is correct that parties may respond to arguments first raised in a reply brief during oral argument. *See, e.g.*, *Novosteel SA v. U.S., Bethlehem Steel Corp.*, 284 F.3d 1261, 1274 (Fed. Cir. 2002) (observing "the non-moving party ordinarily has no right to respond to the reply brief, at least not until oral argument"). In the limited context of Defendant's argument that the "interest follows principal" cases are not analogous to this case, Plaintiffs' counterargument—that federal laws effectively required Plaintiffs to pay TRP contributions using assets from their trust accounts—was a proper rebuttal argument.

In summary, Plaintiffs waived any argument that they have a cognizable property interest in their respective trust accounts as a whole. *See EWTF II*, 2023 WL 4530118, at *10–*11. Consequently, to the extent Plaintiffs argue the structure of the ACA and other federal laws effectively identified the trust accounts as a whole as the relevant "specific funds" for purposes of the Takings Clause, that argument is waived. However, the Court clarifies that Plaintiffs' argument that federal laws effectively required Plaintiffs to pay TRP contributions using assets from their trust accounts was a proper rebuttal to an argument Defendant advanced in its Reply. *See* Mot. at 10–13. Plaintiffs therefore did not waive their rebuttal argument that the structure of the ACA and other federal laws, including the Taft-Hartley Act and ERISA, effectively required Plaintiffs to pay TRP contributions using assets from their trust accounts. *See id.* This accords with Plaintiffs' long-held—though incorrect—theory that the relevant "specific funds" are the assets paid as TRP contributions, rather than the

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Reply simply reflects the point-counterpoint nature of briefing. *See Novosteel*, 284 F.3d at 1274 (observing "reply briefs *reply* to arguments made in the response brief") (emphasis in original).

respective trust accounts as a whole. *See* 2d Am. Compl. ¶¶ 103–05; *EWTF II*, 2023 WL 4530118, at *8.

CONCLUSION

For the reasons explained above, Plaintiffs' Motion for Reconsideration is **DENIED**.

IT IS SO ORDERED.

/s/ Eleni M. Roumel
ELENI M. ROUMEL
Judge

August 18, 2023
Washington, D.C.

APPENDIX C

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ELETRICAL WELFARE TRUST FUND, *et al.*, Plaintiffs, v. THE UNITED STATES, Defendant.	No. 19-cv-353 Filed: July 7, 2023 Published: July 13, 2023[1]

Joseph Howard Meltzer, Kessler, Topaz, Meltzer & Check, LLP, Radnor, Pennsylvania for Plaintiffs. With him on the briefs were *Melissa L. Troutner*, Kessler, Topaz, Meltzer & Check, LLP, Radnor, Pennsylvania; *Charles F. Fuller*, McChesney & Dale, P.C., Bowie, Maryland.

Borislav Kushnir, Trial Attorney, United States Department of Justice, Commercial Litigation Branch,

[1] This Memorandum and Order was filed under seal in accordance with the Protective Order entered in this case (ECF No. 35) and was publicly reissued after the parties indicated redactions were not necessary. *See* Notice (ECF No. 131). The sealed and public versions of this Memorandum and Order are otherwise substantively identical, except for a minor typographical edit, the publication date, and this footnote.

Civil Division, Washington, D.C. for Defendant. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, Washington, D.C.; *Patricia M. McCarthy*, Director, United States Department of Justice, Civil Division, Washington, D.C.; *Eric P. Bruskin*, Assistant Director, United States Department of Justice, Civil Division, Washington, D.C.; *Kenneth Whitley*, Attorney, United States Department of Health and Human Services, Office of the General Counsel, Washington, D.C.; *Robert Balderson*, Attorney, United States Department of Health and Human Services, Office of the General Counsel, Washington, D.C.

MEMORANDUM AND ORDER

Pending before this Court is Defendant United States' Motion for Partial Summary Judgment (ECF No. 105), urging this Court to dismiss the remaining claim in this action seeking just compensation under the Takings Clause of the Fifth Amendment. Specifically, Plaintiffs Operating Engineers Trust Fund of Washington, D.C. (OETF) and Stone & Marble Masons of Metropolitan Washington, D.C. Health and Welfare Fund (Stone Masons) (collectively, Plaintiffs) seek to recover amounts paid under United States Department of Health and Human Services' (HHS's) regulations implementing the Patient Protection and Affordable Care Act of 2010's (ACA's) Transitional Reinsurance Program (TRP) for benefit years 2014 through 2016. Second Amended Complaint (ECF No. 59) (2d Am. Compl.). Plaintiffs contend Defendant's implementation of the TRP amounted to a taking under the Fifth Amendment such that Plaintiffs are owed just compensation for their mandatory, paid contributions into the program. *Id.* ¶¶ 13–14. Plaintiffs primarily assert their respective payment of TRP contributions, mandated by Defendant,

amounted to a *per se* taking. *Id.* ¶108. Plaintiffs further contend Defendant's actions would also satisfy the requirements of either a categorical or non-categorical regulatory taking. *Id.* ¶¶ 108–09; Plaintiffs' Response to Motion for Partial Summary Judgment (ECF No. 116) (Resp.) at 30–44.

The issue presented by Defendant's Motion for Partial Summary Judgment (Motion) is a straightforward question of law concerning whether a Fifth Amendment taking occurred. *See* ECF No. 105 (Mot.). Indeed, the parties agree that the facts necessary to rule on Defendant's Motion are undisputed.[2] *See generally* Mot.; *see also* Resp. at 11 (stating the "undisputed facts in this case show that" Plaintiffs have a cognizable property interest in assets held within their funds and that Defendant "seized this identifiable property"). In its Motion, Defendant contends Plaintiffs' takings claims must be dismissed because they suffer from three "fundamental problems"; the claims (i) fail to identify a

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[2] While the parties do not dispute the facts relevant to step one of the Federal Circuit's two-step takings analysis, Plaintiffs attempt to argue that genuine issues of material fact may remain related to step two, specifically Defendant's secondary argument that Plaintiffs' claims are untimely under a regulatory takings analysis. Resp. at 8–9 ("[E]ven if a regulatory analysis is applied, the Government has not carried its burden to show there are no genuine issues of material fact as to whether a regulatory taking occurred . . . ."); Transcript of Oral Argument, dated May 11, 2023 (ECF No. 126) (Trans.) at 37:4–15. This Court expressed skepticism towards Plaintiffs' characterization during oral argument. *See* Trans. at 37:16–18 (noting, in response to Plaintiffs' counsel's claim that they may need a more fulsome record, that discovery had closed). Even accepting Plaintiffs' view, however, the existence of such purported issues of fact would be relevant only if this Court were to reach step two of the takings analysis, which, it does not. *See infra* Discussion Sections I and II.

relevant property interest cognizable under the Takings Clause of the Fifth Amendment, (ii) are time-barred, and (iii) do not address government action that amounts to a taking of property. Mot. at 10. This Court conducted oral argument on Defendant's Motion on May 11, 2023, and the Motion is ripe for adjudication. *See* Trans.

This Court has considered each of the parties' filings and arguments. For the reasons explained below, Defendant's Motion for Partial Summary Judgment is **GRANTED**. Plaintiffs' Motion for Leave to File to Amend Takings Class Definition in the Second Amended Class Action Complaint (ECF No. 83) and Motion to Certify Takings Class (ECF No. 84) are accordingly **DENIED AS MOOT**.

BACKGROUND

This action has a lengthy history, familiarity with which is presumed. *See, e.g., Elec. Welfare Trust Fund (EWTF) v. United States*, 155 Fed. Cl. 169 (2021) (ECF No. 22). A background summary pertinent to Defendant's Motion follows.

I. Plaintiffs' Health Plans

Plaintiffs are group health plans[3] created through collective bargaining and regulated by the Labor

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[3] "[G]roup health plan" is defined by statute as,

> an employee welfare benefit plan (as defined in [29 U.S.C. § 1002(1)]) to the extent that the plan provides medical care (as defined in paragraph (2)) . . . to employees or their dependents (as defined under the terms of the plan) directly or through insurance, reimbursement, or otherwise. Except for purposes of part C of title XI of the Social Security Act (42 U.S.C. 1320d et seq.), such term shall not include any qualified small employer health

Management Relations Act of 1947 (Taft-Hartley) and the Employee Retirement Income Security Act of 1974 (ERISA). 2d Am. Compl. ¶ 3. Plaintiffs' group health plans "are funded through employee contributions to a multiemployer benefit trust, and benefits under the plans are provided to covered workers and their families pursuant to negotiated wages, hours, and terms of employment through a collective bargaining agreement between one or more unions and more than one employer." *Id.* Participation in these plans is limited to employees who share "a common employer (or affiliated employers), coverage under one or more collective bargaining agreements, membership in a labor union, or membership in one or more locals of a national or international labor union." 2d Am. Compl. ¶ 35. Pursuant to 29 U.S.C. § 1103 (ERISA), these plans use funds which are held in trust for the exclusive benefit of the plan participant, and which cannot be used for any other purpose. *Id.* ¶ 36.

Plaintiffs' group health plans are self-insured. *Id.* ¶ 3. Self-insured multiemployer plans may be administered in one of three ways: (1) self-administered, (2) administered by a third-party administrator that is not a health insurance issuer, or (3) administered by a third-party administrator that is a health insurance issuer through an administrative services only (ASO) agreement. *EWTF*, 155 Fed. Cl. at 175 (2021); *see* 2d Am. Compl. ¶ 39.

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reimbursement arrangement (as defined in section 9831(d)(2) of Title 26).

42 U.S.C. § 300gg-91(a)(1).

The parties agree that OETF[4] and Stone Masons[5] are each administered by a third-party administrator that is not a health insurance issuer. *EWTF*, 155 Fed. Cl. at 175; 2d Am. Compl. ¶¶ 23–31; Mot. at 13. These third-party administrators: (1) determine eligibility and control enrollment for participants, (2) perform claims processing and adjudication, and (3) directly pay the health care costs incurred by the OETF and Stone Masons participants and beneficiaries. *EWTF*, 155 Fed. Cl. at 175; 2d Am. Compl. ¶ 26.

II. Transitional Reinsurance Program

The TRP was one of several programs established by the ACA to distribute the financial risk carried by health insurance issuers covering higher-risk populations. 42 U.S.C. § 18061 (codifying the TRP). To fund the program, the ACA required "health insurance issuers, and third party administrators on behalf of group health plans" pay into the appropriate reinsurance pool, whether state or federal, for a three-year period. 42 U.S.C. § 18061(b)(1)(A). The funds collected from the entities described in section (a)(1) were used to reimburse "health insurance issuers" for enrolling high-risk individuals in the individual marketplace. 42 U.S.C. § 18061(b)(1)(B).

Congress delegated authority to HHS to implement the TRP, requiring HHS—in consultation with the National Association of Insurance Commissioners (NAIC)—create federal standards for the program. 42 U.S.C. § 18061(b)(1). Between July 2011 and March 2014, HHS published three sets of proposed and final rules

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[4] OETF's third-party administrator is Associated Administrators, LLC. Second Am. Compl. ¶ 26.

[5] Stone Masons' third-party administrator is Carday Associates, LLC. Second Am. Compl. ¶ 30.

defining the group of entities that were required to contribute to the TRP under 42 U.S.C. § 18061(b)(1) as "contributing entities." *See* Motion to Dismiss (MTD) App. 3 (77 Fed. Reg. 17,220 (March 23, 2012)) (ECF No. 6-3) (2012 Final Rule); MTD App. 6 (78 Fed. Reg. 15,410 (March 11, 2013)) (ECF No. 6-6) (2013 Final Rule); MTD App. 9 (79 Fed. Reg. 13,744 (March 11, 2014)) (ECF No. 6-9) (2014 Final Rule).

On March 11, 2014, HHS published its third final rule defining "contributing entity." *See* 2014 Final Rule. HHS's definition of "contributing entity" in its 2014 Final Rule reads as follows:

> *Contributing entity* means—
>
> (1) a health insurance issuer; or
>
> (2) For the 2014 benefit year, a self-insured group health plan (including a group health plan that is partially self-insured and partially insured, where the health insurance coverage does not constitute major medical coverage), whether or not it uses a third party administrator; and for the 2015 and 2016 benefit years, a self-insured group health plan (including a group health plan that is partially self-insured and partially insured, where the health insurance coverage does not constitute major medical coverage) that uses a third party administrator in connection with claims processing or adjudication (including the management of internal appeals) or plan enrollment for services other than for pharmacy benefits or excepted benefits within the meaning of section 2791(c) of the PHS Act. Notwithstanding the foregoing, a self-insured group health plan that uses an unrelated third party to obtain provider network and related claim repricing services, or uses an unrelated third party for up to 5 percent of claims processing or adjudication or plan enrollment,

> will not be deemed to use a third party administrator, based on either the number of transactions processed by the third party, or the volume of the claims processing and adjudication and plan enrollment services provided by the third party. A self-insured group health plan that is a contributing entity is responsible for the reinsurance contributions, although it may elect to use a third party administrator or administrative services-only contractor for transfer of the reinsurance contributions.

Id. at 4763; 45 C.F.R. § 153.20 (2019) (codifying the definition of "contributing entity" as announced in the 2014 Final Rule).

III. Plaintiffs' Contributions to the TRP

For benefit year 2014, Defendant required Plaintiffs OETF and Stone Masons—"contributing entities"—to pay a contribution of $63 per covered life. 2d Am. Compl. ¶ 80; HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. at 15,460. For benefit years 2015 and 2016, Defendant required OETF and Stone Masons to pay a contribution of $44 and $27 per covered life, respectively. HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. at 13,775; HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. at 10,775.

OETF remitted TRP contribution payments to Defendant in the amount of $142,569 on January 12, 2015; $107,712 on January 8, 2016; and $72,873 on January 10, 2017. *Id.* ¶ 83; Appendix to Defendant's Motion for Summary Judgment (ECF No. 105-1) (Mot. App.) at 197 (OETF 2014 Contribution); Mot. App. at 198 (OETF 2015 Contribution); Mot. App. at 199 (OETF 2016 Contribution). Collectively, OETF paid Defendant $323,154 for benefit years 2014, 2015, and 2016. 2d Am. Compl. ¶ 27. Stone Masons remitted TRP contribution

payments to Defendant in the amount of $20,664 on January 14, 2015; $14,476 on January 14, 2016; and $11,637 on January 13, 2017. *Id.* ¶ 84; Mot. App. at 200 (Stone Masons 2014 Contribution); Mot. App. at 201 (Stone Masons 2015 Contribution); Mot. App. at 202 (Stone Masons 2016 Contribution). Collectively, Stone Masons paid Defendant $46,777 for benefit years 2014, 2015, and 2016. *Id.* ¶ 31. OETF and Stone Masons each paid their TRP contributions with monies held in their respective trust accounts. 2d Am. Compl. ¶ 85; *see* OETF 2014 Contribution; OETF 2015 Contribution; OETF 2016 Contribution; Stone Masons 2014 Contribution; Stone Masons 2015 Contribution; Stone Masons 2016 Contribution.

IV. Procedural Background and Motion to Dismiss

Plaintiffs EWTF, OETF, and Stone Masons filed their Complaint in the present action on March 8, 2019, alleging two sets of claims—illegal exaction claims and claims brought pursuant to the Takings Clause of the Fifth Amendment. Complaint (ECF No. 1) (Compl.).

On May 7, 2019, Defendant moved to dismiss Plaintiffs' complaint for lack of jurisdiction[6] and for failure to state a claim, pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims (Rules), and alternatively moved for summary judgment. *See* MTD. Defendant argued that requiring Plaintiffs to pay TRP contributions did not amount to an illegal exaction because HHS's definition of "contributing entities" was in accordance with statutory text and was owed deference

[6] Defendant withdrew its Rule 12(b)(1) motion at oral argument. Defendant's Reply in Support of its Motion to Dismiss (ECF No. 8) at 25 n.8; Oral Argument Transcript, dated October 12, 2020 (ECF No. 21) at 5:13–19.

consistent with *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). MTD at 26–28. Further, Defendant argued Plaintiffs failed to state valid takings claims because the requirement to pay TRP contributions imposed only an obligation to pay money. *Id.* at 20–23.

On February 27, 2020, this case was reassigned to the undersigned judge. *See* Order Reassigning Case (ECF No. 15). On July 30, 2021, this Court subsequently granted in part and denied in part Defendant's Motion to Dismiss and, relevant here, dismissed OETF's and Stone Masons' illegal exaction claims. *EWTF*, 155 Fed. Cl. at 184–88. In doing so, this Court reasoned the ACA empowered HHS to collect TRP contributions from entities that used third-party administrators, such as OETF and Stone Masons. *Id.* The Court denied the motion with regard to EWTF—a self-insured, self-administered group health plan—as the plain text of the ACA did not provide HHS the authority to collect TRP contributions from self-insured group health plans that did not use a third-party administrator. *EWTF*, 155 Fed. Cl. at 181–84 ("As EWTF clearly alleged that it is a self-funded, self-administered plan that does not use a third-party administrator, Defendant's [motion to dismiss] EWTF's illegal exaction claim must be denied.").

With respect to Plaintiffs' takings claims, this Court identified the central inquiry as "whether Plaintiffs' ERISA funds constitute a 'specific fund of money' protected by an 'identified property interest.'" *Id.* at 189. Though it rejected some of Plaintiffs' arguments, this Court ultimately denied Defendant's Motion to Dismiss without prejudice as it related to Plaintiffs' takings claims. *EWTF*, 155 Fed. Cl. at 193. While Plaintiff narrowly survived dismissal at the 12(b)(6) stage, this Court

nevertheless highlighted that the record lacked clarity regarding the "specific property right that the TRP operates to extract." *Id.* at 191. In denying Defendant's Motion to Dismiss without prejudice, this Court specifically previewed its concerns and warned that to adjudicate the claim in the future (either via amended complaint and a motion to dismiss or via a summary judgment motion), it would need "further information concerning: (1) the nature of plaintiffs' property interest in their respective group health care plans, and (2) the effect, if any, the TRP had on those alleged property interests." *Id.* at 188–93.[7]

V. Subsequent Filings & Motion for Partial Summary Judgment

Plaintiffs EWTF, OETF, and Stone Masons filed an Amended Complaint (ECF No. 28) on September 14, 2021, and a Second Amended Complaint (ECF No. 59) on May 2, 2022. On October 28, 2022, Plaintiffs EWTF, OETF, and Stone Masons filed two motions related to their takings claims: (1) a Motion for Leave to File to Amend Takings Class Definition in the Second Amended Class Action Complaint (ECF No. 83) and (2) a Motion to Certify Takings Class (ECF No. 84) (Class Certification Motions, collectively) using Plaintiffs' proposed amended class definition.

Prior to these filings, this Court had certified an Illegal Exaction Class, with EWTF serving as class

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[7] The Court similarly denied Defendant's Motion to Dismiss (ECF No. 6) without prejudice to the extent the parties urged the Court to consider it as one for summary judgment, noting that "genuine issues of material fact [were] in dispute concerning the nature of the plaintiffs' property interest and the effect the TRP had on those alleged property interests." *EWTF*, 155 Fed. Cl. at 193 n.13

representative, but had not yet granted summary judgment to the Class on their illegal exaction claims. Order Granting Motion to Certify Illegal Exaction Class (ECF No. 70). EWTF was thus able to proceed on dual claim tracks until December 21, 2022, when this Court granted the Illegal Exaction Class's unopposed Motion for Summary Judgment (ECF No. 72). *See* Order Granting EWTF's Motion for Summary Judgment on the Illegal Exaction Claims (ECF No. 97); Transcript, dated December 21, 2022 (ECF No. 100) at 4:16–5:8. This Court and the parties agreed that the granting of summary judgment for EWTF's illegal exaction claim barred it from maintaining its Fifth Amendment taking claim. *See EWTF*, 155 Fed. Cl. at 188 n.11 ("[I]f EWTF ultimately succeeds on its illegal exaction claim, it cannot also proceed under its Takings Claims."); Plaintiffs' Motion to Certify Takings Class (ECF No. 84) at 1 n.1 ("Members of the Exaction Class who obtain judgment in their favor cannot be members of the Takings Class . . . ."); Trans. at 17:14–20 (Defendant's counsel: "I do want to clarify, when I say 'plaintiffs,' I'm talking about OETF, the [Stone Masons], not about EWTF[,] . . . the takings plaintiffs."); *see also Reid v. United States*, 148 Fed. Cl. 503, 528 (2020) (citing *Orient Overseas Container Line (UK) Ltd. v. United States*, 48 Fed. Cl. 284, 289 (2000)) ("When the government expropriates property, a plaintiff can obtain relief under either a takings theory or an illegal-exaction theory . . . but not both."); *Figueroa v. United States*, 57 Fed. Cl. 488, 496 (2003), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006). Accordingly, on December 21, 2022, EWTF ceased being a plaintiff related to the takings claims asserted in the Second Amended Complaint.

On January 31, 2023, Defendant moved for partial summary judgment on OETF's and Stone Masons' takings claims. *See* Mot. On agreement of the parties, this

Court stayed consideration of the pending Class Certification Motions related to Plaintiffs' takings claims until after this Court's ruling on Defendant's Motion. Order Staying Consideration of Class Certification Motions (ECF No. 115); *see* Defendant's Response to Motion to Certify Class (ECF No. 98) at 20 ("[T]he Court should first decide whether OETF and Stone Masons can maintain a takings claim against the United States, and only then, in the event OETF and Stone Masons prevail, decide whether a class of similarly-situated plans should be certified."); Plaintiffs' Reply to Response to Motion to Certify Class (ECF No. 102) at 17 ("Plaintiffs do not oppose the Government's request to have dispositive motions adjudicated prior to class certification."). This Court subsequently conducted oral argument on Defendant's Motion on May 11, 2023. *See* Trans.

STANDARD OF REVIEW

A court may grant summary judgment if the pleadings, affidavits, and evidentiary materials filed in a case reveal that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a). The moving party bears the initial burden to demonstrate the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A genuine factual dispute exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court may only grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita, Elec. Indus. Co., Ltd. v. United States*, 475 U.S. 574, 587 (1986) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). Summary judgment is especially appropriate

when "the only disputed issues [are] issues of law." *Dana Corp. v. United States*, 174 F.3d 1344, 1347 (Fed. Cir. 1999).

DISCUSSION

The Tucker Act provides this Court with jurisdiction "to render judgment upon any claim against the United States founded . . . upon the Constitution" as long as the constitutional provision "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." 28 U.S.C. § 1491(a)(1); *United States v. Testan*, 424 U.S. 392, 400 (1976) (quoting *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 607 (1967)). Such claims include those brought pursuant to the Takings Clause of the Fifth Amendment, which provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V; *see Jan's Helicopter Serv., Inc. v. F.A.A.*, 525 F.3d 1299, 1309 (Fed. Cir. 2008) ("It is undisputed that the Takings Clause of the Fifth Amendment is a money-mandating source for purposes of Tucker Act jurisdiction."). The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

This Court analyzes takings claims via a two-step approach provided by the United States Court of Appeals for the Federal Circuit (Federal Circuit). *See Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004); *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002). *First*, the court must identify the property interest that was allegedly taken and determine whether such a property interest is cognizable under the Takings Clause of the Fifth Amendment. *Adams*, 391 F.3d at 1218;

see Tyler v. Hennepin Cnty., 143 S. Ct. 1369 (2023) (analyzing a Fifth Amendment taking claim by first identifying the plaintiff's interest in the appropriated property). *Second*, "[o]nce a property right has been established, the court must then determine whether a part or a whole of that interest has been appropriated by the government for the benefit of the public." *Members of Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005) (citing *Conti v. United States*, 291 F.3d 1334, 1339 (Fed. Cir. 2002)); *see Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000) ("If a plaintiff possesses a compensable property right, . . . a court determines whether the governmental action at issue constituted a taking of that [right].") (citing *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995)). However, courts cannot reach this second step without initially identifying a cognizable property interest. *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1329 (Fed. Cir. 2012); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2005).

Plaintiffs contend both steps of the takings analysis are satisfied by Defendant's "requirement that [Plaintiffs] relinquish funds held in self-insured health and welfare trust funds to pay the [TRP] Contribution," which "constitutes a . . . taking." 2d Am. Compl. ¶¶ 108–09. Specifically, Plaintiffs argue the first step of the analysis is satisfied either because (i) "[f]unds held in self-insured health and welfare trust funds constitute identifiable property interests in specific funds of money," or (ii) Plaintiffs' TRP contributions were effectively required to be paid with moneys contained within their trust accounts since ERISA required Plaintiffs to hold their monetary assets in such trust accounts. *Id.* ¶ 103; Resp. at 20–27; Trans. at 25:24–26:2, 31:9–15. Regarding the second step of the takings analysis, Plaintiffs assert the forced

payment of TRP contributions satisfies the requirements to be considered as either a per se or regulatory taking, although they view a per se analysis as more appropriate. 2d. Am. Compl. ¶¶ 108–09; Resp. at 30–44.

Defendant disagrees, asserting as an initial matter that a required TRP contribution is an ordinary obligation to pay money rather than a taking. Accordingly, Defendant contends that such an obligation "cannot itself be a taking of property, as it does not implicate the type of 'property' protected by the Fifth Amendment." Defendant's Reply in Support of its Motion for Partial Summary Judgment (ECF No. 121) (Reply) at 9. Even if this Court were to find Plaintiffs have a cognizable property interest in the money paid as TRP contributions, Defendant argues its actions cannot be considered to have effected *per se* takings since Defendant did not physically appropriate property. *Id.* at 13–25. Defendant also asserts its actions cannot be considered to have effected a regulatory taking, as the claims are untimely and fail under the *Penn Central* factors. *Id.*; *see Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

Since the relevant material facts necessary to resolve this Motion are not in dispute,[8] this Court now considers Defendant's Motion for Partial Summary Judgment and whether Plaintiffs' TRP contributions constitute takings compensable under the Takings Clause. *See EWTF*, 155 Fed. Cl. at 184–88; *see also* Mot. at 13–17 (providing "Undisputed Material Facts"); Resp. at 11 (stating the "undisputed facts in this case show that" Plaintiffs have a cognizable property interest in assets held within their funds and that Defendant "seized this identifiable

[8] *See supra* note 2 (noting the parties agree that the facts are not in dispute related to step one of the takings analysis).

property"). As described below, this Court's inquiry begins and ends with the first prong of the Federal Circuit's two-step takings analysis, as Plaintiffs do not possess a property interest in the money paid as TRP contributions that is cognizable under the Takings Clause.

I. Plaintiffs Do Not Possess a Property Interest Cognizable Under the Takings Clause.

It is well-established that a property interest in money alone is generally not cognizable under the Takings Clause of the Fifth Amendment. *See E. Enters. v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring) (stating in a controlling concurrence that although the statute at issue "imposes a stagging financial burden on the petitioner, ... [i]t does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest")[9]; *id.* at 554 (Breyer, J.,

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[9] *Eastern Enterprises v. Apfel* involved a challenge to the retroactive liability provisions of the Coal Industry Retiree Health Benefit Act of 1992, codified at 26 U.S.C. §§ 9701–9722 (the Coal Act) which required a former mining company to pay a large sum of money for the health benefits of retired employees. 524 U.S. at 504. Writing for the plurality, Justice O'Connor, joined by three other justices (Chief Justice Rehnquist, Justice Scalia, and Justice Thomas), concluded the retroactive impact of the Coal Act as applied to Eastern Enterprises resulted in an unconstitutional taking of property because it placed a "severe, disproportionate, and extremely retroactive burden on Eastern." *Id.* at 538. As explained by the Federal Circuit in *Commonwealth Edison Co.*, a plurality of the Supreme Court found the retroactive liability unconstitutional, but five Justices concluded the law did not effect a taking, as the law did not appropriate a specific property interest but rather imposed an obligation to pay money. 271 F.3d at 1339 (citing *E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring)). Concurring, Justice Kennedy acknowledged the statute "impose[d] a staggering financial burden," which factored into his conclusion that the statute violated Eastern's

dissenting) (agreeing with Justice Kennedy that "[t]he Constitution's Takings Clause does not apply" since "[t]his case involves not an interest in physical or intellectual property, but an ordinary liability to pay money"); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338–40 (Fed. Cir. 2001) (en banc) ("[T]he mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment."). Such a rule comports with the long-recognized differentiation between real or personal property and money, as the latter is fungible in ways the former are not. *See United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) ("It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible."); *E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring) ("The Coal Act does not appropriate, transfer, or encumber an estate in land (e.g.,

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due process rights. *E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring). Nevertheless, Justice Kennedy explained, the law did not effect a taking because it did not "operate upon or alter" a "specific and identified propert[y] or property right," such as "an estate in land (e.g., a lien on a particular piece of property), a valuable interest in an intangible (e.g., intellectual property), or even a bank account or accrued interest." *Id.* at 540–41. Instead, "[t]he law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so." *Id.* at 540. Justice Breyer, writing for three other Justices (Justice Stevens, Justice Souter, and Justice Ginsburg), agreed the Takings Clause was not implicated, viewing the Takings Clause as applying only when the government appropriates a "specific interest in physical or intellectual property" or "a specific, separately identifiable fund of money." *Id.* at 554–55 (Breyer, J., dissenting). By contrast, Justice Breyer noted the Takings Clause has no bearing when the government imposes "an ordinary liability to pay money." *Id.* at 554 (citations omitted).

a lien on a particular piece of property), a valuable interest in an intangible (e.g., intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.").

While one cannot possess a cognizable property interest in money generally, one's property interest in a *specific fund* of money—e.g., the interest or principal of an identified account—is cognizable under the Takings Clause such that government deprivation can amount to a taking. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160–65 (1980) (finding a taking of a specific fund of money where a court appropriated the interest earned on principal held in an interpleaded account); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 163–72 (1998) (finding interest earned in an Interest on Lawyer Trust Account (IOLTA) remained the private property of the clients); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–41 (2003) (same); *EWTF*, 155 Fed. Cl. at 189–90 ("[W]hen a specific fund of money is protected by an identifiable property interest, a Taking may occur."). A specific fund of money stands in contrast to an "abstract sum of money capable of being calculated," as one's property interest in a specific fund is in the fund itself rather than in its monetary assets. *Adams*, 391 F.3d at 1225; *see also id.* at 1224 (distinguishing between "specific funds" as "legitimate property interests" and mere "statutory obligations to pay money"). As a result, a government actor only implicates one's property interest in a specific fund when it appropriates the fund *in toto*. *See id.* Finding a property interest in a specific fund to be implicated when only a portion of that fund was appropriated would require recognizing a property interest in money alone, which no court may do. *See E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring); *Edison*, 271 F.3d at 1340. Presented with Plaintiffs' claims

that the required TRP contributions amounted to takings of specific funds of money, this Court must therefore first "identify what, if anything, was the subject of the alleged taking" to determine whether the property at issue actually constituted specific funds of money. *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 855 (Fed. Cir. 2009); *King v. United States*, 159 Fed. Cl. 450, 462 (2022).

The uncontested material facts—many of them proffered by Plaintiffs—make this a straightforward inquiry. Neither 42 U.S.C. § 18061 nor 45 C.F.R. § 153.20(2) identified specific funds to be appropriated in their entirety. Rather, Defendant required Plaintiffs pay sums of money as TRP contributions for three benefit years, with the amount owed calculated annually. *See* 2d Am. Compl. ¶ 80 (providing the TRP contribution rates per covered life for 2014 ($63), 2015 ($44), and 2016 ($27)); HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. at 15,460; HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. at 13,775; HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. at 10,775. Neither 42 U.S.C. § 18061 nor 45 C.F.R. § 153.20(2) specified from whence these contributions needed to be paid, nor did they effect *de facto* appropriations of Plaintiffs' funds *in toto*.[10] Absent

[10] Indeed, none of Plaintiffs' three annual contributions amounted to even 1% of their annual income for the same year. *See* 2d Am. Compl. ¶¶ 83–84 (stating OETF paid Defendant a total of $323,154 and Stone Masons paid Defendant a total of $46,777 for benefit years 2014, 2015, and 2016). *Compare* OETF 2014 Contribution ($142,569), OETF 2015 Contribution ($107,712), *and* OETF 2016 Contribution ($72,873), *with* Mot. App. 203–14 (ECF No. 105-1) (providing OETF's total income for benefit years 2014 ($16,766,937), 2015 ($11,269,649), and 2016 ($16,974,450)); *compare*

identification of specific funds of money taken *in toto*, the property targeted by Defendant were the sums of money calculated for each Plaintiff annually and paid as TRP contributions. Such "abstract sum[s] of money" cannot be considered specific funds in which Plaintiffs have compensable property interests under the Takings Clause of the Fifth Amendment. *See Adams*, 391 F.3d at 1225. Because the property Plaintiffs allege Defendant took was simply sums of money, annually calculated, rather than specific funds, Plaintiffs have not identified a property interest appropriated by Defendant that is cognizable under the Takings Clause. *See E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring); *Edison*, 271 F.3d at 1338–40; *Adams*, 391 F.3d at 1225.

Plaintiffs present two arguments[11] against this conclusion, one presented in their Second Amended

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Stone Masons 2014 Contribution ($20,664), Stone Masons 2015 Contribution ($14,476), *and* Stone Masons 2016 Contribution ($11,637), *with* Mot. App. 215–26 (providing Stone Masons' total income for benefit years 2014 ($2,795,956), 2015 ($2,583,185), and 2016 ($3,204,037)).

[11] Despite this Court's direction to clarify the source of any asserted property interests, lack of clarity remained as to Plaintiffs' theories even after the filing of their two amended complaints. *See EWTF*, 155 Fed. Cl. at 193 ("To sufficiently assess Plaintiffs' Takings claim (either on a subsequently-filed motion to dismiss or a motion for summary judgment) the parties must provide the Court with further information concerning: (1) the nature of plaintiffs' property interest in their respective group health care plans, and (2) the effect, if any, the TRP had on those alleged property interests."). Defendant's Motion to Dismiss accordingly addressed a multitude of arguments Defendant believed Plaintiffs to be making. *See* Mot. 28–40. In their Response to Defendant's Motion, Plaintiffs disclaimed several of the arguments discussed by Defendant and clarified the sole purported sources of cognizable property interests in this case are Plaintiffs'

Complaint and in subsequent filings, and the other presented for the first time in full at oral argument. Plaintiffs' first argument contends each TRP contribution was a specific fund of money in which Plaintiffs had a property interest by virtue of the trust agreements establishing their trust funds. *See* 2d Am. Compl. ¶ 103; Resp. at 20 ("Plaintiffs clearly have an identifiable property interest in [their trust accounts' monetary assets] pursuant to the Trust Agreements."); *see also* Mot. App. 15 (OETF Trust Agreement); Mot. App. 52 (Stone Masons Trust Agreement). Plaintiffs' argument looks first to their trust agreements, which provide "[a]ll right, title and interest in and to the assets of the Plan and of the Fund shall at all times be vested in the Trustees." Mot. App. 15 (OETF Trust Agreement); Mot. App. 52 (Stone Masons Trust Agreement). Plaintiffs contend this language demonstrates they have a cognizable property interest in their trust funds and, by extension, a property interest in the monetary assets held within those trust accounts. Resp. at 14, 20–22. This reasoning leads Plaintiffs to engage in a semantic sleight of hand, using the term "funds" to reference both their trust funds themselves and those accounts' monetary assets, such that Plaintiffs' asserted property interests in their overall accounts—on Plaintiffs' theory—would purportedly extend to any sum of money contained within. *See* 2d Am. Compl. ¶ 103 ("Funds held in self-insured health and welfare trust funds constitute identifiable property interests in specific funds of money protected by the Takings Clause of the Fifth Amendment."). Plaintiffs point to "basic principles of contract and trust law," citing

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respective trust agreements. Resp. at 20. This Court accordingly addresses only the argument evinced in Plaintiffs' Response and the waived argument raised by Plaintiffs' counsel at oral argument.

sources such as Restatement (Third) of Trusts (2003), to assert their trust agreements create a cognizable property interest in their trust accounts. Resp. at 20–24. However, such citations do not resolve the clear conflict between Plaintiffs' argument that an entity may possess a property interest in a sum of money held within a trust account and binding precedent prohibiting a court from finding a cognizable property interest in money alone. *See E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring); *Adams*, 391 F.3d at 1224–25.

Defendant's Motion and Reply focus on this tension, noting the property allegedly appropriated via TRP contributions was money alone rather than any specific fund. Mot. at 23–24; Reply at 9. Defendant characterizes Plaintiffs as effectively arguing for recognition of a general property interest in their assets, which is foreclosed by the Supreme Court's reasoning in *Eastern Enterprises*. Reply at 9; *see E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring). Defendant is clear to distinguish this rule from the so-called "interest follows principal" cases, "in which the Supreme Court held that states may not retain the interest earned on principal placed in an interest-bearing account." Mot. at 30 n.7. Those cases, including *Webb's, Phillips*, and *Brown*, are exemplars of takings of specific funds of money, and indeed the Federal Circuit cited to *Webb's* and *Phillips* when defining its use of the term "specific" in *Adams*. 391 F.3d at 1225 ("[T]he term 'specific' [means] an actual sum of money representing interest derived from ownership of particular deposits in an established account, as opposed to some abstract sum of money capable of being calculated . . . ."); *see EWTF*, 155 Fed. Cl. at 190–91 (discussing both *Webb's* and *Phillips*). Plaintiffs, in contrast, cite *Webb's*, *Phillips*, and *Brown* to contend that any money held in trust constitutes a "specific fund,"

categorizing the cases as "controlling precedent" here. While Plaintiffs are correct in casting these cases as central to this Court's analysis of the taking claims, the undisputed facts of the present case cause it to fall outside the purview of *Webb's*, *Phillips*, and *Brown*, such that even a cursory examination of those Supreme Court cases demonstrates they undermine rather than support Plaintiffs' position. Resp. at 24–27.

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, the Supreme Court unanimously held an unconstitutional taking had occurred under the Fifth Amendment when a county court claimed as its own the interest accrued on an interpleader fund deposited in the registry of the county court after already assessing a fee for the service. 449 U.S. 155, 155–56 (1980). To reach its decision, the Supreme Court first determined whether an entity possessed a cognizable property interest in the accrued interest, stating, "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Id.* at 161 (alteration in original) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). The Supreme Court further noted that under common law the "general rule is . . . any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." *Id.* at 162–63. The deposited fund at issue in Webb's "plainly was private property," which was "held only for the ultimate benefit of the [receivers], not for the benefit of the court and not for the benefit of the county." *Id.* at 160–61. Since "interest follows principal," the fund's receivers possessed property interests in both the fund's principal and accrued interest. *Id.* at 160–64. As the government had identified a specific

fund of money—interest on an interpleaded fund—for appropriation *in toto*, and the appropriation of that specific fund was "not reasonably related to the costs of using the courts," the Supreme Court held the retention of the interest was "a forced contribution to general government revenues" and thus amounted to a taking. *Id.* at 163.

The Supreme Court again relied upon the "interest follows principal" rule to identify a cognizable property interest in *Phillips v. Washington Legal Foundation*. 524 U.S. 156, 172 (1998). There, the Supreme Court examined the constitutionality of a Texas law mandating interest earned on client funds deposited into IOLTAs be paid to foundations financing legal services for low-income populations. *Id.* at 159–60. Applying the "interest follows principal" rule, *id.* at 165–68, the Supreme Court held interest generated by client funds in IOLTA accounts remained private property of those clients. *Id.* at 172. The Supreme Court also noted that the interest income transferred to Texas could not reasonably be viewed "as payment for services rendered by the State." *Id.* at 171 (internal quotation and citation omitted). Despite holding "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal," the Supreme Court declined to opine on whether the Texas law effected a taking demanding just compensation. *Id.* at 172. In *Brown v. Legal Foundation of Washington*, the Supreme Court reaffirmed that directing interest from IOLTA accounts to certain organizations implicates the Takings Clause of the Fifth Amendment. 538 U.S. at 216, 235, 240–41.

Each of these three cases saw a government actor identify a specific type of fund—e.g., interest earned in IOLTAs—and then appropriate that fund in its entirety.

In each case, the plaintiffs complained of the taking of specific funds, rather than the imposition of obligations to pay some amount of money to the government, making the plaintiffs' property interest in those specific funds the relevant property interests for purposes of takings analyses. Plaintiffs cite to these cases to argue that money held in trust funds purportedly constitutes "specific funds of money," but Plaintiffs ignore that the plaintiffs in *Webb's*, *Phillips*, and *Brown* possessed property interests in specific funds due to the common law rule that "interest follows principal," not because funds held in trust are necessarily specific funds of money. *Webb's*, 449 U.S. at 163–64; *Phillips*, 524 U.S. at 156–57; *Brown*, 538 U.S. at 217. Plaintiffs also ignore that such property interests were only relevant because the property allegedly taken in *Webb's*, *Phillips*, and *Brown* was specific funds rather than mere sums of money. *See Webb's*, 449 U.S. at 158; *Phillips*, 524 U.S. at 162; *Brown*, 538 U.S. at 228–29.

The "interest follows principal" cases are thus controlling here, as Plaintiffs argue, but only insomuch as those cases reflect the well-established predicate for finding a property interest in a specific fund of money to be relevant to a takings analysis: the property at issue must be a fund in its entirety. *See Adams*, 391 F.3d at 1225. Whatever property interest Plaintiffs may have in their overall trust funds is therefore immaterial here, as Plaintiffs do not contend Defendant appropriated those trust funds in their entirety. *Id.*; *see* 2d Am. Compl. at ¶¶ 83–84; *compare* OETF 2014 Contribution ($142,569), OETF 2015 Contribution ($107,712), *and* OETF 2016 Contribution ($72,873), *with* Mot. App. 203–14 (ECF No. 105-1) (providing OETF's total income for benefit years 2014 ($16,766,937), 2015 ($11,269,649), and 2016 ($16,974,450)); *compare* Stone Masons 2014 Contribution ($20,664), Stone Masons 2015 Contribution ($14,476), *and*

Stone Masons 2016 Contribution ($11,637), *with* Mot. App. 215–26 (providing Stone Masons' total income for benefit years 2014 ($2,795,956), 2015 ($2,583,185), and 2016 ($3,204,037)). Indeed, the contributions paid were calculated annually and did not amount to even 1% of Plaintiffs' annual income for the same year. *See supra* note 9. That the scope of the "funds" appropriated by Defendant can only be described in terms of a mathematical formula rather than a descriptor—such as "interest earned in IOLTAs"—further underscores how far afield this case is from those where specific funds of money were at issue. Given the contrast between these precedential cases and the facts of the present case, this Court finds unpersuasive Plaintiffs' primary argument—that a sum money paid from a trust account is itself a specific fund.[12]

Plaintiffs' second argument was first presented at oral argument and was thus not briefed. As an initial matter, this argument was waived. *See CardSoft v. Verifone, Inc.*, 769 F.3d 1114 (Fed. Cir. 2014) ("Arguments that are not appropriately developed in a party's briefing may be deemed waived.") (citing *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312 (Fed. Cir. 2006) (collecting cases standing for the same proposition)). However, even considering the merits of Plaintiffs' second argument, it fails for much the same reason as their first. While Plaintiff's first argument urged this Court to view any sums of money paid out of their trust accounts as "specific funds," their second argument asserts the relevant "specific funds" are actually Plaintiffs' trust accounts,

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[12] This Court previously denied Plaintiffs' argument, not reasserted in its summary judgment briefing, that ERISA's "exclusive benefits provision" alone created a cognizable property interest. *EWTF*, 155 Fed. Cl. at 191.

from which Plaintiffs argue they were effectively required to pay their TRP contributions. *See* Trans. at 25:24–26:2 (Plaintiffs' counsel: "But here, this statute or this contribution is being required of group health plans. So by its nature it's targeting that specific fund of money."); *id.* at 21:25–22:3 (Plaintiffs' counsel: "I'm saying the federal law, which obviously the Government knows about, requires all of their assets to be held in trust."); *id.* at 30:2–10 (the Court: "So you're saying [the TRP contribution] has to by law come from the trust?" Plaintiffs' counsel: "I think by operation of this statute, yes. . . . [T]he hypothetical of a friend could pay it or a bank could pay it . . . does not give enough deference to the way this statute is written and applied . . . against a backdrop of [ERISA] that requires this money to be held this way.").

In detailing this position during oral argument, Plaintiffs' counsel attempted to distinguish *Adams* and *Eastern Enterprises* from the facts of the present case and offered as legal support only the Supreme Court's decision in *Horne v. Department of Agriculture*. 576 U.S. 350 (2015); *see* Trans. at 25:7–15. That case is inapposite to the present case. The Supreme Court in *Horne* held "an administrative reserve requirement compelling raisin growers to physically set aside a percentage of their crop for the government constituted a . . . taking." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (summarizing *Horne*); *Horne*, 576 U.S. at 354. Plaintiffs' counsel analogized *Horne* to the circumstances in this case, specifically Defendant's requirement that Plaintiffs pay TRP contributions while also having to hold all their assets within their trust accounts. Trans. at 25:1–11 (Plaintiffs' counsel: "What we have here is money that's already there, money that is sitting in this trust, required by federal law to be there, the only assets of the . . . group health plans who are defined as the contributing entity,

and they have to use that money. It's . . . like [*Horne* because] . . . . the growers of the raisins had a crop that they were using obviously to satisfy this government taking . . . ."). Since any payment of TRP contributions would thus be paid out of their trust accounts, Plaintiffs argue, those accounts are the relevant ones for the purpose of determining whether Defendant's actions implicated a cognizable property interest. *Id.*

Plaintiffs' argument is not persuasive. *Horne* is not relevant here because it concerned a taking of physical, personal property, which the Supreme Court in *Sperry* confirmed is cognizable by the Takings Clause—in contrast to alleged takings of money. 493 U.S. at 62 n.9 ("It is artificial to view deductions of a percentage of a monetary award as [*per se* takings]. Unlike real or personal property, money is fungible."). The paucity of proffered legal support for Plaintiffs' position—that one's property interest in a fund is implicated when paying the government money out of said fund—underscores its lack of viability. Accepting Plaintiffs' argument would effectively erase the Supreme Court and Federal Circuit's distinction between takings of specific funds and obligations to pay money. A requirement to pay a sum of money cannot be transformed into a taking of a specific fund merely because such payment may be made from a certain account, as one simply cannot have a cognizable property interest in money itself. *E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring); *Edison*, 271 F.3d at 1338–40; *Adams*, 391 F.3d at 1225. Such a rule is practical and necessary; as highlighted by Defendant, Plaintiffs' alternative reasoning has the potential to turn all government taxes and fees into takings of specific funds whenever it is clear they will be paid out of an individual's bank account. Trans. at 20:18–25 (Defendant's counsel: "But in reality, when the Supreme Court talked about a

specific fund of money, the focus [was] on how the statute was structured[.] Because every assessment that is paid from a bank account is paid from a specific fund of money. Every tax that is paid from a bank account is paid from a specific fund of money. A specific fund of money is always involved or almost always.").

That Plaintiffs' two arguments concerning cognizable property interests fail to persuade is not surprising given that Defendant's actions are textbook examples of the government leveling an obligation to pay calculable sums of money. The undisputed facts of this case demonstrate the property appropriated was simply money, the amount to be paid determined by annual calculation. *See* 2d Am. Compl. ¶ 80; HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. at 15,460; HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. at 13,775; HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. at 10,775. Since there is no dispute that Defendant did not appropriate specific funds *in toto*, that Plaintiffs' trust agreements may provide them with property interests in the trust accounts is unavailing; the accounts were not the property allegedly taken by Defendant's mandating of TRP contributions. Plaintiffs' arguments extending their interest in their overall trust accounts to an annually-calculated portion of the assets within those trust accounts contravene binding Supreme Court and Federal Circuit precedent holding, in the context of the Takings Clause, that individuals do not have cognizable property interests in individual sums of money. *See E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring); *Edison*, 271 F.3d at 1340 ("[T]he mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment."). This Court's previous skepticism of Plaintiffs' takings claims was thus well-founded, as

Plaintiffs' opportunity to amend their complaint to more precisely articulate their theory for possessing a cognizable property interest in the TRP contributions simply confirms that Defendant's mandating of contributions represented only an obligation to pay money. *See EWTF*, 155 Fed. Cl. at 169, 191–93.

Accordingly, Plaintiffs' Takings claims fail the first step of this Court's takings analysis, as the requirement to pay TRP contributions did not implicate a cognizable property interest, but instead represented a "mere imposition of an obligation to pay money" that is not compensable under the Fifth Amendment. *Edison*, 271 F.3d at 1340.

II. This Court Need Not Consider Defendant's Step Two Arguments.

Defendant argues in its Motion that, should this Court find Plaintiffs have a cognizable property interest, this Court should apply a regulatory takings analysis at the second step of the two-step takings test. Mot. at 23–26 (arguing "[P]laintiffs do not allege a *per se* taking as a matter of law"). Further, Defendant argues Plaintiffs' claims of regulatory takings accrued when the ACA was signed into law in 2010. *Id.* at 26–27. As Plaintiffs filed this action some 9 years later, Defendants contend Plaintiffs' regulatory takings claims are untimely under 28 U.S.C. § 2501. *Id.* Plaintiffs counter that a *per se* takings analysis is more appropriate—although a taking also should be found under a regulatory takings analysis—and that their claims are timely, as the claims did not accrue until HHS's publication of its final rule defining "contributing entity" in 2014. Resp. at 30–44.

Absent a constitutionally cognizable property interest in the present case under step one of the takings analysis, this Court need not proceed to step two and address the

parties' disputes concerning timeliness and the type of taking that would have been at issue. *Hearts Bluff Game Ranch*, 669 F.3d at 1329 ("First, as a threshold matter, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. . . . Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was 'taken.' . . . 'We do not reach this second step without first identifying a cognizable property interest.'") (quoting *Air Pegasus*, 424 F.3d at 1213); *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004) ("If the claimant fails to demonstrate the existence of a legally cognizable property interest, the court's task is at an end."). This Court accordingly finds Defendant's arguments on these issues to be moot in light of this Court's findings in Discussion Section I and declines the invitation to clarify via dicta (i) the type of taking that would have occurred had Plaintiffs possessed a cognizable property interest in the money paid as TRP contributions, or (ii) whether Plaintiffs' claims under a regulatory takings analysis would have been timely.

CONCLUSION

For the reasons explained above, Defendant's Motion for Partial Summary Judgment (ECF No. 105) is **GRANTED**. Plaintiffs' Motion for Leave to File to Amend Takings Class Definition in the Second Amended Complaint (ECF No. 83) and Motion to Certify Takings Class (ECF No. 84) are accordingly **DENIED AS MOOT**.

The parties are directed to **CONFER** and **FILE** a Notice within seven days, attaching a proposed public version of this Memorandum and Order, with any competition-sensitive or otherwise protected information redacted.

The Clerk of Court is **DIRECTED** to enter Judgment accordingly.

IT IS SO ORDERED.

/s/ Eleni M. Roumel
ELENI M. ROUMEL
Judge

July 7, 2023
Washington, D.C.

APPENDIX D

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ELETRICAL WELFARE TRUST FUND, *et al.*, Plaintiffs, v. THE UNITED STATES, Defendant.	No. 19-cv-353 Filed: July 30, 2021

Joseph Howard Meltzer, Kessler, Topaz, Meltzer & Check, LLP, Radnor, Pennsylvania for Plaintiffs. With him on the briefs were *Melissa L. Troutner*, Kessler, Topaz, Meltzer & Check, LLP, Radnor, Pennsylvania; *William P. Dale* and *Charles F. Fuller*, McChesney & Dale, P.C., Bowie, MD.

Eric P. Bruskin, United States Department of Justice, Civil Division, Washington, D.C. for Defendant. With him on the briefs are *Joseph H. Hunt*, Assistant Attorney General, *Robert E. Kirschman, Jr.*, Director, National Courts Section, Commercial Litigation Branch, Civil Division; and *L. Misha Preheim*, Assistant Director, Commercial Litigation Branch, Civil Division, Washington, D.C.

MEMORANDUM AND ORDER

This case arises out of the Department of Health and Human Services' (HHS's) implementation of the Patient Protection and Affordable Care Act of 2010 (ACA). Plaintiffs, self-insured group health plans funded through employee contributions to a multiemployer benefit trust,[1] seek to recover amounts paid under HHS regulations implementing the ACA's Transitional Reinsurance Program (TRP). The TRP mandated that all "health insurance issuers, and third party administrators on behalf of group health plans, [were] required to make payments to an applicable reinsurance entity for any plan beginning in the 3-year period beginning January 1, 2014. . . ." 42 U.S.C. § 18061(b)(1)(A). HHS regulations implementing the TRP defined the group of entities that were required to contribute to the TRP as "contributing entities." *See* 45 C.F.R. § 153.20(2) (2019) ("[Contributing entity means f]or the 2014 benefit year, a self-insured group health plan . . . whether or not it uses a third party administrator; and for the 2015 and 2016 benefit years, a self-insured group health plan . . . that uses a third party administrator . . . ."). HHS deemed Plaintiffs' self-insured group health plans as "contributing entities" and, consequently, required Plaintiffs to contribute to the TRP. Complaint (ECF No. 1) (Compl.) ¶¶ 57-58; Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss or, in the alternative, Motion for Summary Judgment (ECF No. 7) (Pls.' Resp.) at 9-10. Plaintiffs allege that these contribution payments constitute an illegal exaction

[1] Defendant's motion addresses three Plaintiffs: (1) the Electrical Welfare Trust Fund (EWTF); (2) the Operating Engineers Trust Fund of Washington, D.C. (OETF); and (3) the Stone & Marble Masons of Metropolitan Washington, D.C. Health and Welfare Fund (Stone Masons).

because HHS's definition of "contributing entity" exceeded its statutory authority and was an unreasonable interpretation of 42 U.S.C. § 18061. Compl. ¶¶ 100-111; Pls.' Resp. at 2-3. Plaintiffs also allege that, even if HHS's interpretation of 42 U.S.C. § 18061 was permissible, Plaintiffs are still entitled to recover the fees paid pursuant into the TRP as just compensation under the Fifth Amendment's Takings Clause. Compl. ¶¶ 89-99; *see* also Pls.' Resp. at 12.

Pending before the Court is Defendant's motion to dismiss Plaintiffs' complaint for failure to state a claim, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC or Rule) or, in the alternative, Defendant's motion for summary judgment. *See generally* Defendant's Motion to Dismiss or, in the alternative, Motion for Summary Judgment (Def.'s Mot.) (ECF No. 6); *see also* Defendant's Reply in Support of Its Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (Def.'s Reply) (ECF No. 8).[2] In its motion, Defendant argues that Plaintiffs' illegal exaction claims must be dismissed because HHS reasonably interpreted section 18061 to require reinsurance contributions from Plaintiffs. Def.'s Mot. at 2, 34-35. Defendant also argues that Plaintiffs fail to state a valid Takings claim because ordinary obligations to pay money, such as Plaintiffs' contributions to the TRP, do not constitute a Fifth Amendment Taking under controlling precedent of the United States Court of Appeals for the Federal Circuit (Federal Circuit). Def.'s Mot. at 2, 11-14.

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[2] Defendant originally moved to dismiss Plaintiffs' illegal exaction claims for lack of jurisdiction but withdrew this part of the motion at oral argument. Def.'s Reply at 20 n.8; Oral Argument Transcript (ECF No. 21) at 5:13-19.

This Court has considered each of the parties' filings and arguments. For the reasons explained below, Defendant's motion to dismiss is **GRANTED in part** and **DENIED in part**. With respect to EWTF, this Court holds that HHS's inclusion of self-administered accounts within the definition of "contributing entity" is contrary to section 18061(b)(1)(A)'s plain language; therefore, Defendant's motion is **DENIED** as to EWTF's illegal exaction claim. With respect to OETF and Stone Masons, which use a third-party administrator, and are therefore covered under section 18061(b)(1)(A)'s plain language, this Court holds that those Plaintiffs' illegal exaction claims are without merit. Accordingly, Defendant's motion is **GRANTED** with respect to Stone Masons' and OETF's illegal exaction claims. Finally, as explained below, Defendant's motion is **DENIED** with respect to Stone Masons', OETF's, and EWTF's Takings claims.

BACKGROUND

I. Plaintiffs' Health Plans

Plaintiffs are group health plans[3] created through collective bargaining and regulated by the Labor Management Relations Act of 1947 (Taft-Hartley) and the Employee Retirement Income Security Act of 1974 (ERISA). Compl. ¶ 3. They are not health insurance issuers.[4] Compl. ¶ 30. Plaintiffs' group health plans "are funded through employee contributions to a multiemployer benefit trust, and benefits under the plans are provided to covered workers and their families pursuant to negotiated wages, hours, and terms of employment through a collective bargaining agreement

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[3] "[G]roup health plan" is defined by statute as,

> An employee welfare benefit plan (as defined in [29 U.S.C. § 1002(1)]) to the extent that the plan provides medical care (as defined in paragraph (2)) . . . to employees or their dependents (as defined under the terms of the plan) directly or through insurance, reimbursement, or otherwise. Except for purposes of part C of title XI of the Social Security Act (42 U.S.C. 1320d et seq.), such term shall not include any qualified small employer health reimbursement arrangement (as defined in section 9831(d)(2) of title 26).

42 U.S.C. § 300gg-91(a)(1).

[4] "[H]ealth insurance issuer" is defined by statute as,

> an insurance company, insurance service, or insurance organization (including a health maintenance organization, as defined in paragraph (3)) which is licensed to engage in the business of insurance in a State and which is subject to State law which regulates insurance (within the meaning of section 514(b)(2) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1144(b)(2)]). Such term does not include a group health plan.

42 U.S.C. § 300gg-91(b)(2).

between one or more unions and more than one employer." *Id.* Participation in these plans is limited to employees who share "a common employer (or affiliated employers), coverage under one or more collective bargaining agreements, membership in a labor union, or membership in one or more locals of a national or international labor union." Compl. ¶ 28. Pursuant to 29 U.S.C. § 1103, these plans use funds which are held in trust for the exclusive benefit of the plan participant and which cannot be used for any other purpose. Compl. ¶ 29.

Unlike Plaintiffs, commercial insurers write policies for group and individual health plans. Pls.' Resp. at 5. Plaintiffs allege that, unlike commercial insurers, Plaintiffs' health plans are not commercial in nature and are not sold on the individual market. Compl. ¶ 28. Plaintiffs also note that even before enactment of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (the Act or ACA), Plaintiffs' group health plans did not exclude participants on the basis of pre-existing conditions. Compl. ¶¶ 28, 33; Pls.' Resp. at 5. Thus, according to Plaintiffs, their group health plans did not undertake any additional risk when Congress abolished denials for pre-existing conditions—unlike commercial insurers. Compl. ¶¶ 38, 50.

Plaintiffs' group health plans are self-insured. Compl. ¶ 3. Self-insured multiemployer plans may be administered in one of three ways: (1) self-administered, (2) administered by a third-party administrator that is not a health insurance issuer, or (3) administered by a third-party administrator that is a health insurance issuer through an administrative services only (ASO) agreement. Compl. ¶ 32; Pls.' Resp. at 5-6.

EWTF is a self-administered group health plan. Compl. ¶ 3; Pls.' Resp. at 5. As a self-administered plan,

EWTF: (1) determines eligibility and controls enrollment for its participants, (2) performs claims processing and adjudication, and (3) directly pays the health care costs incurred by its participants and beneficiaries. Compl. ¶¶ 19-20. OETF[5] and Stone Masons[6] each are administered by a third-party administrator that is not a health insurance issuer. Compl. ¶¶ 21-24. These third-party administrators: (1) determine eligibility and control enrollment for its participants, (2) perform claims processing and adjudication, and (3) directly pay the health care costs incurred by the OETF and Stone Masons participants and beneficiaries. *Id.* ¶¶ 22-24.

II. Transitional Reinsurance Program

In 2010, President Obama signed the ACA into law. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively the ACA). Under the ACA, all individuals must maintain "minimum essential" health insurance coverage, 26 U.S.C. § 5000A, and health insurance providers cannot discriminate against individuals with pre-existing medical conditions by denying them coverage, 42 U.S.C. § 300gg-3. As a result, Congress anticipated that the enrollment of a disproportionate number of previously uninsured, high-risk individuals into the health insurance market could cause premiums to rise for all insured individuals. *See King v. Burwell*, 576 U.S. 473, 479-81 (2015). Among other

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[5] OETF's third-party administrator is Associated Administrators, LLC. Compl. ¶¶ 21-22.

[6] Stone Masons' third-party administrator is Carday Associates, LLC. Compl. ¶¶ 23-24.

provisions, the ACA established three programs to attempt to more evenly distribute the financial risk carried by health insurance issuers that cover higher-risk populations: (1) the Transitional Reinsurance Program (TRP), (2) the risk corridors program, and (3) the risk adjustment program. 42 U.S.C. §§ 18061 (codifying the transitional reinsurance program), 18062 (codifying the risk corridors program), 18063 (codifying the risk adjustment program).

At issue here is the TRP, a temporary program intended to stabilize premiums for coverage in the individual health insurance market during the early years of the ACA's implementation—2014, 2015, and 2016. *See* 42 U.S.C. § 18061(c)(1)(A). To fund the program, the ACA required that "health insurance issuers, and third party administrators on behalf of group health plans" pay into the appropriate reinsurance pool, whether state or federal, for the three-year period. 42 U.S.C. § 18061(b)(1)(A). The funds collected from the entities described in section (a)(1) were used to reimburse "health insurance issuers" for enrolling high-risk individuals in the individual marketplace. 42 U.S.C. § 18061(b)(1)(B).

Congress delegated authority to HHS to implement the TRP, requiring that HHS—in consultation with the National Association of Insurance Commissioners (NAIC)—create federal standards for the program. 42 U.S.C. § 18061(b)(1). Between July 2011 and March 2014, HHS published three sets of proposed and final rules defining the term "contributing entities," found in 42 U.S.C. § 18061(b)(1).

A. Proposed and Final Rules Titled "Patient Protection and Affordable Care Act; Standards Related to Reinsurance, Risk Corridors and Risk Adjustment"

On July 15, 2011, HHS, for the first time, issued a proposed rule interpreting the term "contributing entity" as "any health insurance issuer and, in the case of a self-insured group health plan, the third party administrator of the group health plan." Def.'s Mot. App. 1 (76 Fed. Reg. 41930 (July 15, 2011)) (ECF No. 6-1) at A23[7] (2011 Proposed Rule). HHS accepted public comments on the 2011 Proposed Rule until September 28, 2011. *Id.* at A2.

On March 23, 2012, HHS published a Final Rule based on its July 2011 proposal. Def.'s Mot. App. 3 (77 Fed. Reg. 17220 (March 23, 2012)) (ECF No. 6-3) (2012 Final Rule). In the 2012 Final Rule, HHS stated that it received several comments requesting clarification of its proposed definition of "contributing entity." *See id.* at A1964, A1978. In response, HHS explained that the ACA "directs a broad cross-section of issuers and self-insured plans to make reinsurance contributions, given the uncertainty of the size and characteristics of the population that will participate in the Exchanges." *Id.* at A1978. While HHS claimed that the definition of "contributing entities" is broad, it failed to clarify the definition's alleged breadth in the final regulatory text. Despite the public comments and noted confusion about the term, HHS instead simply mirrored the ACA's text, stating "[c]ontributing entity means a health insurance issuer or a third party administrator on behalf or [sic] a self-insured group plan." *Id.* at A1988.

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[7] The nine (9) appendices attached to Defendant's motion are sequentially paginated. *See* ECF Nos. 6-1 through 6-9. Throughout this Memorandum and Order, the Court uses this sequential numbering in its citations, preceding the page number with "A."

B. Proposed and Final Rules Titled "Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014"

On December 7, 2012, HHS issued another proposed rule to "provide[] further detail and parameters related to" a host of ACA topics. Def.'s Mot. App. 4 (77 Fed. Reg. 73118 (December 7, 2012)) (ECF No. 6-4) (2012 Proposed Rule) at A1996. In discussing the TRP contribution calculation and collection process in the 2012 Proposed Rule, HHS explained:

> The Affordable Care Act directs that a transitional reinsurance program be established in each State to help stabilize premiums for coverage in the individual market from 2014 through 2016. The reinsurance program is designed to alleviate the need to build into premiums the risk of enrolling individuals with significant unmet medical needs. By stabilizing premiums in the individual market equitably throughout the United States, the reinsurance program is intended to help millions of Americans purchase affordable health insurance, reduce unreimbursed usage of hospital and other medical facilities by the uninsured, and thereby lower medical expenses and premiums for all people with private health insurance.

Id. at A2027. Purportedly with the goals of the TRP in mind, HHS's stated aim in administering the program was "to provide reinsurance payments in an efficient, fair, and accurate manner, where they are needed most, to effectively stabilize premiums nationally." *Id.* At the same time, HHS claims that it sought to minimize the administrative burden of collecting contributions and making reinsurance payments. *See id.* HHS stated that "[w]ith respect to self-insured group health plans, the plan

is liable, although a third-party administrator or administrative-services-only contractor may be utilized to transfer reinsurance contributions on behalf of a self-insured group health plan, at that plan's discretion." *Id.* at A2030. HHS added that "[a] self-insured, self-administered group health plan without a third-party administrator or administrative-services-only contractor would make its reinsurance contributions directly." *Id.* Further, HHS stated that "[u]nder section 1341(b)(3)(B)(i) of the Affordable Care Act, contribution amounts for reinsurance are to reflect, in part, an issuer's fully insured commercial book of business for all major medical products." *Id.* (internal quotations omitted). Accordingly, HHS interpreted section 1341(b)(3)(B)(i) to mean that "an issuer will not be required to make reinsurance contributions for coverage that is non-commercial." *Id.* The public comment period on this 2012 Proposed Rule closed December 31, 2013. *Id.* at A1996.

On March 11, 2013, HHS published a final rule based on its 2012 Proposed Rule. 78 Fed. Reg. 15410 (March 11, 2013). During the preceding comment period, several commenters had requested that HHS amend the definition of "contributing entity" to clarify the liability of third-party administrators. Def.'s Mot. App. 6 (78 Fed. Reg. 15410 (March 11, 2013)) (ECF No. 6-6) (2013 Final Rule) at A3564. In response to the comments received, HHS clarified that "a self-insured group health plan is ultimately responsible for the reinsurance contributions, even though it may elect to use a TPA or ASO contractor to transfer the reinsurance contributions." *Id.*

Several commenters had also requested that group health plans regulated by Taft-Hartley and ERISA be excluded from reinsurance contributions because "many of these plans are self-insured and self-administered, and

include multiemployer plans." *Id.* at A3568. HHS responded that it "d[id] not have authority under the statute to exclude [self-insured and self-administered plans regulated by Taft-Hartley and ERISA] from reinsurance contributions[,]" because these plans' coverage was "employment-based." *Id.* at A3568. However, the 2013 Final Rule stops short of explicitly stating whether HHS believed self-insured or self-administered group health plans created through collective bargaining and regulated by Taft-Hartley and ERISA were considered "commercial."

HHS's 2013 Final Rule, thus clarified that all self-insured group health plans (including plans that are self-administered, and those regulated by Taft-Hartley and ERISA) were included within its definition of "contributing entity." *See id.* at A3634.

HHS's 2013 Final Rule defining "contributing entity" reads as follows:

> *Contributing entity* means a health insurance issuer or self-insured group health plan. A self-insured group health plan is responsible for the reinsurance contributions, though it may elect to use a third party administrator or administrative services only contractor for transfer of the reinsurance contributions.

Id. at A3634.

Thus, under HHS's amended the definition of the term "contributing entity" in the 2013 Final Rule, all self-insured group health plans—including self-administered plans—were required to make reinsurance contributions. *Id.*

B. Proposed and Final Rules Titled "Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015"

In December 2013, HHS issued another proposed rule seeking comment on, *inter alia*, the definition of "contributing entity." Def.'s Mot. App. 7 (78 Fed. Reg. 72322 (December 2, 2013)) (ECF No. 6-7) (2013 Proposed Rule). HHS stated in its 2013 Proposed Rule that "continued study of this issue," had led it "to believe that [section 1341] may reasonably be interpreted in one of two ways." *Id.* at A3670. Specifically, HHS explained its belief that the ACA section 1341 (1) "may be interpreted to mean that self-insured, self-administered plans must make reinsurance contributions," or, (2) alternatively, "may be interpreted to mean that such plans are excluded from the obligation to make reinsurance contributions." *Id.* Accordingly, HHS yet again proposed to modify the definition of "contributing entity" for the 2015 and 2016 plan years, this time to exclude self-insured group health plans that do not use the services of a third-party administrator. *See id.* Consequently, HHS's 2013 Proposed Rule amended the definition of "contributing entity" to exclude self-insured group health plans that do not use a third-party administer (TPA) in connection with claims processing, adjudication, or enrollment. *Id.* at A3670, A3714. However, HHS's proposed definitional exclusion for self-insured, self-administered plans from the contributing entity definition did not apply to the 2014 benefit year. *Id.* As to why HHS did not apply this exclusion to the 2014 benefit year, HHS cited "public policy" explaining:

> While, upon further consideration of the issue, we believe the statutory language can reasonably be read to support the proposition that self-insured group

> health plans that do not use third party administrators for the functions described above should not be obligated to make reinsurance contributions, we also recognize, as a public policy matter, that it would be disruptive to plans and issuers to modify the definition of "contributing entity" for the 2014 benefit year at this late date. Health insurance issuers have already set premiums and developed operational processes based on the definition of 'contributing entity' for the 2014 benefit year at this late date. Health insurance issuers have already set premiums and developed operational processes based on the definition of 'contributing entity' that was previously finalized in the 2014 Payment Notice. To prevent lower reinsurance payments, the contribution rate would have to be raised for other contributing entities, many of whom have already set their 2014 premiums based on the contribution rate finalized in March 2013. Excluding self-insured, self-administered group health plans from the set of entities that must provide reinsurance contributions for the 2014 benefit year, without raising the rate on other entities, would decrease the funds available for reinsurance payments for that benefit year, and thus upset settled estimates with respect to expected reinsurance payments that were used to establish premiums.
>
> Therefore, we do not propose to change the definition of "contributing entity" for the 2014 benefit year.

Id. at A3671.

Additionally, in its 2013 Proposed Rule, HHS stated that self-insured plans administered by a third-party administrator would still be required to make reinsurance contributions. *Id.* at A3670. HHS explained that "[a]n

insured plan and a self-insured plan administered by a third-party administrator are similar in that each arrangement involves an employer and an outside commercial entity—an issuer or a third-party administrator (which is often an insurance company or an affiliate)—for the administration of the core health insurance functions of claims processing and plan enrollment." *Id.* Additionally, HHS noted that,

> under section 1341(b)(3)(B) of the Affordable Care Act and § 153.400(a)(1)(ii), reinsurance contribution amounts are to reflect a "commercial book of business." Our consideration of these comments leads us to believe that a group health plan administered by a third party administrator would normally be viewed as part of the third party administrator's "commercial book of business," but that a self-insured, self-administered plan would not normally be viewed as part of an entity's "commercial book of business."

Id. As a result, HHS proposed that "contributing entity" would mean: "(a) A health insurance issuer; or (b) a self-insured group health plan (including a group health plan that is partially self-insured and partially insured, where the health insurance coverage does not constitute major medical coverage) that uses a third-party administrator in connection with claims processing or adjudication (including the management of appeals) or plan enrollment." *Id.* at A3670.

> The definition of "contributing entity" in the 2013 Proposed Rule reads as follows:
>
> *Contributing entity* means—
>
> (1) A health insurance issuer; or
>
> (2) For the 2014 benefit year, a self-insured group health plan (including a group health plan that is

> partially self-insured and partially insured, where the health insurance coverage does not constitute major medical coverage), whether or not it uses a third party administrator; and for the 2015 and 2016 benefit years, a self-insured group health plan (including a group health plan that is partially self-insured and partially insured, where the health insurance coverage does not constitute major medical coverage) that uses a third party administrator in connection with claims processing or adjudication (including the management of appeals) or plan enrollment. A self-insured group health plan that is a contributing entity is responsible for the reinsurance contributions, although it may elect to use a third party administrator or administrative services-only contractor for transfer of the reinsurance contributions.

Id. at A3714. The public comment period on the 2013 Proposed Rule closed on December 26, 2013. *Id.* at A3652.

On March 11, 2014, HHS published its third and final rule defining "contributing entity." *See* Def.'s Mot. App. 9 (79 Fed. Reg. 13744 (March 11, 2014)) (ECF No. 6-9) (2014 Final Rule). This time, HHS concluded that, although ACA section 18061 "can reasonably be interpreted in more than one way with respect to the applicability of reinsurance contributions to self-insured, self-administered plans[,] . . . the better reading of section 1341 is that a self-insured, self-administered plan should not be a contributing entity. . . ." *Id.* at A4702. HHS explained that excluding self-administered, self-funded group health plans from the definition of "contributing entity" was the better reading because both section 1341(b)(3)(B) of the ACA and section 153.400(a)(1)(ii) of Title 45 of the United States Code of Federal Regulations provide that reinsurance contributions are to reflect a "commercial

book of business," and a self-administered plan would not normally be considered part of an entity's commercial book of business. *See id.*

As noted, HHS also advised that, "as a matter of public policy," the new definition of "contributing entity" would only apply prospectively, for 2015 and 2016. 2013 Proposed Rule at A3671. HHS justified its definitional distinguishment for the 2014 plan year by reasoning that "making the proposed exemption effective for the 2014 benefit year at this late stage would be disruptive to plans and issuers that have already set contribution rates and premiums and could upset settled estimates with respect to expected reinsurance payments and contribution obligations." 2014 Final Rule at A4703.

In response to the 2013 Proposed Rule, several public commenters had argued that self-insured plans, which did not use a health insurance issuer as TPAs, should be exempt from the definition of contributing entity. *Id.* at A4703. HHS rejected these arguments and explained its view that there is no statutory support for this exemption because "sections 1341(b)(1)(A) and (b)(3)(A) of the Affordable Care Act only refer[] to issuers and TPAs, and do[] not distinguish between issuer TPAs and non-issuer TPAs." *Id.* HHS further reasoned that, in contrast to self-administered plans, plans that are administered by a third-party administrator would normally be considered part of a commercial book of business. *Id.* at A4702. Based on the statutory language and the commercial nature of TPAs, HHS concluded that it did not have "the authority to differentiate between TPAs that are issuers or issuer affiliates and non-issuer TPAs for purposes of the exemption." *Id.* at A4703.

HHS's final definition of "contributing entity" in its 2014 Final Rule reads as follows:

Contributing entity means—

(1) a health insurance issuer; or

(2) For the 2014 benefit year, a self-insured group health plan (including a group health plan that is partially self-insured and partially insured, where the health insurance coverage does not constitute major medical coverage), whether or not it uses a third party administrator; and for the 2015 and 2016 benefit years, a self-insured group health plan (including a group health plan that is partially self-insured and partially insured, where the health insurance coverage does not constitute major medical coverage) that uses a third party administrator in connection with claims processing or adjudication (including the management of internal appeals) or plan enrollment for services other than for pharmacy benefits or excepted benefits within the meaning of section 2791(c) of the PHS Act. Notwithstanding the foregoing, a self-insured group health plan that uses an unrelated third party to obtain provider network and related claim repricing services, or uses an unrelated third party for up to 5 percent of claims processing or adjudication or plan enrollment, will not be deemed to use a third party administrator, based on either the number of transactions processed by the third party, or the volume of the claims processing and adjudication and plan enrollment services provided by the third party. A self-insured group health plan that is a contributing entity is responsible for the reinsurance contributions, although it may elect to use a third party administrator or administrative services-only contractor for transfer of the reinsurance contributions.

Id. at 4763; 45 C.F.R. § 153.20 (codifying the definition of "contributing entity" as announced in the 2014 Final Rule).

III. Plaintiffs' Contributions to the TRP

Pursuant to HHS Rules, "[e]ach contributing entity must make reinsurance contributions annually: at the national contribution rate for all reinsurance contribution enrollees, in a manner specified by HHS[.]" 45 C.F.R. § 153.400(a). According to HHS, the reinsurance contribution required from a "contributing entity" during a benefit year is calculated by multiplying "[t]he number of covered lives of reinsurance contribution enrollees during the applicable benefit year for all plans and coverage described in § 153.400(a)(1) of the contributing entity" by "[t]he contribution rate for the applicable benefit year." 45 C.F.R. § 153.405. Defendant required Plaintiffs to pay the reinsurance contribution in the following manner: (1) the contributing entity had to submit an annual enrollment count of the number of covered lives of reinsurance contribution enrollees no later than November 15 of the applicable benefit year; (2) after submitting the annual enrollment count, HHS then notified the contributing entity of the amount of the reinsurance contribution allocated to reinsurance payments, administrative expenses, and the United States Treasury for the applicable benefit year; and (3) the contributing entity remitted reinsurance contributions to HHS. Compl. ¶ 65 (citing 45 C.F.R. § 153.405).[8] For

[8] Plaintiffs' complaint appears to cite to the pre-2016 version of 45 C.F.R. § 153.405. Section 153.405 was amended in 2016, but that amendment does not appear to have materially altered the TRP contribution process.

benefit year 2014, Defendant required EWTF, OETF, and the Stone Masons to pay a contribution of $63 per covered life—an amount that encapsulated both plan participants and their dependents. Compl. ¶ 70. For benefit years 2015 and 2016, Defendant required OETF and the Stone Masons to pay a contribution of $44 and $27 per covered life, respectively. Compl. ¶ 68. For benefit years 2015 and 2016, EWTF did not make TRP contributions. 45 C.F.R. § 153.20.

EWTF paid $865,357.50 to Defendant on January 9, 2015, reflecting its first payment for benefit year 2014. Compl. ¶ 70. It paid an additional $173,071.50 to Defendant on November 9, 2015, reflecting a total sum of $1,038,429 paid for benefit year 2014. *Id.* OETF remitted TRP contribution payments to Defendant in the amount of $142,569 on January 12, 2015; $107,712 on January 8, 2016; and $72,873 on January 10, 2017. Compl. ¶ 71. Collectively, OETF paid Defendant $323,154 for benefit years 2014, 2015, and 2016. Compl. ¶ 22. The Stone Masons remitted TRP contribution payments to Defendant in the amount of $20,664 on January 14, 2015; $14,476 on January 14, 2016; and $11,637 on January 13, 2017. Compl. ¶ 72. Collectively, the Stone Masons paid Defendant $46,777 for benefit years 2014, 2015, and 2016. Compl. ¶ 24.

IV. Subsequent Litigation

In June 2016, EWTF filed suit in federal district court under 28 U.S.C. § 1346(a)(1), challenging HHS's 2015 assessment of the ACA's section 1341 on self-insured, self-administered plans. *See Electrical Welfare Trust Fund v. United States*, No. 16-2186, 2017 WL 3116693, *2 (D. Md. Jul. 21, 2017). The district court dismissed the suit for lack of jurisdiction and the United States Court of Appeals for

the Fourth Circuit affirmed. *Electrical Welfare Trust Fund v. United States*, 907 F.3d 165, 168-70 (4th Cir. 2018).

In 2017, EWTF, Stone Masons, and OETF filed suit in the United States Court of Federal Claims under alleging the TRP constituted "an internal-revenue tax illegally collected under 28 U.S.C. § 1346(a)(1)" and deprived Plaintiffs of "of property without due process of law or without just compensation in violation of the Due Process and/or Takings clauses of the Fifth Amendment of the United States Constitution." *Operating Engineers Trust Fund of Washington, D.C.*, et al. v. United States, No. 17-cv-1732, ECF No. 1. On March 6, 2019, the parties in that case filed a stipulation of dismissal without prejudice pursuant to Rule 41(a)(1)(A)(ii)—two days before Plaintiffs filed their complaint in the present action. *Id.* at ECF No. 29.

On May 7, 2019, Defendant moved to dismiss Plaintiffs' complaint for lack of jurisdiction[9] and for failure to state a claim, pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), and alternatively moved for summary judgment. *See generally* Def.'s Mot.; Def.'s Reply. On February 27, 2020, this case was reassigned to the undersigned judge, and subsequently this Court held oral argument on the pending motions. *See* Order Reassigning Case (ECF No. 15).

STANDARD OF REVIEW

To survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual

[9] As noted, Defendant withdrew its Rule 12(b)(1) motion at oral argument. Def. Reply at 20 n.8; Oral Argument Transcript (ECF No. 21) at 5:13-19.

matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff also must establish "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft*, 556 U.S. at 678. Thus, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 555, 557) (citations omitted).

Pursuant to Rule 56, summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986). A "genuine" dispute is one that "may reasonably be resolved in favor of either party," and a fact is "material" if it might significantly alter the outcome of the case under the governing law. *Anderson*, 477 U.S. at 248, 250. In determining the propriety of summary judgment, a court will not make credibility determinations and will draw all inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

DISCUSSION

Pursuant to the Tucker Act, this Court's primary jurisdictional statute, "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution, . . . or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a). "When the government expropriates property, a plaintiff can obtain relief under either a Takings theory

or an illegal-exaction theory . . . but not both." *Reid v. United States*, 148 Fed. Cl. 503, 528 (2020) (citing *Orient Overseas Container Line (UK) Ltd. v. United States*, 48 Fed. Cl. 284, 289 (2000); *Figueroa v. United States*, 57 Fed. Cl. 488, 496 (2003), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006)). The Tucker Act grants this Court jurisdiction over an "illegal exaction" involving money "improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967); *see also Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1574 (Fed. Cir. 1996) (finding that an agency's imposition of fees was not authorized because it was based on an interpretation of a regulation that was contrary to the authorizing statute). Conversely, "Takings claims arise because of a deprivation of property that is authorized by law." *Orient Overseas Container Line (UK) Ltd.*, 48, Fed. Cl. at 289 (citing *Dureiko v. United States*, 209 F.3d 1345, 1359 (Fed. Cir. 2000)); *see also Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) ("[A] claimant must concede the validity of the government action which is the basis of the taking claim to bring suit under the Tucker Act[.]").

Therefore, this Court must determine whether HHS's inclusion of Plaintiffs within the definition of "contributing entity" is contrary to statute before it may reach Plaintiffs' Takings claims.

I. EWTF's Illegal Exaction Claim

The central question underlying Plaintiffs' illegal exaction claims is whether Congress intended for Plaintiffs to make transitional reinsurance contributions under 42 U.S.C. § 18061. To determine whether HHS's regulation was contrary to statute, the Court is required

to apply the familiar framework found in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The first question under *Chevron* is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If, after the Court exhausts the "traditional tools of statutory construction," the intent of Congress is clear, "that is the end of the matter." *Id.* at 837, 842-43, 843 n.9. If, however, the statute "is silent or ambiguous with respect to the specific issue," *id.* at 843, the Court must proceed to the second prong of *Chevron*, under which the Court must "defer to the agency's interpretation if 'the agency's answer is based on a permissible construction of the statute.'" *Cathedral Candle Co. v. U.S. Int'l Trade Commission*, 400 F.3d 1352, 1362 (Fed. Cir. 2005) (quoting *Chevron*, 467 U.S. at 843).

In determining whether it was permissible for HHS to include EWTF's self-insured, self-administered ERISA Fund within the definition of contributing entity, this Court must begin with the text of the statute. *See Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, (2004); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978); *Strategic Hous. Fin. Corp. of Travis Cty. v. United States*, 608 F.3d 1317, 1323 (Fed. Cir. 2010). "If the statutory language is plain, [the Court] must enforce it according to its terms." *King v. Burwell*, 576 U.S. at 474. "[W]hen deciding whether the language is plain, [the Court] must read the words in their context and with a view to their place in the overall statutory scheme." *Id.* (quotations omitted). Moreover, the court "'must give effect, if possible, to every clause and word of a statute.'" *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (quoting *Loughrin v. United States*, 573 U.S. 351, 358

(2014)); *see also Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) ("each word Congress uses is there for a reason") (citing A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 174–179 (2012)). "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.").

Defendant argues that the term in section 18061(b)(1)(A), "third party administrators on behalf of group health plans," does not directly address the contribution obligation of self-insured group health plans. Def.'s Mot. at 21-22. Specifically, Defendant argues that "on behalf of" could be reasonably interpreted to mean "a self-insured group health plan is ultimately responsible for the reinsurance contributions, even though it may elect to use a TPA or ASO to transfer reinsurance contributions." *See* Def.'s Mot. at 21-22 (citing A3565, A2027); *see also Ohio v. United States*, 154 F. Supp. 3d 621, 625 (S.D. Ohio 2016) (finding that "Congress intended for all group health plans, including those operated by state or local governments, to pay into the Transitional Reinsurance Program.") *aff'd* 849 F.3d 313, 318-322 (6th Cir. 2017) (holding that the TRP applies to state-provided group health insurance plans). In other words, according to Defendant, the term "on behalf of" could purportedly indicate that a third-party administrator was merely a "conduit" and the statutory contribution obligations ran to the group health plan regardless if the plan was self-administered or used a third-party administrator. Def.'s Mot at 22 (citing A3565 ("Although self-insured group health plans are ultimately liable for reinsurance

contributions, a third-party administrator or administrative-services only contractor may be utilized for transfer of the reinsurance contributions.")); *see also* Def.'s Reply at 10-20. Defendant argues that HHS's interpretation of section 18061 requiring all group health plans to contribute to the program, is therefore permissible. Def.'s Reply at 10-20. This Court finds that HHS has warped Congress's plain language, likely as a means to its own ends.

The plain language of section 18061(b)(1)(A) requires "health insurance issuers, and third-party administrators on behalf of group health plans . . . to make [reinsurance contributions]." A presumption exists that each word Congress uses in a statute is there for a reason. *See Advocate Health Care Network*, 137 S. Ct. at 1659 (citing A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 174–179 (2012)). Defendant's interpretation is in complete contravention of that well-established tenet of statutory interpretation and effectively reads "third party administrators" out of the statute. If Congress meant that all group health plans would pay the TRP, it could have easily omitted its third-party administrator qualifier. Indeed, when Congress has meant to regulate self-administered group health plans, it has done so specifically. For instance, 42 U.S.C. § 1395y(b)(7)(A) explicitly identified when statutory duties applied to both an "entity serving as an insurer or third party administrator for a group health plan" and "a group health plan that is self-insured and self-administered. . . ." "If Congress has expressed its intention by clear statutory language, that intention controls and must be given effect." *Rosete*, 48 F.3d at 517; *accord Conn. Nat'l Bank*, 503 U.S. at 253-54 ("[C]ourts must presume that a legislature says in a statute what it

means and means in a statute what it says there." (cleaned up)).

It is also telling that HHS itself ultimately concluded "that the better reading of section 1341 is that a self-funded, self-administered plan should not be a contributing entity." 2014 Final Rule at A4702. Notwithstanding its express acknowledgment, HHS maintained "as a matter of public policy," that the its revised definition of "contributing entity" would only apply prospectively, for the 2015 and 2016 plan years, because "making the proposed exemption effective for the 2014 benefit year at this late stage would be disruptive to plans and issuers that have already set contribution rates and premiums, and could upset settled estimates with respect to expected reinsurance payments and contribution obligations." *Id.* at A4703. Although HHS acknowledged that its interpretation was not a natural reading of the statute, HHS would not correct its previous interpretation to apply to the 2014 plan year because it had already relied on that erroneous interpretation and reversing course to adhere to the plain language of the statute would be administratively difficult. This Court is not aware of an exception that would permit an agency to rewrite the law for plan year 2014 based on such purported administrative difficulties. HHS did not have authority to ignore the plain language of the statute in the name of public policy or administrative efficiency. *See Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 325 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."). This is especially true where, as here, HHS itself caused the "public policy" (or administrative difficulties) concern through its own admittedly erroneous interpretation.

Defendant's reliance on *Ohio v. United States*, a case involving TRP fees, is not persuasive. In *Ohio*, the State of Ohio challenged TRP fees as applied to include state and local entities. 154 F. Supp. 3d at 627-28. The district court held HHS did not err in requiring Ohio to pay a TRP fee because states and localities were included in the definition of "group health plans." In rejecting Ohio's challenge, the court explained that "[p]ut simply, Congress intended for all group health plans, including those operated by state and local governments, to pay into the Transitional Reinsurance Program." *Id.* at 625 (emphasis omitted). In a footnote, the district court stated

> Although § 18061(b)(1)(A) states that "third party administrators[,] on behalf of group health plans, are required to make payments," HHS has interpreted this provision to mean that group health plans themselves are liable for the contributions, "although [the plans] may elect to use a third-party administrator . . . for transfer of the reinsurance contributions." 45 C.F.R. § 153.20. This interpretation makes inherent sense given the simple fee-shifting that would occur were the rule otherwise.

Id. at 635 n.5.

This Court is not bound by the dicta in a district court decision. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). Indeed, the argument that self-administered plans are not required to pay the TRP fee was not before the district court in that case. In *Ohio v. United States*, the United States District Court for the Southern District of Ohio addressed, *inter alia*, "whether Congress intended the Transitional Reinsurance Program to apply to state and local governments that offer qualifying group health plans . . . ." 154 F. Supp. 3d at 628. But to the extent the *Ohio* district court held that section 1341 of the ACA

applies to all group health plans such a holding effectively reads "third party administrator on behalf of" out of the statute. As noted, HHS's purported "policy concerns," including concerns over "fee-shifting," do not trump the plain meaning of the statutory text. *See Util. Air Regulatory Grp.*, 573 U.S. at 325. Indeed, as HHS expressly acknowledged in its 2014 Final Rule, it would also make inherent sense for Congress to exclude group health plans that did not use a third-party administrator because these entities had little to no connection to the commercial healthcare market. 2014 Final Rule at A4702 ("[T]he better reading of section 1341 is that a self-funded, self-administered plan should not be a contributing entity.").

As EWTF clearly alleged that it is a self-funded, self-administered plan that does not use a third-party administrator, Defendant's motion dismiss EWTF's illegal exaction claim must be denied.

II. OETF's and Stone Masons' Illegal Exaction Claims

OETF and Stone Masons allege that their TRP contribution respective payments for benefit years 2014, 2015, and 2016 constituted an illegal exaction because HHS's definition of "contributing entity" exceeded its statutory authority and was an unreasonable interpretation of 42 U.S.C. § 18061. *See generally* Compl ¶¶ 105-111.

In analyzing OETF's and Stone Masons' illegal exaction claims, the Court must again begin with the plain language of the statute. Plaintiffs argue that section 18061(b)(1)(A) applies only to health insurance issuers and commercial issuers acting as administrators and because OETF and Stone Masons' third-party administrators are not also health insurers. Pls.' Resp. at 27-28.

This argument is unavailing. Nothing in the statute precludes HHS from calculating fees for group health plans administered by an ASO. The statute does not differentiate between third-party administrators, which are also health insurance issuers, and those third-party administrators, which are not. Moreover, section 18061(b)(3)(A) explicitly grants authority to HHS to establish a specific method to calculate the reinsurance contribution fee for group health plans which use a third-party administrator. Section 18061(b)(3)(A) states that "contribution amount[s] for any plan year may be based on the percentage of revenue of each issuer and the total costs of providing benefits to enrollees in *self-insured plans* . . . ." 42 U.S.C. § 18061 (emphasis added). The statute's reference to "self-insured plans" in the context of section 18061(b)(3)(A)'s general instruction for calculating reinsurance contributions clearly indicates Congress's intention to subject self-insured plans that use a third-party administrator to reinsurance contributions.

Plaintiffs next contend that section 18061's reference to "commercial book of business" and NAIC indicates that Congress intended TRP to apply to health insurance issuers. Pls.' Resp. at 7, 30-31. While section 18061 indicates that Congress placed emphasis on health insurance issuers, section 18061's reference to a "commercial book of business" or to NAIC does not prohibit HHS from defining "contributing entity" to include self-insured group health plans. That Congress mandated more detailed instructions for health insurance issuers does not nullify section 18061(b)(1)(A)'s and 18061(b)(3)(A)'s references to group health plans that use a third-party administrator.

Next, Plaintiffs contend that HHS's interpretation was unreasonable because, under 42 U.S.C. § 18061(b)(1)(B),

only commercial health insurers could receive reinsurance payments. Pls.' Resp. at 1, 7-9, 18-19, 37-38. However, the plain language of section 18061 clearly permitted HHS to collect reinsurance contributions from self-insured group health plans while providing for only health insurance issuers to receive funds from the TRP. Section 18061(b)(1)(A) requires "health insurers issuers[] and third party administrators on behalf of group health plans" to contribute to the TRP. In the very next subparagraph, section 18061(b)(1)(B), mandates that only "health insurance issuers . . . that cover high risk individuals in the individual market" are eligible to receive payments out of the TRP fund. The proximity of these provisions indicates that Congress intended to define contributing entities differently than those entities that were eligible to receive TRP funds. *See Comm'r v. Lundy*, 516 U.S. 235, 250 (1996) ("The interrelationship and close proximity of these provisions of the statute presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." (internal quotations and citations omitted)). It is well-established, as the Supreme Court has observed, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citing *United States v. Wong Kim Bo*, 472 F.2d 710, 722 (5th Cir. 1972)); *see also Heino v. Shinseki*, 683 F.3d 1372, 1379 (Fed. Cir. 2012) (endorsing the *Russello* principle). As the statute at issue does not prohibit HHS from including Stone Masons and OETF funds within the definition of "contributing entity," this Court cannot find that HHS acted contrary to section 18061's plain language when

HHS defined "contributing entity" to include health care groups using ASO third-party administrators.

Nor is Plaintiffs' reliance on legislative history persuasive. In its opposition to Defendant's motion, Plaintiffs cite (1) the September 2009 Senate Finance Committee Mark of the America's Healthy Future Act of 2009, which Plaintiffs contend contained base text of what would later become ACA section 1341, and (2) June 2014 testimony before the House of Representatives by Mandy Cohen, Acting Deputy Administrator of HHS and Director of the Center for Consumer Information and Insurance Oversight. Pls.' Resp. at 33.

In September 2009, the Senate Finance Committee released the Chairman's Mark of the America's Healthy Future Act of 2009. Compl. ¶ 46 (citing *Legislation, H.R. 3590: Patient Protection and Affordable Care Act of 2009*, THE UNITED STATES SENATE COMMITTEE ON FINANCE, http://www.finance.senate.gov/legislation/details/hr-3590; Chairman's Mark, America's Healthy Future Act of 2009, THE UNITED STATES SENATE COMMITTEE ON FINANCE https://www.finance.senate.gov/imo/media/doc/091609%20Americas_Healthy_Future_Act.pdf (last visited Mar. 5, 2019). The Chairman's Mark stated:

> [a]s a condition of issuing commercial, major medical health insurance policies or administering benefit plans for major medical coverage in years 2013, 2014, and 2015, all health insurance issuers would be required to contribute to a reinsurance program for individual policies that is [sic] administered by a non-profit reinsurance entity that would function as described below.

Pls.' Resp. at 31 (emphasis omitted) (citing Compl. ¶ 46). The Chairman's Mark also stated that the "requirement

would be enforced at the state level" and the "National Association of Insurance Commissioners (NAIC) would be directed to develop a model for states to adopt." *Id* (citing Compl. ¶¶ 36 n.10, 47. The Chairman's Mark further provided "[t]he contribution amount must proportionally reflect each entity's fully insured commercial book of business for all major medical products and third-party administrators (TPA) fees (e.g., based on percentage of revenue or flat, per enrollee amount)." *Id.* (citing Compl. ¶ 47). Plaintiffs note that there is no discussion in the Chairman's Mark of non-commercial employee benefits. Pls.' Resp. at 32.

In June 2014, Mandy Cohen, Acting Deputy Administrator of HHS, testified before the House Committee on Oversight and Government Reform that the intent of the TRP was "to help provide stability in the health insurance market as the Affordable Care Act extends new benefits to consumers" and "encouraging issuers to participate in the Marketplace and compete on price and quality." Compl. ¶ 44.[10]

"[L]egislative history is not the law." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018). The Constitution establishes specific procedures for the enactment of statutes. *See* U.S. Const. Art. I, § 7, cls. 2, 3. Statements

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[10] *Testimony by Mandy Cohen M.D., Acting Deputy Administrator and Director Center for Consumer Information and Insurance Oversight Centers for Medicare & Medicaid Services U.S. Department of Health and Human Services (HHS) on The Affordable Care Act's Premium Stabilization Programs: Reinsurance, Risk Corridors, and Risk Adjustment* before Committee on Oversight & Government Reform United States House of Representatives (June 18, 2014), https://docs.house.gov/meetings/GO/GO28/20140618/102420/HHRG-113-GO28-Transcript-20140618.pdf.

made by legislators whether made on the floor or in a committee report are not subject to bicameralism and presentment. *See INS v. Chadha*, 462 U.S. 919, 946-52 (1983). The legislature acts as a collective and the enactment of a law often represents a compromise between individual legislators and between individual legislators and the president. The Court's reliance on statements made by individual legislators and committees "would demean the constitutionally prescribed method of legislating to suppose that its elaborate apparatus for deliberation on, amending, and approving a text is just a way to create some evidence about the law, while the real source of legal rules is the mental processes of legislators." *Matter of Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.). This Court accordingly looks to the plain language of the statute and not to legislative history when conducting its interpretation.

Even if this Court were to consider the legislative history cited by Plaintiffs, there is nothing in the legislative history to suggest that Congress clearly intended for section 18061 to only apply to those entities. *Azar v. Allina Health Svcs.*, 139 S. Ct. 1804, 1814 (2019) ("And even those of us who believe that clear legislative history can 'illuminate ambiguous text" won't allow 'ambiguous legislative history to muddy clear statutory language.'" (internal citation omitted)).

The Court's analysis must, therefore, proceed to *Chevron* step two, in which the Court should defer to HHS's interpretation of section 18061(b) as long as it "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute. . . ." *Chevron*, 467 U.S. at 845 (internal quotations and citation omitted).

Plaintiffs argue that HHS's interpretation of section 18061(b) is unreasonable because according to Plaintiffs, Stone Masons and OETF were not part of the problem Congress sought to fix through the TRP. Specifically, Plaintiffs argue that the TRP was designed "to help stabilize premiums for coverage in the individual market during the first 3 years of operation of an Exchange . . . when the risk of adverse selection related to new rating rules and market changes [was] greatest." Pls.' Resp. at 30 (quoting 42 U.S.C. § 18061(c)(1)(A)); *see also* Compl. ¶¶ 6, 38. Plaintiffs argue that "ERISA Funds do not collect premiums, do not operate in the individual market, and are not sold on the ACA's exchanges, they neither affect nor are affected by the problem the TRP was designed to address." Pls.' Resp. at 30 (citing Compl. ¶¶ 28, 33). Additionally, because Plaintiffs did not exclude participants with pre-existing conditions, Plaintiffs did not undertake additional risk when Congress abolished denials for pre-existing conditions under the ACA. *See* Compl. ¶¶ 38, 50; Pls.' Resp. at 4-6.

Defendant argues that in view of TRP's goal of stabilizing premiums, HHS reasonably required both health insurance issuers and self-insured group health plans to contribute to the reinsurance program, because such an interpretation distributed the risk of enrolling new high-risk patients over the entire health insurance market. Def.'s Mot. at 27, 30.

This Court agrees with Defendant that HHS reasonably interpreted section 18061(b) considering the section's text, structure, and purpose. Plaintiffs understandably take issue with the fact that HHS's implementing regulations require Plaintiffs' group health plans to pay into a program from which they were not eligible to receive payment and which was purportedly

enacted to address an issue non-attributable to Plaintiffs' group health plans. In enacting section 18061, however, Congress did not limit or define "contributing entities" to those entities eligible to receive payment out of the fund. Nor did Congress limit HHS's authority to define "contributing entity" to those entities that excluded individuals with pre-existing conditions. As reflected in much of the ACA, many pay into the program, but that doesn't always equate to those entities or persons eligible to receive benefits. *See e.g.*, 42 U.S.C. § 18062(b) (instructing HHS to establish the risk corridors program under which health plans with lower allowable cost pay into the program and health plans with higher allowable cost receive payment under the program).

Congress charged HHS, not this Court, with authority to implement the TRP. See 42 U.S.C. §§ 18041(a)(1)(C) (delegating authority to HHS to issue regulations for, *inter alia*, TRP), 18061(b)(1) (requiring the Secretary of HHS to establish standards under section 18041(a)). Whether or not this Court agrees with *Chevron*, it is bound to follow it as a lower court, and HHS's interpretation is entitled to deference "[i]f this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute . . . ." *Chevron*, 467 U.S. at 845 (internal quotations and citation omitted).

As stated in the ACA, the primary purpose of the TRP was to help stabilize premiums for coverage in the individual market during the first three years of operation of the ACA when the risk of adverse selection related to new rating rules and market changes was greatest. *See* 42 U.S.C. § 18061(c)(1)(A) (stating the purpose for "applicable reinsurance entity"). HHS, through three separate rounds of rulemaking, carefully considered the

statutory language and comments from interested parties to tailor a rule that would, in its view, effectuate this purpose. HHS received conflicting comments suggesting that exempting those plans from the contribution would decrease the premium stabilization effects of the program. *See, e.g.*, Def.'s Mot. App. 8 at A3738, Comment from BlueCross BlueShield Association to CMS (Dec. 23, 2013) (ECF No. 6-8) ("The exclusion of self-funded plans that do not use [third-party administrators] from the reinsurance contribution pool will shift costs to remaining contributors. . . . [S]hould the exemption for self-insured, self-administered plans be finalized into law, the industry would need to pass through the shortfall amount to all commercial lines of business. This would discourage self-insured groups that use a [third-party administrator], as well as fully-insured groups."); Def.'s Mot. App. 8 at A4015-27, Comment from National Coordinating Committee for Multiemployer Plans (NCCMP) to CMS (Dec. 26, 2013) (arguing that requiring self-administered group health to make temporary reinsurance contributions while barring their plans from realizing any benefit of risk pooling is unfair and contrary to the plain language of section 18061). Through the iterative rulemaking process, HHS concluded that TRP's intended stabilizing effects would be best achieved by including within the definition of "contributing entity" the widest statutorily permissible range of health insurance issuers and group health plans. *See* 2013 Final Rule at A3628.

Even if this Court disagrees with HHS's rational, it is not this Court's job to make policy. *See Chevron*, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."); *Anderson v. Wilson*, 289

U.S. 20, 27 (1933) ("We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it.").

Accordingly, Defendant's motion to dismiss is granted with respect to OETF's and Stone Masons' illegal exaction claims.

III. Plaintiffs' Taking Claims

Even if HHS's definition were permissible under the ACA, this Court must determine whether EWTF, OETF, and Stone Masons may still recover under their Takings claims.[11]

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. This Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

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[11] The parties' filings do not distinguish between EWTF, OETF, and Stone Masons for their Takings arguments; and, for purposes of this Memorandum and Order's Takings analysis, the Court does not distinguish between the two. *See generally* Def.'s Mot. at 11-14; Pls. Resp. 12-21. As noted, if EWTF ultimately succeeds on its illegal exaction claim, it cannot also proceed under its Takings Claim. *See Reid*, 148 Fed. Cl. at 528. However, Plaintiffs (including EWTF) have not cross-moved for summary judgment on any of its claims. Accordingly, the Court cannot affirmatively rule in favor of EWTF on its illegal exaction claim at this time. Consequently, the Court includes EWTF in its Takings analysis in this Memorandum and Order.

The Federal Circuit has developed a two-step approach to Takings claims. *See Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004); *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002). First, a plaintiff must identify the property interest that was allegedly taken. *Adams*, 391 F.3d at 1218. Second, "[o]nce a property right has been established, the court must then determine whether a part or a whole of that interest has been appropriated by the government for the benefit of the public." *Members of Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005) (citing *Conti v. United States*, 291 F.3d 1334, 1339 (Fed. Cir. 2002)); *see also Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000) ("If a plaintiff possesses a compensable property right, . . . a court determines whether the governmental action at issue constituted a taking of that 'stick.'" (citing *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995))). Courts cannot reach this second step without initially identifying a cognizable property interest. *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1329 (Fed. Cir. 2012); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2005).

Plaintiffs argue that they have a cognizable property interest because their group healthcare plans consist of "a specific fund" that is "held in trust for the benefit of plan participants and their families pursuant to federal law." Pls.' Resp. at 12-16 (citing 29 U.S.C. § 1103(c) (ERISA's exclusive benefits provision)); Compl. ¶¶ 92-93. Plaintiff argues that the TRP constituted either a per se or regulatory Taking because it deprived the plan participants of those funds without receiving any benefit from the TRP. Compl. ¶¶ 94-95.

Defendants argue Plaintiffs fail to state a valid Takings claim because the TRP creates an ordinary obligation to pay money. Def.'s Mot. at 11-14; Def.'s Reply at 3. Defendant also argues that, even assuming that Plaintiffs have a cognizable property interest in their ERISA fund assets, Plaintiffs' Takings claims fail, under either as a per se or regulatory Taking, because Plaintiffs do not have a reasonable expectation that ERISA funds would be shielded from legislative enactments requiring payment. Def.'s Mot. at 14; Def.'s Reply at 5 (citing *Boyle v. Anderson*, 68 F.3d 1093, 1102 (8th Cir. 1995) (holding ERISA's exclusive benefit provisions were "intended to prohibit . . . wrongful diversions of trust assets" resulting from "self-dealing, imprudent investing, and misappropriation of funds.").

If Plaintiffs do not have a cognizable property interest, their Takings claims must fail. *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir.2001) ("[O]nly persons with a valid property interest at the time of the taking are entitled to compensation.") (citing, *inter alia*, *Almota Farmers Elevator & Warehouse Co. v. United State*s, 409 U.S. 470, 473-74 (1973)). The Constitution itself neither creates nor defines the property interests that, if taken by the Government, are compensable under the Fifth Amendment. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). Rather, "existing rules or understandings that stem from an independent source, such as state," federal, or common law, create and define the dimensions of property interests for purposes of establishing a cognizable right and hence a potential taking. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (quoting *Roth*, 408 U.S. at 577). As the Federal Circuit has noted:

> Property interests are about as diverse as the human mind can conceive. Property interests may be real and personal, tangible and intangible, possessory and nonpossessory. They can be defined in terms of sequential rights to possession (present interests—life estates and various types of fees—and future interests), and in terms of shared interests (such as those of a mortgagee, lessee, bailee, adverse possessor), and there are interests in special kinds of things (such as water, and commercial contracts). And property interests play across the entire range of legal ideas.

Adams v. United States, 391 F.3d at 1219 (quoting *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1572 n.32 (Fed. Cir. 1994)).

The issue here is whether Plaintiffs' ERISA funds constitute a "specific fund of money" protected by an "identified property interest." Ordinarily, the "mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001) (en banc); *Kitt v. United States*, 277 F.3d 1330, 1336 (Fed. Cir. 2002), *on reh'g in part*, 288 F.3d 1355 (Fed. Cir. 2002) (holding that a tax imposed on early withdrawals from individual retirement accounts was not a taking); *see also United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) (holding that a federal statute that required the payment of a portion of an arbitral award from the Iran–United States Claim Tribunal to the United States government did not violate the Takings Clause because, in part, "[i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible."); *U.S. Shoe*

Corp. v. United States, 296 F.3d 1378, 1383 (Fed. Cir. 2002) (holding that a statute requiring the payment of Harbor Maintenance Tax on exported merchandise violated the Export Clause, but was not a taking). However, when a specific fund of money is protected by an identifiable property interest, a Taking may occur. *See Commonwealth Edison Co.*, 271 F.3d at 1339-40.

For instance, in *Webb's Fabulous Pharmacies v. Beckwith*, Eckerd's of College Park, Inc. entered into an agreement to purchase substantially all the assets of Webb's Fabulous Pharmacies. 449 U.S. 155, 156 (1980). The debts of Webb's appeared to be greater than the purchase price, so, Eckerd's filed a complaint of interpleader in state court to protect itself from Webb's creditors, interpleading as defendants both Webb's and its creditors and tendering the purchase price to the court. *Id.* at 156-57. The state court deducted a statutorily prescribed fee for maintenance of the fund in the amount of $9,228.74 and an additional amount from the principal of the fund of $40,200 pursuant to court order. *Id.* at 157-58. The remaining principal was paid to a court-appointed receiver to act on behalf of Webb's. *Id.* at 158. However, the clerk of court retained all the interest earned on the principal, approximately $100,000. *Id.* at 157-158. The receiver challenged the clerk's retention of the interest, arguing that the company's creditors were entitled to the interest. *Id.*

The Supreme Court held that the state court's appropriation of the interest earned on the interpleader fund, in excess of a fee for services, resulted in a taking under the Fifth Amendment. *Id.* at 160-61, 164-65. The Supreme Court explained that the deposited fund of the purchase price for the assets of Webb's "plainly was private property," which was "held only for the ultimate

benefit of the [receivers], not for the benefit of the court and not for the benefit of the county." *Id.* at 160-61. The Supreme Court also noted that under common law the "general rule [is] . . . that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." *Id.* at 162-63 (internal citation omitted). The Supreme Court further held that the retention in interest "[was] not reasonably related to the costs of using the courts" but rather "a forced contribution to general government revenues" which amounted to a Taking. *Id.* at 163.

In *Phillips v. Washington Legal Found.*, the Supreme Court examined the constitutionality of a Texas law mandating that interest earned on client funds deposited by attorneys into Interest on Lawyer Trust Accounts (IOLTA) be paid to foundations financing legal services for low-income populations. 524 U.S. at 159-60. Texas had required that lawyers holding nominal amounts of client funds, which would otherwise be unable to earn interest, place such funds in a separate, interest-bearing bank account. *Id.* at 156. Again, applying the "interest follows principal" rule, *id.* at 168, the Supreme Court held that interest generated by client funds in IOLTA accounts remained the private property of those clients. *Id.* at 172. The Supreme Court also noted that the interest income transferred to Texas could not reasonably be viewed "as payment for services rendered by the State." *Id.* at 171 (internal quotation and citation omitted). Thus, the Supreme Court held that the use of the IOLTA's interest income by Texas amounted to a taking.

Plaintiffs argue that the present action is analogous to *Webb's* and *Phillips*. That may be true, but it is difficult for the Court to discern that on the record before it.

Important gaps in the record prevent the Court from conclusively determining whether Plaintiffs' ERISA funds are similar to the funds at issue in Webb's and Phillips. Both *Webb's* and *Phillips* addressed funds covered by an identifiable property interest, *i.e.*, the principal owner's common law right to interest income. *Webb's*, 449 U.S. at 155-56; *Phillips*, 524 U.S. at 160, 165. In both Webb's and Phillips, the principal funds were held by the government but belonged to the specific depositors. *Webb's*, 449 U.S. at 162-63; *Phillips*, 524 U.S. at 172. Under applicable common law, as the owner of the principal funds, the *Webb's* and *Phillips* plaintiffs were entitled to any interest earned on those funds. *Webb's*, 449 U.S. at 163-64; *Phillips*, 524 U.S. at 172.

Here, unlike in *Webb's* and *Phillips*, the record is unclear as to whether EWTF, OETF, and Stone Masons have a specific property right that the TRP operates to exact from the Funds. As the record currently stands, Plaintiffs have not identified a cognizable property interest that specific individuals possess in the fund. Instead, Plaintiffs rely on section 1103(c) of ERISA's "exclusive benefits provision" as support for the proposition that the group health plans constitute a "specific fund of money." *See e.g.*, Compl. ¶¶ 29, 93; Pls.' Resp. at 4, 15-17, 20. This reliance on ERISA's "exclusive benefits provision," alone, does not suffice to show a cognizable property interest.

The exclusive benefits provision requires that ERISA plan fiduciaries act solely in the interest of participants and beneficiaries and provide benefits exclusively to them or defray reasonable plan administrative costs. 29 U.S.C. § 1104(a)(1)(A); *see also* 60A Am. Jur. 2d Pensions § 371. ERISA's exclusive benefits provision does not create any property interest as recognized by common law, but

instead creates a statutory duty of care on the part of the trustees to hold "all assets of an employee benefit plan . . . in trust" for "the exclusive purposes of providing benefits to participants in the plan and their beneficiaries. . . ." 29 U.S.C. § 1103(a), (c)(1). ERISA's "exclusive benefits provision" was "intended to prohibit . . . wrongful diversions of trust assets" resulting from "self-dealing, imprudent investing, and misappropriation of plan funds." *Boyle*, 68 F.3d at 1102 (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15 (1987)). The Government's imposition of this statutory duty on fund trustees does not alone create a cognizable property interest in ERISA funds. *See E. Enterprises v. Apfel*, 524 U.S. 498, 544 (1998) (Kennedy, J., concurring in part) ("[T]he Government's imposition of an obligation between private parties, or destruction of an existing obligation, must relate to a specific property interest to implicate the Takings Clause.").[12] Nor was ERISA's exclusive benefits provision

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[12] *Eastern Enterprises v. Apfel* involved a challenge to the retroactive liability provisions of the Coal Industry Retiree Health Benefit Act of 1992, codified at 26 U.S.C. §§ 9701–9722 (the "Coal Act") which required a former mining company to pay a large sum of money for the health benefits of retired employees. 524 U.S. at 504. Writing for the plurality, Justice O'Connor, joined by three other justices (Chief Justice Rehnquist, Justice Scalia, and Justice Thomas), concluded that the retroactive impact of the Coal Act as applied to Eastern Enterprises resulted in an unconstitutional taking of property because it placed a "severe, disproportionate, and extremely retroactive burden on Eastern." *Id.* at 538. As explained by the Federal Circuit in *Commonwealth Edison Co.*, the plurality found the law was unconstitutional, but five Justices of the Court determined that the law did not effect a Taking, because the law did not appropriate a specific property interest but rather merely imposed an obligation to pay money. 271 F.3d at 1339 (citing *Eastern Enterprises*, 524 U.S. at 540). In his concurrence, Justice Kennedy

designed to protect funds from costs arising from generally applicable federal healthcare regulations, like TRP, which appear to simply increase the cost of administration or augment the duty of the fund's trustees. *See United Wire, Metal & Mach. Health & Welfare Fund v. Morristown Mem'l Hosp.*, 995 F.2d 1179, 1196 (3d Cir. 1993) ("[W]e are unwilling to infer from ERISA's prohibition against applying fund assets for the benefit of others a Congressional intent to foreclose health care cost regulation of the kind here challenged."); *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 645-46 (1993) (noting that ERISA plans have long been the object of legislative concern and that "those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative

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acknowledged that the statute "impose[d] a staggering financial burden" (which influenced his conclusion that it violated due process). *Eastern Enterprises*, 524 U.S. at 540 (Kennedy, J., concurring). Nevertheless, Justice Kennedy explained, the law did not effect a Taking because it did not "operate upon or alter" a "specific and identified propert[y] or property right," such as an estate in land (e.g., a lien on a particular piece of property), a valuable interest in an intangible (e.g., intellectual property), or even a bank account or accrued interest. *Id.* at 540–541. Instead, "[t]he law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so." *Id.* at 540. Justice Breyer, writing for three other Justices, (Justice Stevens, Justice Souter, and Justice Ginsburg) agreed that the Takings Clause was not implicated. *Id.* at 554–555 (dissenting opinion). He stated that the Takings Clause applies only when the government appropriates a "specific interest in physical or intellectual property" or "a specific, separately identifiable fund of money." By contrast, the Clause has no bearing when the government imposes "an ordinary liability to pay money. . . ." *Id.* at 554-55 (citations omitted).

end." (internal quotations and citation omitted)). Indeed, section 1103(c)(1) explicitly states that trust assets may be used to "defray[] reasonable expenses of administering the plan." The record demonstrates that TRP fees "constitute a permissible expense of the plan for purposes of Title I of [ERISA.]" 2013 Final Rule at A3627 n.41 ("The Department of Labor has reviewed this rule and advised that paying required reinsurance contributions would constitute a permissible expense of the plan for purposes of Title I of the Employee Retirement Income Security Act (ERISA) because the payment is required by the plan under the Affordable Care Act as interpreted in this rule." (citing Advisory Opinion 2001–01A to Mr. Carl Stoney, Jr., available at www.dol.gov/ebsa discussing settlor versus plan expenses)). Therefore, by the ERISA's exclusive benefits provision's own terms, TRP contribution fees would not deprive Plaintiffs of a property interest in their ERISA funds.

However, Plaintiffs and the beneficiaries of their plans may have some property right in the employee contributions paid into the ERISA funds or may have some contractual right to these funds. *See Nat'l Educ. Ass'n-Rhode Island ex rel. Scigulinsky v. Ret. Bd. of Rhode Island Employees' Ret. Sys.*, 172 F.3d 22, 30 (1st Cir. 1999) (stating that the Takings Clause arguably protects *property* interests in funds contributed to an ERISA pension plan); *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 230-31 (1986) (O'Connor, J., concurring) (finding that ERISA's broad definition of defined benefit plan "may in some circumstances raise constitutional doubts under the Taking Clause or Due Process Clause."). In this respect, Plaintiffs' ERISA plans may be distinguishable from *Adams*, 391 F.3d at 1225, upon which Defendant relies for the proposition that "statutory obligation to be paid money" is not a cognizable

"property interest grounded in property law." Def.'s Mot. at 12-13 (quoting *Adams*, 391 F.3d at 1212, 1224-25). In *Adams*, federal employees received overtime compensation at a rate less than one-and-one-half times their regular rate of pay. 391 F.3d at 1214. The *Adams* plaintiffs alleged, *inter alia*, that they had a cognizable property interest "in payment of underpaid overtime compensation according to FLSA rates . . . ." *Id.* at 1219. In rejecting these arguments, the Federal Circuit held that where plaintiff is owed money under a statute and the government does not pay the money, the government's non- payment of the statutory entitlement is not a taking under the Fifth Amendment. *See id.* at 1225. The Federal Circuit distinguished plaintiff's alleged statutory right to unpaid overtime wages from an "express right[s] under [this] contract" or an "actual sum of money." *Id.* at 1221-22. In doing so the Federal Circuit held that a contractual rights and paid sums may be cognizable property interests. *Id.* at 1220.

Unfortunately, neither party has submitted to this Court information concerning how Plaintiffs' plans are funded or the nature of the agreements governing the use of the funds. There is simply no pertinent information on the record before this Court. Accordingly, at this time this Court cannot discern whether or not Plaintiffs or their beneficiaries have a particular property interest in the funds that were used to pay TRP contributions. Further, other courts that have decided Takings claims involving ERISA or similar benefit schemes have found it prudent to address the *Penn Central* three factor test before categorically rejecting a plaintiff's Takings claim. *See Concrete Pipe & Prod. of California, Inc.*, 508 U.S. at 604-05 (analyzing whether "withdrawal liability" under ERISA, 29 U.S.C. §§ 1301–1461 violated the Taking Clause under the *Penn Central* three factor test);

Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 225 (1986) (same); *see also Maritrans, Inc. v. United States*, 40 Fed. Cl. 790, 797 (1998) (rejecting the government's theory that the regulated nature of the industry precludes a cognizable Fifth Amendment property interest in light of the Supreme Court's decisions in *Connolly* and *Concrete Pipe*).

At this point, there is insufficient information before this Court to grant Defendant's motion. To sufficiently assess Plaintiffs' Takings claim (either on a subsequently-filed motion to dismiss or a motion for summary judgment) the parties must provide the Court with further information concerning: (1) the nature of plaintiffs' property interest in their respective group health care plans, and (2) the effect, if any, the TRP had on those alleged property interests. For this reason, this Court denies without prejudice Defendant's motion to dismiss Plaintiffs' Taking claims.[13]

CONCLUSION

For the reasons stated, Defendant's motion is **GRANTED in part** and **DENIED in part**. Consistent with this Memorandum and Order, Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (ECF No. 6) is:

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[13] To the extent the parties contend that this Court should consider Defendant's motion as one for summary judgment, the motion is similarly denied without prejudice as there are genuine issues of material fact in dispute concerning the nature of the plaintiffs' property interest and the effect the TRP had on those alleged property interests.

1. **DENIED** with respect to EWTF's illegal exaction claim;
2. **GRANTED** with respect to OETF's and Stone Masons' illegal exaction claim; and
3. **DENIED** with respect to Plaintiffs' Fifth Amendment Takings claims.

Within fourteen (14) days of this Memorandum and Order, the parties shall file a Joint Status Report, including a joint proposal for further proceedings.

IT IS SO ORDERED.

s/ Eleni M. Roumel
ELENI M. ROUMEL
Judge

Dated: July 30, 2021
Washington, D.C.

APPENDIX E

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 19-353 C

Filed: July 10, 2023

ELETRICAL WELFARE TRUST FUND, et al.

Plaintiffs

JUDGMENT

v.

THE UNITED STATES

Defendant

Pursuant to the court's Memorandum and Order, filed July 7, 2023, granting defendant's motion for partial summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered in favor of defendant.

Lisa L. Reyes
Clerk of Court

By: s/Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amed. V.

…

[N]or shall property be taken for public use, without just compensation.

* * *

29 U.S.C. § 186. Restrictions on financial transactions

…

(c) Exceptions

…

The provisions of this section shall not be applicable … (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance,

disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

…

* * *

29 U.S.C. § 1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

> **(1)** the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or
>
> **(2)** authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title

…

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d), or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of Title 26 (as in effect on December 29, 2022), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan. …

* * *

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

…

* * *

42 U.S.C. § 300gg-91. Definitions

(a) Group health plan

(1) Definition

The term "group health plan" means an employee welfare benefit plan (as defined in section 3(1) of the

Employee Retirement Income Security Act of 1974) to the extent that the plan provides medical care (as defined in paragraph (2)) and including items and services paid for as medical care) to employees or their dependents (as defined under the terms of the plan) directly or through insurance, reimbursement, or otherwise. Except for purposes of part C of title XI of the Social Security Act (42 U.S.C. 1320d et seq.), such term shall not include any qualified small employer health reimbursement arrangement (as defined in section 9831(d)(2) of Title 26).

…

* * *

42 U.S.C. § 18021. Qualified health plan defined

…

(b) Terms relating to health plans

In this title:

…

(3) Group health plan

The term "group health plan" has the meaning given such term by section 300gg-91(a) of this title.

* * *

42 U.S.C. § 18061. Transitional reinsurance program for individual market in each State

(a) In general

Each State shall, not later than January 1, 2014—

(1) include in the Federal standards or State law or regulation the State adopts and has in effect under section 18041(b) of this title the provisions described in subsection (b); and

(2) establish (or enter into a contract with) 1 or more applicable reinsurance entities to carry out the reinsurance program under this section.

(b) Model regulation

(1) In general

In establishing the Federal standards under section 18041(a) of this title, the Secretary, in consultation with the National Association of Insurance Commissioners (the "NAIC"), shall include provisions that enable States to establish and maintain a program under which—

(A) health insurance issuers, and third party administrators on behalf of group health plans, are required to make payments to an applicable reinsurance entity for any plan year beginning in the 3-year period beginning January 1, 2014 (as specified in paragraph (3); and

(B) the applicable reinsurance entity collects payments under subparagraph (A) and uses amounts so collected to make reinsurance payments to health insurance issuers described in subparagraph (A) that cover high risk individuals in the individual market (excluding grandfathered health plans) for any plan year beginning in such 3-year period.

(2) High-risk individual; payment amounts

The Secretary shall include the following in the provisions under paragraph (1):

(A) Determination of high-risk individuals

The method by which individuals will be identified as high risk individuals for purposes of the

reinsurance program established under this section. Such method shall provide for identification of individuals as high-risk individuals on the basis of—

(i) a list of at least 50 but not more than 100 medical conditions that are identified as high-risk conditions and that may be based on the identification of diagnostic and procedure codes that are indicative of individuals with pre-existing, high-risk conditions; or

(ii) any other comparable objective method of identification recommended by the American Academy of Actuaries.

(B) Payment amount

The formula for determining the amount of payments that will be paid to health insurance issuers described in paragraph (1)(B) that insure high-risk individuals. Such formula shall provide for the equitable allocation of available funds through reconciliation and may be designed—

(i) to provide a schedule of payments that specifies the amount that will be paid for each of the conditions identified under subparagraph (A); or

(ii) to use any other comparable method for determining payment amounts that is recommended by the American Academy of Actuaries and that encourages the use of care coordination and care management programs for high risk conditions.

(3) Determination of required contributions

(A) In general

The Secretary shall include in the provisions under paragraph (1) the method for determining the amount each health insurance issuer and group health plan described in paragraph (1)(A) contributing to the reinsurance program under this section is required to contribute under such paragraph for each plan year beginning in the 36-month period beginning January 1, 2014. The contribution amount for any plan year may be based on the percentage of revenue of each issuer and the total costs of providing benefits to enrollees in self-insured plans or on a specified amount per enrollee and may be required to be paid in advance or periodically throughout the plan year.

(B) Specific requirements

The method under this paragraph shall be designed so that—

(i) the contribution amount for each issuer proportionally reflects each issuer's fully insured commercial book of business for all major medical products and the total value of all fees charged by the issuer and the costs of coverage administered by the issuer as a third party administrator;

(ii) the contribution amount can include an additional amount to fund the administrative expenses of the applicable reinsurance entity;

(iii) the aggregate contribution amounts for all States shall, based on the best estimates of the NAIC and without regard to amounts described in clause (ii), equal $10,000,000,000 for plan years beginning in 2014, $6,000,000,000

for plan years beginning2 2015, and $4,000,000,000 for plan years beginning in 2016; and

(iv) in addition to the aggregate contribution amounts under clause (iii), each issuer's contribution amount for any calendar year under clause (iii) reflects its proportionate share of an additional $2,000,000,000 for 2014, an additional $2,000,000,000 for 2015, and an additional $1,000,000,000 for 2016.

Nothing in this subparagraph shall be construed to preclude a State from collecting additional amounts from issuers on a voluntary basis.

(4) Expenditure of funds

The provisions under paragraph (1) shall provide that—

(A) the contribution amounts collected for any calendar year may be allocated and used in any of the three calendar years for which amounts are collected based on the reinsurance needs of a particular period or to reflect experience in a prior period; and

(B) amounts remaining unexpended as of December, 2016, may be used to make payments under any reinsurance program of a State in the individual market in effect in the 2-year period beginning on January 1, 2017.

Notwithstanding the preceding sentence, any contribution amounts described in paragraph (3)(B)(iv) shall be deposited into the general fund of the Treasury of the United States and may not

be used for the program established under this section.

(c) Applicable reinsurance entity

For purposes of this section—

(1) In general

The term "applicable reinsurance entity" means a not-for-profit organization—

(A) the purpose of which is to help stabilize premiums for coverage in the individual market in a State during the first 3 years of operation of an Exchange for such markets within the State when the risk of adverse selection related to new rating rules and market changes is greatest; and

(B) the duties of which shall be to carry out the reinsurance program under this section by coordinating the funding and operation of the risk-spreading mechanisms designed to implement the reinsurance program.

(2) State discretion

A State may have more than 1 applicable reinsurance entity to carry out the reinsurance program under this section within the State and 2 or more States may enter into agreements to provide for an applicable reinsurance entity to carry out such program in all such States.

(3) Entities are tax-exempt

An applicable reinsurance entity established under this section shall be exempt from taxation under chapter 1 of Title 26. The preceding sentence shall not apply to the tax imposed by section 511 such3 title

(relating to tax on unrelated business taxable income of an exempt organization).

(d) Coordination with State high-risk pools

The State shall eliminate or modify any State high-risk pool to the extent necessary to carry out the reinsurance program established under this section. The State may coordinate the State high-risk pool with such program to the extent not inconsistent with the provisions of this section.