UNITED STATES COURT OF FEDERAL CLAIMS

OWL CREEK ASIA I, L.P., *et al.*, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	**Redacted Version** Case No. 18-281C (Chief Judge Sweeney)
APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, *et al.*, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-370C (Chief Judge Sweeney)
AKANTHOS OPPORTUNITY MASTER FUND, L.P., Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-369C (Chief Judge Sweeney)
CSS, LLC, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-371C (Chief Judge Sweeney)

MASON CAPITAL L.P., *et al.*,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 18-529C
(Chief Judge Sweeney)

CORRECTED COMBINED OPPOSITION TO DEFENDANT'S OMNIBUS MOTION TO DISMISS,

OF PLAINTIFFS
OWL CREEK ASIA I, L.P., *et al.*,
APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, *et al.*,
AKANTHOS OPPORTUNITY MASTER FUND, L.P.,
CSS, LLC, and
MASON CAPITAL L.P., *et al.*

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INTRODUCTION

Plaintiffs, holders of over $4 billion in junior preferred stock of Fannie Mae and Freddie Mac (the "Companies"), purchased primarily after the Federal Housing Finance Agency ("Agency") placed the companies under conservatorship in the 2008 recession, had the economic value of their property wiped-out when that Agency in 2012 "worked with" another federal agency (Treasury) to decree that those profitable companies direct "every dollar of earnings" to Treasury. The agencies did so by "amending" 2008 agreements by which Treasury had purchased senior preferred stock as well as warrants to obtain a super-majority of common stock for a nominal price. Their action flew in the face of the longstanding "background principles," derived from rules of trust and property law, by which a conservator, far from being free to set a company perpetually on the brink of insolvency, is a fiduciary charged with rehabilitating it—preserving and conserving its assets and property, putting it in a sound and solvent condition, and ultimately restoring it to normal operations and ending the oversight. Between 2008 and 2012, the government repeatedly reaffirmed that such background principles governed these conservatorships—including in public statements, congressional testimony, and rulemaking.

To redress this wiping out, these five groups of holders, the "Junior Preferred Plaintiffs," brought direct damages actions against the United States for seizing for itself all earnings of these Companies in perpetuity. They allege takings, illegal exactions (in the alternative), breaches of fiduciary duty, and breaches of an implied-in-fact contract. The government, however, asserts that it may do with impunity what no other conservator or controlling shareholder could do—appropriating an enormous and unprecedented windfall of *over $120 billion* (as of the end of 2017) that lacks even a claimed basis in "existing rules and understandings" and contradicts the government's own emphatic, public, sworn words. Essentially, the government claims that it is neither a government actor constrained by

constitutional and statutory obligations nor a commercial actor bound to honor its fiduciary duties and contractual obligations. This cannot be, and is not, the law. Nevertheless, in its Omnibus Motion to Dismiss, it seeks to throw out the Junior Preferred Plaintiffs' claims at the outset, on four grounds, all of which this Court should reject:

I. *Plaintiffs' actions are against the United States, and thus within this Court's jurisdiction*. They challenge actions of Treasury, which is indisputably an arm of the United States. They challenge actions of the Agency, which Congress expressly made an agency of the United States and which is one here under any analysis—when acting as no private conservator could or has and, indeed, no government conservator ever has. And these challenged actions involve these two agencies of the United States coordinating (indeed, colluding) on common goals for the companies they jointly controlled, for the exclusive benefit of the United States.

II. *Nor does this Court otherwise lack jurisdiction*. Although the government contends that plaintiffs' takings and illegal-exaction claims improperly sound in tort, both claims are exactly of the sort for this Court to hear, alleging, respectively, uncompensated authorized taking of property and (in the alternative) an unlawfully required payment. The fiduciary-duty claim also does not improperly sound in tort, as it is founded upon both an express contract with the United States (Treasury's agreement purchasing senior preferred stock, which gave it *de facto* control) and a money-mandating federal law (the Recovery Act, described below, by which the Agency became a conservator, a status that, under background law and the analysis the Supreme Court has prescribed, imposes a fiduciary duty whose breach is remedied by a damages action). And this Court has jurisdiction over plaintiffs' claim of breach of an implied contract, as they have, in detail, pleaded both the basis for the contract—the Agency agreed with the Companies to conduct a traditional conservatorship, in exchange for their consent to

conservatorship—and the basis for finding that the parties to it intended that the non-controlling shareholders—the shareholders other than the United States—would be third-party beneficiaries.

III. *The Junior Preferred Plaintiffs have "standing."* They assert claims that are direct, not derivative—not only on their face but also in substance, resting on the government's *differential* treatment of itself at the expense of all other shareholders. Even if these claims were deemed derivative, Federal Circuit precedent would allow them, because the Agency suffers under a manifest conflict-of-interest in deciding whether to sue itself for its own actions as conservator.

IV. *Each count readily states a claim*. While the government may wish (and later try to prove) that the alleged facts were not as they are, if taken as true (as they must be at this stage and in any event are), they plausibly establish entitlements to relief. With respect to *takings*, a property interest in stock remained during conservatorship under the same background law that confirms the governmental action, and the government "took" that property under any mode of analysis: It directly appropriated it to itself, a paradigmatic taking; it wiped out all economically beneficial use of it by owners; and it in any event committed a regulatory taking under the "*Penn Central*" factors. On that, the background law, which the government once embraced, established strong investment-backed expectations; the economic impact of the government's action was total and vast; and the character of that action was naked and unprecedented self-dealing. If such action was not authorized (as plaintiffs plead it is), then it was, in the alternative, an *illegal exaction*. Finally, for the same reasons that this Court has jurisdiction over the claims for *breach of fiduciary duty* and *breach of contract*, plaintiffs also adequately pleaded claims for relief.

Accordingly, this Court should deny the government's motion in full as to each count of all the Junior Preferred Plaintiffs' complaints.

QUESTIONS PRESENTED

1. Whether the claims of the Junior Preferred Plaintiffs (challenging the coordinated actions of two United States agencies for the benefit of the United States) are "against the United States." 28 U.S.C. § 1491(a)(1).

2. Whether jurisdiction over any claim is lacking on another ground, namely:

(a) whether the claims for takings (alleging uncompensated authorized action) and illegal exaction (alleging facts establishing the elements the Federal Circuit has recognized) impermissibly sound in tort;

(b) whether the claim for breach of fiduciary duty (founded upon both an express contract with the United States and an act of Congress) impermissibly sounds in tort; and

(c) whether the claim for breach of an implied-in-fact contract (into which Fannie Mae and Freddie Mac entered with the United States for the benefit of their non-government shareholders) involves a contract to which the non-controlling, non-government shareholders are third-party beneficiaries.

3. Whether the Junior Preferred Plaintiffs lack standing to bring their direct claims on the ground that the Recovery Act bars derivative claims.

4. Whether the Junior Preferred Plaintiffs have stated plausible claims for relief (based on the government's appropriating to itself, indefinitely, "every dollar of earnings each firm generates") for (a) takings, (b) illegal exaction, (c) breach of fiduciary duty, and (d) breach of an implied-in-fact contract.

STATEMENT OF THE CASE

A. Amid the Great Recession, which crushed housing and mortgage markets in 2008, Congress sought to improve oversight of the two private, for-profit, shareholder-owned corporations it had set up years before to support the secondary-mortgage market, commonly known as Fannie Mae ("Fannie") and Freddie Mac ("Freddie," together, the "Companies"). In the Housing and Economic Recovery Act ("Recovery Act"), it established the Federal Housing Financing Agency, whose powers included being appointed, by its Director, "as conservator or receiver for" the Companies. §§ 4511(a), 4617(a)(1).[1]

In crafting that act, Congress drew, often verbatim, from its Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), which governs the Federal Deposit Insurance Corp. ("FDIC"). *Cf.* § 4617(a)&(b), *with* § 1821(c)&(d). The Recovery Act lists circumstances in which the Director must appoint the Agency receiver; and grounds (including Company consent) under which he may appoint the Agency "conservator or receiver" to "reorganize[e], rehabilitat[e], or wind[] up the affairs of" a Company. § 4617(a)(2), (3)(I), (4). It sets out various powers for the Agency as either conservator or receiver. § 4617(b)(2). And it sets out powers specific to each role: "The Agency may, as conservator, take such action as may be (i) necessary to put the [Company] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [Company] and preserve and conserve [its] assets and property." § 4617(b)(2)(D); *cf.* § 1821(d)(2)(D). The Agency as receiver "shall place the [Company] in liquidation and proceed to realize upon [its] assets," and provisions prescribe its handling of

[1] Citations of the U.S. Code are of Title 12 unless otherwise stated. The facts come, unless otherwise stated, from the allegations in the amended Complaint in *Owl Creek Asia I, L.P. et al. v. United States*, No. 18-281C, Dkt. 16 (Aug. 16, 2018) ("Complaint"), the first-filed of the Junior Preferred Plaintiffs, whose contents are representative of the others.

claims in liquidation. § 4617(b)(2)(E), (b)(3)-(9), (c). The Recovery Act also clarifies that the Agency—"as conservator or receiver"—has "such incidental powers as shall be necessary to carry out" the powers that § 4617 "specifically granted to conservators or receivers, respectively," and may "take any action authorized by [§ 4617], which the Agency determines is in the best interests of the [Company] or the Agency." § 4617(b)(2)(J); *cf.* § 1821(d)(2)(J).

B. In September 2008, the Director placed the Companies into conservatorship, with the consent of the Boards of Directors. Compl. ¶ 40; *infra* Pt. II.C.1. The next day, Treasury via the Agency entered into Senior Preferred Stock Purchase Agreements ("Treasury SPAs"), exercising special authority, which the Recovery Act had granted it through 2009, to "purchase any obligations and other securities" of the Companies and to "determine" their "terms and conditions" and "amounts." §§ 1455(*l*)(l)(A), (*l*)(4), 1719(g). Treasury committed to invest up to $100 billion in each Company as needed to maintain positive net worth. Compl. ¶ 42. Treasury received a million shares of preferred stock, senior to all other preferred; it also received (a) an initial liquidation preference of $1000 per share (thus, $1 billion), plus any outstanding amount drawn from the commitment; (b) a dividend of 10% per annum of the outstanding amount (which also could be paid "in kind," at a 12% rate, increasing the liquidation preference); and (c) warrants for up to 79.9% of the common stock of each Company for a nominal price. *Id.* The Treasury SPAs also restricted the Agency from taking certain actions for the Companies without Treasury's prior written consent and barred certain other actions. *See id.* ¶¶ 42-44.

In announcing the conservatorships, the Agency assured markets that the goal was to "return[] the entities to normal business operations"; that they would be temporary, terminating once the Companies had been restored "to a safe and solvent condition"; that non-government stock would remain outstanding and trade; and that stockholders would "retain all rights in the

stock's financial worth, as such worth is determined by the market." *Id.* ¶¶ 45-46, 48. The Agency reiterated such assurances throughout 2009, 2010, and 2011. *Id.* ¶¶ 50, 54-56. In November 2011, for example, the Director told the Senate that, "[b]y law, the conservatorships are intended to rehabilitate the [Companies] as private firms." *Id.* ¶ 56. Such statements were consistent with traditional conservatorship, including under FIRREA. *Id.* ¶¶ 7, 102.

In the sixteen months between entry into the Treasury SPAs and the expiration of Treasury's special authority, Treasury and the Agency amended the SPAs three times, including to increase Treasury's commitment, to roughly $200 billion per Company. *Id.* ¶¶ 48, 50-51. By the end of 2009, however, Fannie and Freddie had drawn only $60 billion and $51 billion, respectively. *Id*. ¶ 52.

The Companies, as Treasury and the Agency knew they would, began to emerge from the recession-induced trough in their financial performance. *Id.* ¶ 57. By the first and second quarters of 2012, the Companies reported positive net worth and announced that they would not be requesting a further draw under the Treasury SPAs. *Id.* ¶ 58. Renewed profitability also suggested that the Companies might soon be able to recognize deferred tax assets in the tens of billions of dollars; and the extent of their draws had been, in part, due to required estimates of future credit losses, which were proving excessive by tens of billions of dollars. *Id.* ¶¶ 28, 57-59, 71, 89-90. In summer 2012, Fannie's CFO predicted "golden years" of earnings, and Treasury anticipated that the next reporting period would show "very strong earnings," "in-excess of the 10% dividend to be paid to Treasury." *Id.* ¶ 57. As of the end of 2012, Fannie still had over $115 billion available on its commitment from Treasury, and Freddie had over $140 billion. *Id.* ¶ 84.

C. On August 17, 2012, Treasury and the Agency (as purported conservator) imposed an "Amendment" of the Treasury SPAs (the "Sweep Amendment"), which they had not

amended since 2009. *Id.* ¶¶ 2, 9, 60. The Sweep Amendment replaced the dividend payable under Treasury's senior preferred stock with net-worth-sweeps ("Sweeps")—each quarter, the Companies pay to Treasury their entire net worth. *Id.* ¶ 60. There is no termination date; and, by barring the Companies from realizing a profit, the Sweeps indefinitely bar dividends to any other stockholders and any pay-down of Treasury's liquidation preference. *Id.* Treasury had hatched the idea for this in 2010, in a conversation with a former Treasury official who had transferred to the Agency the year before to advise the Director; but the Companies' strong state in 2012 led Treasury to push to carry it out with the Agency then. *Id.* ¶¶ 65, 69-75. When the agencies did so, and made their joint action public, the market value of junior preferred stock, as measured by trading price, plummeted. *Id.* ¶ 104.

In announcing the Sweep Amendment, Treasury emphasized benefits to "taxpayers"—ensuring that "every dollar of earnings" goes to them—and explained that it was a means of ensuring the Companies were "wound down," rather than rebuilding capital and "return[ing] to the market" in their prior form. *Id.* ¶ 76. The Agency began to say the same thing. *See id.* ¶ 83. And a White House advisor, in emailing Treasury, praised the Sweeps as "a policy change of enormous importance." *Id.* ¶ 79. (Treasury did not in its announcement explain why it had not just exercised its warrants to purchase 79.9% of the Companies' common stock for a pittance.)

Indeed, "taxpayers"—Treasury—did well: As of the end of 2017, it had received over $223 billion in "dividends" under the Sweeps, in addition to over $55 billion paid between 2008 and 2012; and it had received at least $120 billion more than if it had not imposed the Sweep Amendment, money that otherwise could have gone to the Companies' capital. *Id.* ¶¶ 92-95.

D. The "Junior Preferred Plaintiffs" are the funds in (1) *Owl Creek Asia I, L.P.*, No. 18-281C; (2) *Appaloosa Investment Limited Partnership I*, No. 18-370C; (3) *Akanthos*

Opportunity Master Fund, L.P., No. 18-369C; (4) *CSS, LLC*, No. 18-371C; and (5) *Mason Capital L.P.*, No. 18-529C, who filed complaints in February, March, and April of 2018 challenging the Sweep Amendment. (Counsel also represent the plaintiffs in *CRS Master Fund, L.P.*, No. 18-529C, filed in August, which is not part of the present briefing schedule.)

They have sued based on their purchase of the Companies' junior preferred stock after (or, in some instances, before) the Agency imposed the conservatorships but before it joined with Treasury to impose the Sweep Amendment. Compl. ¶¶ 11, 96-98. Their total holdings as of market close on August 16, 2012, were 77,073,681 shares of Fannie with a stated value and/or liquidation preference of *$2.3 billion*, and 60,633,685 shares of Freddie with a stated value and/or liquidation preference of *$1.9 billion*. *E.g.*, Compl. ¶¶ 13-20.

The Junior Preferred Plaintiffs do not here challenge the Agency's imposition of the conservatorship or other Agency actions prior to the Sweep Amendment; they have not challenged the Sweep Amendment in any other court; and they plead direct (not derivative) claims. Because they filed their complaints in 2018, they were not part of the jurisdictional discovery, but have received access to it since filing. Each of their complaints pleads four counts, seeking compensation for (I) the taking of their property in violation of the Fifth Amendment or (II) in the alternative, the illegal exaction of their property in violation of the Fifth Amendment; (III) breach of fiduciary duty; and (IV) breach of implied contract. The government's 81-page Omnibus Motion to Dismiss ("MTD"), *Owl Creek* Dkt. 21, seeks to dismiss their complaints in full. For the reasons detailed below, the Court should deny the motion in full as to them. (We do not address Parts VI, VII, or XII of the MTD, because they do not apply to any of the Junior Preferred Plaintiffs.)

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THE JUNIOR PREFERRED PLAINTIFFS' SUITS, WHERE TREASURY AND THE AGENCY, ARMS OF THE UNITED STATES GOVERNMENT, BOTH ACTED AS SUCH AND FOR ITS BENEFIT IN IMPOSING THE SWEEP AMENDMENT.

This Court's jurisdiction is over claims "against the United States." 28 U.S.C. § 1491(a). In opposing a motion to dismiss for lack of jurisdiction, a plaintiff "must make only a *prima facie* showing of jurisdictional facts." *Evans v. United States*, 2007 WL 5171118, at *2 (Fed. Cl. Jan. 5, 2007). The Court "usually assumes all factual allegations in the complaint are true and draws all reasonable inferences in the plaintiffs' favor." *Fairholme Funds, Inc. v. United States*, 114 Fed. Cl. 718, 720 (2014). If the motion "challenges the truth of the jurisdictional facts alleged in the complaint, however, the court may consider relevant evidence in order to resolve the factual dispute," and a plaintiff ultimately must "establish[ ] jurisdiction by a preponderance of the evidence." *Lewis v. United States*, 32 Fed. Cl. 59, 64 (1994); *see Buser v. United States*, 85 Fed. Cl. 248, 254 (2009); *Fairholme*, 114 Fed. Cl. at 720. Here, the government does not challenge the truth (as opposed to the implications) of the alleged facts on which the Junior Preferred Plaintiffs rest jurisdiction (*cf.* MTD 42), and those facts readily show that their claims are against the United States, for several reasons.

A. The Junior Preferred Plaintiffs' suits are against the United States because they challenge actions of Treasury, indisputably an arm of the United States, in imposing the Sweep Amendment for the United States' sovereign purposes.

The claims are most obviously "against the United States" because they challenge actions of Treasury, indisputably an arm of the United States, in appropriating billions of dollars to itself via the Sweep Amendment. *E.g.,* Compl. ¶¶ 2, 21. The government offers one sentence of response, claiming: "Treasury alone could not have implemented the [Sweep] Amendment, and

its role as a counterparty to a voluntary agreement with the [Companies] does not support plaintiffs' claims." MTD 20-21; *see id.* at 3. This sentence is doubly irrelevant.

First, it does not matter (certainly not to jurisdiction) if "Treasury alone could not have implemented" the Sweep Amendment. The Federal Circuit's decision in *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (2014), establishes this. There, car dealers sued for a regulatory taking based on Treasury's financing agreements with car manufacturers, by which it allegedly coerced the manufacturers (given their financial straits) into terminating the dealers' franchise agreements in bankruptcy. Because Treasury had taken the challenged action, there was no question that the dealers were suing the United States; the Federal Circuit, obliged to consider on its own initiative any issues of subject-matter jurisdiction, found none. *See id.* at 1149 n.4 (questioning whether government was still challenging jurisdiction and, "[i]n any event," seeing "no lack"). The only real question was whether the dealers had *stated a claim*—including whether they had alleged sufficient government action—and on that as well the Federal Circuit refused to dismiss (because government action through a third party, including by monetary inducement, was a valid theory, and the allegation of coercion might succeed upon further factual development). *See id.* at 1153-56.

Here, it is even more clear that there is "no lack" of jurisdiction: Not only are the plaintiffs challenging actions of Treasury (as in *A&D Auto*), but, in addition, Treasury's action was contracting with another federal agency (the Agency as conservator), not private parties (in contrast with *A&D Auto*). In either case, "Treasury alone could not have" accomplished its goal; but in this case, that agency of the United States overcame that obstacle through another federal agency, not a private car manufacturer.

Second, it also does not matter for jurisdiction whether Treasury was "counterparty to a voluntary agreement with the [Companies]." For this assertion, the government string-cites three takings cases, but in those cases the *plaintiffs* had a voluntary agreement with the challenged government actor. *See* MTD 21.

Yet, here, there is no contract between the Junior Preferred Plaintiffs and Treasury; and (again) the issue in those cases was the viability of a claim, not jurisdiction. *E.g.*, *Norman v. United States*, 429 F.3d 1081, 1089 (Fed. Cir. 2005) (finding relevant to merits of takings claim that plaintiffs voluntarily transferred title to third party). In *A&D Auto*, the government also invoked these cases, and the Federal Circuit rejected its argument for this reason, emphasizing that the dealers "did not bargain or contract with" the government and had "no ordinary commercial remedy" against it. 748 F.3d at 1156. In any event, Treasury here, in agreeing with another federal agency to siphon billions from the Companies to itself, and for no consideration or "(at best) significantly lesser value," Compl. ¶ 107, was hardly "bargaining with private actors for the provision or procurement of goods and services," *A&D Auto*, 748 F.3d at 1156.

B. The Agency in imposing the Sweep Amendment for Treasury's benefit also was acting as the government arm that it is, not as any sort of private conservator.

The Junior Preferred Plaintiffs' claims also are against the United States because they challenge actions of the Agency, another arm of the United States, in expropriating billions of dollars from its wards to Treasury. The government offers one, brief response: It contends that, because the Agency acted under its federal authority "as conservator," it ceased to be the federal government, instead merging into the Companies (under a line of cases the government traces to *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994)), even to the point of becoming incapable of violating the Constitution while exercising the authority that Congress gave it in the Recovery Act. *See* MTD 22-23. The government both overlooks and misunderstands relevant law.

1. The Agency is a wholly federal entity. Indeed, Congress in establishing it under the Recovery Act specified that it "shall be" an "agency of the Federal Government." § 4511(a); *see Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 396 (1995) (emphasizing such explicit language). Nor did Congress create an exception for when the Agency is acting as a conservator; it actually specified that the Agency when "acting as conservator or receiver" shall not be subject to the direction or supervision of "any *other* agency of the United States," recognizing it remained such an "agency" when so "acting." § 4617(a)(7) (emphasis added). This reading is confirmed by the general rule in this Circuit—reaffirmed in a case rejecting government arguments that the FDIC could not be the United States—that, "when a federal instrumentality acts within its statutory authority to carry out defendant's purposes, the United States submits itself to liability under the Tucker Act unless some specific provision to the contrary exists." *Slattery v. United States*, 635 F.3d 1298, 1309 (Fed. Cir. 2011) (en banc) ("*Slattery II*") (internal quotation marks omitted); *see id.* at 1315 ("the jurisdictional criterion is" whether "the government entity" is "acting on authority of the United States"). Here, there is no "specific provision to the contrary."

Moreover, it would not be for "Congress to make the final determination" of an agency's "status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions." *Lebron*, 513 U.S. at 392. Even if an entity is a *corporation* and Congress says it is *not* part of the government, it nevertheless is if Congress (1) has created it by special law, (2) to further federal governmental objectives, and (3) retains permanent authority to appoint a majority of its board. *See id.* at 400. In short, "the practical reality of federal control and supervision prevails over Congress' disclaimer." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1233 (2015); *see Altair Global Credit Opportunities Fund (A), LLC v. United States*,

138 Fed. Cl. 742, 764 (2018) (holding that, where suit was against congressionally created Oversight Board, which was a "federal entity" under *Lebron*, then it was "an action against the United States"). And issues that may arise under the Constitution's structural requirements, as the result of concluding that an entity is a federal agency, do not undermine that conclusion. *See Dep't of Transp.*, 135 S. Ct. at 1228, 1233, 1234; *id.* at 1240 (Alito, J., concurring).

Here, the Agency is not a corporation, nor did Congress make any disclaimer. It did provide in the "Succession Clause" that the Agency as conservator *takes on* the rights, titles, powers, and privileges of the Companies to be conserved, § 4617(b)(2), *see* MTD 22; but Congress did not say the Agency thereby *loses* its governmental character—to the contrary, it said it was an "agency of the Federal Government" and an "agency of the United States." Moreover, (1) Congress did create the Agency by special law; (2) the Agency furthers governmental objectives[2]; and (3) the federal government retains permanent authority to appoint the Agency's single director.

Indeed, the three circuit-court cases the government invokes reinforce that the Agency does not lose its governmental status due to "stepping into the shoes" of the Companies. *See* MTD 22 (citing *Herron v. Fannie Mae*, 861 F.3d 160 (D.C. Cir. 2017); *Meridian Invs., Inc. v. Fed. Home Loan Mortg. Corp.*, 855 F.3d 573 (4th Cir. 2017); *U.S. ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259 (9th Cir. 2016)). Those cases apply *Lebron* to determine the status of *the Companies*; because Congress chartered the Companies, and to accomplish "governmental objectives for the national housing market," *Herron*, 861 F.3d at 168, the only question is the

[2] The Agency serves such objectives even more clearly than the FDIC (*see Lebron*, 513 U.S. at 388, 394-95): It is an agency, not a corporation; it appoints itself conservator or receiver, as an incident of its ordinary regulatory duties, not being appointed by others, *see* § 1821(c); Congress has focused its authority on two federally sponsored companies, not extending it to myriad private entities; and it has no stake in the Companies, not insuring them, *see* § 1821(a).

third requirement, given the indefinite but theoretically-not-permanent conservatorship. *See Sisti v. FHFA*, 324 F. Supp. 3d 273, 279-81 (D.R.I. 2018) (collecting cases, and noting no dispute over first two requirements). They mention the Agency's stepping into the shoes of the Companies in rejecting the argument that the conservatorship transformed *the Companies*. *See Herron*, 861 F.3d at 169. That the Agency as conservator does not *impart* its governmental character to another entity hardly establishes that the Agency as conservator *loses* its governmental character. If anything, it suggests the opposite; and given that, as to the Agency, the third *Lebron* requirement is obviously satisfied (as noted above), it follows that the Agency remains the United States when exercising its statutory authority as conservator. (It certainly remains a state actor.[3]) Accordingly, courts actually considering the Agency's status have, in various contexts, "found [it] to be a government actor, even when acting as conservator." *Sisti*, 324 F. Supp. 3d at 282 n.8 (collecting cases, involving statute of limitations, "private action" under securities law, and removal, and so holding as to due-process challenge to foreclosure); *FHFA v. Royal Bank of Scot. Grp. PLC*, 2012 WL 3580522, at *4 (D. Conn. Aug. 17, 2012) (recognizing that "courts have treated federal agencies acting in their capacities as receivers or conservators differently from private litigants").

The government also invokes *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 622-23 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 978 (2018), but it is irrelevant on this question. MTD 23. The court held that the sue-and-be-sued clause for *the Companies* (in their charters), which the Agency takes on as conservator, is not a sue-and-be-sued clause for *the Agency* "in its own

[3] *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298, 300 (2001) (concluding association was state actor because it was "pervasivel[y] entwine[d]" with public officials who not only "control[led] but overwhelmingly perform[e]d" most acts); *Com. of Pa. v. Bd. of Directors of City Trusts of City of Philadelphia*, 353 U.S. 230, 231 (1957) (finding board operating college, as trustee, was state actor because it was a state agency).

name." 864 F.3d at 622-23. The question was not whether, under the Tucker Act, the Agency *loses* its character as part of the United States when it acts under its authority as conservator. *Id.*

2. In any event, any implicit exception to both the terms of the Recovery Act and a straightforward application of *Lebron*, by which the Agency might sometimes shed its character as an "agency of the United States" when it acts "as conservator," would not extend to Agency action that went beyond what a *private* conservator could do with others' property.

In *Waterview Management Co. v. FDIC*, 105 F.3d 696 (1997), the D.C. Circuit applied the canon of constitutional avoidance to interpret FIRREA. The Resolution Trust Corp. ("RTC") was interpreting its charter statute to permit it to ignore underlying property rights when it disposed of an entity's assets. *Id.* at 701. The court, however, concluded that, "to permit a federal agency acting as conservator or receiver to sell assets *in disregard of all pre-receivership rights*[ ] raises significant constitutional questions under the takings clause." *Id.* (emphasis added). So the court read the statute to avoid this issue, notwithstanding an "open question" whether the claimed property right was protectable and whether the RTC's conduct had caused compensable damages. *Id.* at 702. The court did not hesitate to treat the RTC as part of "the federal government," which could not "simply *vitiate the terms of existing assets*, taking rights of value from private owners with no compensation in return." *Id.* at 699 (emphasis added); *see United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982) (reading Bankruptcy Code so as to avoid destroying pre-enactment property rights and give rise to takings claims).

This logic governs all the more when the United States' reading of a statute would free it to not only disregard pre-existing property rights but also thereby directly enrich itself. In that context, to read a statute such that an Executive Branch agency remains part of the United States is to read it to allow jurisdiction over claims to "prevent[] executive encroachment on Congress's

exclusive powers to raise revenue, and to appropriate funds." *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994). Indeed, the government has identified no case holding that a federal agency may participate in expropriating private property for the benefit of the Treasury yet not even be *subject to suit* under the Fifth Amendment.

To apply these principles in the context here, the line is simple. Under applicable background law, a conservator is a "guardian, protector, or preserver," "the modern equivalent of the common-law *guardian*"; and a "managing conservator" is a "person appointed by a court to manage the estate or affairs of someone who is legally incapable of doing so." *Conservator*, Black's Law Dictionary (10th ed. 2014). A conservator is "given the legal authority to establish control of an entity to put it in a sound and solvent condition" and is to be "protective," "acting as a prudent business manager." *Leon County v. FHFA*, 700 F.3d 1273, 1278-79 (11th Cir. 2012). More specifically, from a case the government cites, "[a] conservator is a person or entity, including a government agency, appointed by a regulatory authority to operate a troubled financial institution in an effort to conserve, manage, and protect the troubled institution's assets." *Ameristar Fin. Serv. Co. v. United States*, 75 Fed. Cl. 807, 808 n.3 (2007) (internal quotation marks omitted); *see* 76 Fed. Reg. 35724, 35727 (2011) ("[T]he essential function of a conservator is to preserve and conserve the institution's assets."); 76 Fed. Reg. at 35730 ("A conservator's goal is to continue the operations of a regulated entity, rehabilitate it and return it to a safe, sound and solvent condition."). And such a person accordingly has "a fiduciary duty running to the corporation itself." *Sisti*, 324 F. Supp. 3d at 283.

Since long before the Recovery Act, courts have applied this background law to the actions of the FDIC (and similar entities) under FIRREA as conservator for a troubled bank, § 1821(d)(2)(D). For example, as the Fifth Circuit put it, such "a conservator only has the power

to take actions necessary to restore a financially troubled institution to solvency." *McAllister v. RTC*, 201 F.3d 570, 579 (5th Cir. 2000); *see*, *e.g.*, *Elmco Props., Inc. v. Second Nat'l Fed. Sav. Ass'n*, 94 F.3d 914, 922 (4th Cir. 1996) ("[A] conservator's function is to restore the bank's solvency and preserve its assets."); *Del E. Webb McQueen Dev. Corp. v. RTC*, 69 F.3d 355, 361 (9th Cir. 1995) ("The RTC, as conservator, operates an institution with the hope that it might someday be rehabilitated."). And the quotation above from *Ameristar*, that a conservator, including an agency, is someone who protects the assets of a troubled institution, comes from a report of the FDIC's own Office of the Inspector General.

If a "conservator" is authorized to act beyond these longstanding boundaries (particularly in a self-serving way, and even in the interests of another agency), its actions make sense only as state action, and therefore should face judicial review, particularly when implicating constitutional protections. This court therefore can and should read the Recovery Act as (at least) not implicitly directing that the Agency sheds its character as the United States when, as here, it acts as no private conservator could, but rather as only a government actor could.

3. The government ignores the background principles above, including those involving the similar FDIC. Yet it selectively asks this Court to find lack of jurisdiction under what it claims is a piece of background law, derived from *O'Melveny*. MTD 22. The government would hang its argument on one thread, pulled from the overall fabric, that cannot bear that weight.

First, *O'Melveny* does not control, because it presented no question whether a receiver was part of the United States for jurisdictional purposes (or otherwise), nor any question of an agency's avoiding liability, nor any constitutional question. The Supreme Court simply declined to invent pre-emptive federal common law for a state-law claim that the FDIC had brought for a

failed S&L. *See* 512 U.S. at 80-81, 83; *id.* at 87 (seeing no justification for "judicial creation of a special federal rule"). In looking to FIRREA for guidance, the Court described its Succession Clause as "appear[ing] to indicate that the FDIC as receiver steps into the shoes of the failed S&L, *obtaining* the rights of the insured depository institution that existed prior to receivership." *Id.* at 86 (emphasis added; citation and internal quotation marks omitted); *see id.* at 87 (finding it "hard to avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law"). Plus, only "primary conduct on the part of private actors" was at issue. *Id.* at 88. So it was reasonable for the FDIC to sue under the same state law to which the S&L would be subject if it sued for itself.

That is why the D.C. Circuit later held that the FDIC as receiver was the "United States" for a statute of limitations that originated in the Tucker Act. *Auction Co. of Am. v. FDIC*, 141 F.3d 1198, 1199 (D.C. Cir. 1998) (per curiam). Unlike the district court in that case, it was not "impressed by *O'Melveny*" as a global pronouncement, including because the Supreme Court had not even been interpreting "any . . . federal statute." *Id.*, 132 F.3d 746, 748 (D.C. Cir. 1997); *see Slattery v. United States*, 583 F.3d 800, 827 (Fed. Cir. 2009) (following *Auction Co.*), *vacated, and reinstated in relevant part*, *Slattery II*, 635 F.3d at 1300, 1321.

Second, in any event, *O'Melveny* concerned the FDIC as a receiver, not conservator, and the difference matters for any deeming of an agency not to be an agency. Under background law, a receiver "owes fiduciary duties to the creditors," to simply conduct a fair and orderly liquidation, duties "which the corporation would otherwise owe to creditors during a period of insolvency." *Sisti*, 324 F. Supp. 3d at 283. Because the receiver "assumes the fiduciary duties *of*" that terminal entity, it might make sense to say that the receiver "steps into the shoes of" it. *Id.* (emphasis added). In contrast, "[c]onservators, unlike receivers, have a fiduciary duty running *to*

the corporation itself," to operate and restore it; thus, a conservator "remains distinct" from the entity, "critically distinct." *Id.* (emphasis added; internal quotation marks omitted). *See* Goldman, The Indefinite Conservatorship of Fannie Mae & Freddie Mac is State-Action, 17 J. Bus. & Sec. L. 11, 23-27 (2016). Rather than "merg[ing] with" a dissolving company, it is "in a separate, bilateral relationship with the target company," which continues to operate. *Id.* at 33. Thus, if a conservator "step[s] into the shoes" of anyone, it is those of "the officers and directors" whose control it displaces, not those of the company itself. *Gibraltar Fin. Corp. v. Fed. Home Loan Bank Bd.*, 1990 WL 394298, at *2-3 (C.D. Cal. June 15, 1990).

Although Chief Judge Damich in *Ameristar* (which the government string-cites, MTD 22) accepted the government's invitation to "extend" the purported rule of *O'Melveny* to the FDIC as conservator, he did so in a distinct context: The Office of Thrift Supervision had appointed the FDIC conservator of a new bank simultaneously with chartering it to receive the deposits of a failed bank, enabling FDIC-as-receiver to liquidate the latter. 75 Fed. Cl. at 810, 812. The plaintiff sued FDIC in both capacities. *Id.* at 808, 809. Being a conservator as an incident to being a receiver is distinct from the ordinary context, which *Ameristar* elsewhere acknowledged, of being conservator to "stabiliz[e]" a "troubled" entity. *Id.* at 808 n.3. The decision also did not grapple with either *O'Melveny*'s actual, narrow holding or the difference between receivership and conservatorship.

Finally, the government yanks the "step into the shoes" cases out of their context in background law: They do not involve action beyond the "standard . . . situation" of "enforcing the rights or defending claims and paying the bills" of the overseen entity, *Slattery*, 583 F.3d at 827-87 (holding FDIC as receiver to be United States, on facts beyond standard situation), much less "allegations that the FDIC and United States were in collusion, or engaged in any behavior

that would make the United States responsible for the conduct of the FDIC," *Frazer v. United States*, 288 F.3d 1347, 1354 (Fed. Cir. 2002). In *O'Melveny* itself, the FDIC sued to vindicate the rights of the failed S&L; and in *Ameristar*, the government described the FDIC as acting "in the interests of the depositors and investors and is, therefore, more akin to a private party," and the court concurred, describing the "FDIC's role as conservator" as "to preserve and conserve the assets" the new bank acquired from the old, 75 Fed. Cl. at 810, 812 (internal quotation marks omitted). *See also Tenerife Real Estate Holdings LLC v. United States*, 136 Fed. Cl. 156, 160-61 (2018) (finding it "clear" that the FDIC as receiver was acting "for a failed bank and not in a governmental capacity when it disposed of" bank's assets in connection with suit to collect on defaulted loan); *cf. Frazer*, 288 F.3d at 1354 (in assessing tolling agreement between FDIC and United States, considering FDIC not to be the United States with respect to bringing a *Winstar* claim—against the United States on behalf of an S&L).

4. In sum, the Recovery Act itself says what *Lebron* here requires, that the Agency is an agency of the United States, including when acting as conservator for the Companies. And the government has identified no credible exception that would apply here to nevertheless deprive this Court of jurisdiction by deeming agency action private.

This case would be the weakest possible for divining any such exception: The government has transferred billions of dollars to itself and openly dispensed with the background law, admitting that the Sweep Amendment serves "governmental interests," *e.g., Perry Capital*, 864 F.3d at 607-08, and that the Agency acted beyond the bounds of a "typical conservatorship scenario," Br. in Opp. 35, *Perry Capital*, No. 17-580 (U.S.). That is why it has conceded, as no private conservator would, that the Sweeps leave the Companies "effectively balance-sheet *in*solvent, a textbook illustration of financial *in*stability." Def's. Mot. to Dismiss 19, *Samuels v.*

FHFA, No. 1:13-22399-Civ. (S.D. Fla. Dec. 6, 2013) (emphases added). It is admitting to state action. Indeed, the government here relies on authority concerning regulatory action. *See infra* Pts. II.B.2 & IV.A.1.c; IV.A.2.c; IV.A.4.a. Nor has the government identified a single example, from either the common law or the decades of FDIC practice built on it, of a conservator doing to its ward anything like the Agency here has been doing to the Companies. Whatever that is, it is an act of the United States.

C. That the Agency imposed the Sweep Amendment by "work[ing] with" Treasury on their "common goals" for the Companies they jointly controlled confirms that this suit is against the United States.

Cases discussing a federal agency's standing in the shoes of a failed bank or S&L, as its receiver, do not (as noted above) concern its acting in collusion with another federal agency or otherwise "engag[in]g in any behavior that would make the United States responsible." *Frazer*, 288 F.3d at 1354. But the claims here, involving conduct of both Treasury and the Agency, are all the more clearly against the United States when one considers how they acted as one.

1. The principle is neither novel nor difficult. In *A&D Auto*, involving whether plaintiffs had pleaded sufficient action by Treasury, the Federal Circuit recognized that "the government may be liable" for a taking even when it acted through a *private* third party, if the third party was "acting as the government's agent" or under "government[ ] influence" that "was coercive rather than merely persuasive." 748 F.3d at 1154. An agency arises from being "hired or granted legal authority to carry out the government's business"; and coercion might arise when the government conditions its own action on which a company depends to remain in business, although it is more likely to "flow[ ] from an existing relationship" creating the ability to exercise general control. *See id.* at 1154-56.

Courts employ similar considerations to select standards of liability under corporate law. A "number of shareholders, each of whom individually cannot exert control over the corporation

. . . can collectively form a control group" if "connected in some legally significant way"—such as "by contract, common ownership, agreement, or other arrangement"—"to work together toward a shared goal." *Frank v. Elgamal*, 2012 WL 1096090, at *8 (Del. Ch. Mar. 30, 2012). A control group is deemed a single, majority shareholder. *Id.* And "a majority shareholder and its director designees occupy a fiduciary relationship to the minority shareholders." *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 496 (Del. 1982); *see Basho Techs. Holdco B, LLC v. Georgetown Basho Inv'rs, LLC*, 2018 WL 3326693, at *25 (Del. Ch. July 6, 2018) (same for "those who effectively control a corporation," including "a stockholder who otherwise would not owe [fiduciary] duties"). The question is whether a control group "'exercises control over the business and affairs of the corporation'" in the "transaction that is being challenged." *Williamson v. Cox Commc'ns, Inc.*, 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006) (quoting *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113-14 (Del. 1994)).

2. Here, on the undisputed alleged facts, Treasury and the Agency in working together to impose the Sweep Amendment operated as a control group, and thus even more plainly as the United States. It was not a matter of the Agency deciding on its own that that was best for the Companies (or even, incidentally, for itself). It was one agency of the United States working hand in glove with another to achieve a benefit for the United States.

The Agency and Treasury, both federal agencies acting under the Recovery Act, together created control over the Companies from the combination of the Agency's conservatorship and Treasury's SPAs. Initially, the self-appointed conservatorship gave the Agency complete control by statute, and then, the day after, the Treasury SPAs gave Treasury control over the Agency's conservatorship. Compl. ¶¶ 37-38. This included having *de facto* ownership of 79.9% of the common stock, in addition to exclusive ownership of senior preferred; barring the Agency from

taking several corporate actions absent advance written consent; and totally barring certain Agency action for the Companies. *Id.* ¶¶ 42-44. This combination allowed Treasury to control the operations of the conservatorship—which amply "suffices to make the government a dominant shareholder." *Sisti*, 324 F. Supp. 3d at 283 n.9 (discussing SPAs) (internal quotations omitted); *see Meridian Investments*, 855 F.3d at 579 (recognizing that "the government does exert some control over Freddie Mac through the PSPA with Treasury"); Compl. ¶ 68 (same, noting event at issue in *Meridian*); 76 Fed. Reg. at 35725 (Agency explaining that Treasury "facilitated [its] decision to utilize its statutory conservatorship powers").

And through that "existing relationship" and "legal authority," the two agencies together, with Treasury in the lead, did exercise the ability to control the Companies for the benefit of the United States. *See A&D Auto*, 748 F.3d at 1154-55; *Williamson*, 2006 WL 1586375, at *4. By 2012, that relationship involved close coordination, which a longtime Treasury official, Mario Ugoletti, particularly enabled after transferring to advise the Agency's Director. Compl. ¶¶ 57, 64, 69, 71; A001-34[4], A110-13, A042. (Jeffrey Foster, then "a senior Treasury official," has testified that the seed for the Sweep Amendment was planted in a call he had with Ugoletti in 2010. Compl. ¶ 64; A110-13.) Then "Treasury made the decision, on behalf of itself and the Agency, to cause the execution of the Sweep Amendment," a decision Ugoletti communicated—he gave the Director the "heads up"—and Treasury made without consulting either Company's board. *Id.* ¶¶ 71-74; A048, A037-39, A054, A119, A006. [redacted]

[redacted] A056.

[4] "A" citations are to the appendix of jurisdictional documents filed with this brief.

Indeed, documents from jurisdictional discovery confirm the close relationship by 2012. For example, [redacted] A059-60. And on July 31, 2012, Foster emailed Bowler that, [redacted] A062. And in fact, as a senior White House official testified, the Sweep Amendment was a "Treasury-driven process." A051-52. [redacted] A116.

3. The government, focusing on the *Reid* complaint, overlooks these facts and their implications. *See* MTD 23-26. It does, as noted at the outset (I.A), observe that Treasury by itself could not have implemented the Sweep Amendment and claims that it was a voluntary agreement with the Companies. But missing is, in Treasury's own words, its "work with" the Agency (Compl. ¶ 63; A066, A107) on their "common goals" (*id.* ¶ 69; A046): Treasury implemented the Amendment not through a private third party but by coordinating with another federal agency, and that agency was the *de facto* counterparty—not the Companies, under the thumbs of both. Together—first secretly, and then publicly—they accomplished a major "policy change." *Id.* ¶ 79; A069. To disregard this collusive unity of control, purpose, and action, and thus deny the work of "the United States," would be to indulge a shell game, allowing the government to evade responsibility "by the simple device of having" two federal agencies rather than one do the work. *Lebron*, 513 U.S. at 397; *see Dep't of Transp.*, 135 S. Ct. at 1234 (Alito,

J., concurring) ("One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern."). That cannot be the law.

II. THE UNITED STATES' OTHER CHALLENGES TO THIS COURT'S JURISDICTION, AS RELEVANT TO THE JUNIOR PREFERRED PLAINTIFFS, ALSO FAIL.

In addition to its primary challenge to jurisdiction, the government raises several others, three of which bear on the claims of the Junior Preferred Plaintiffs. Those challenges also fail.

A. The government's contention that Plaintiffs' takings and illegal-exaction claims "sound in tort" rests on no relevant authority and would deny this Court jurisdiction over any such claims.

The government devotes a page and a half to contending that plaintiffs' takings and illegal-exaction claims "rely on allegations sounding in tort." MTD 44-46. This argument begs the question of the nature of the *claim*. The Federal Circuit has held that a "complaint suggest[ing] the United States may have acted tortiously … does not remove it from the jurisdiction of the Court of Federal Claims." *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346, 1353 (Fed. Cir. 2004). And this Court has recognized its jurisdiction over a complaint that alleges "the predicates for a traditional takings claim" even if the facts also could be predicates for a tort claim. *Hansen v. United States*, 65 Fed. Cl. 76, 81 (2005).

This defeats the only argument that the government makes specific to the claims of the Junior Preferred Plaintiffs, that their allegation of "collusion" between Treasury and the Agency sounds in tort. MTD 45. "Collusion" is not a claim here; rather, it supports plaintiffs' claim. To point to it in isolation is meaningless. Similarly, the government cites cases involving claims of "professional negligence," "fraud," and "wrongful coercion," but those are not the claims here. MTD 46. Whether pleaded as a taking or illegal exaction, the Junior Preferred Plaintiffs' constitutional claim is that the United States has forced them to give the public a multi-billion-dollar windfall. Such a claim is precisely what this Court exists to remedy.

In any event, *none* of the cases the government cites (MTD 45-46) concerned a claim of illegal exaction—no surprise, given that the Federal Circuit has recognized the permissibility of such a claim involving "illegal" action, "improperly" done "in contravention of" law. *Piszel v. United States*, 833 F.3d 1366, 1382 (Fed. Cir. 2016) (internal quotation marks omitted). And *none* threw out for lack of jurisdiction a complaint that pleaded a takings claim; they just involved the merits requirement that a taking depends on authorized action. *See generally Del-Rio Drillings Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998). From its primary case, *Golden Pacific Bancorp. v. United States*, the government cites two pages of the opinion on appeal, but the district-court decision discussed there was not on a takings claim (which is why the Federal Circuit rejected claim preclusion). 15 F.3d 1066, 1069, 1071 (Fed. Cir. 1994). And the Claims Court had simply recognized that, to plead a taking, the plaintiffs "admitted that the Comptroller had the authority to take the actions he did." 25 Cl. Ct. 768, 770 & n.2 (1992). Similarly, in the government's other main case, *Franklin Savings Corp. v. United States*, the Court simply recognized that the takings claim had to rest on actions authorized under FIRREA rather than taken in bad faith. *See* 56 Fed. Cl. 720, 755 (2003), *summarily aff'd*, 97 F. App'x 331 (Fed. Cir. 2004) (per curiam). So here, the takings claim alleges that the Sweep "was an authorized act of the government, done within the general scope of the duties of the agencies and officers who executed it." Compl. ¶ 114.

B. This Court has jurisdiction over the breach-of-fiduciary-duty damages claim because Treasury's duty is founded on a contract (its initial SPAs) and the Agency's duty arises from a money-mandating statute (the Recovery Act).

The government challenges jurisdiction over Count III, breach of fiduciary duty, on the ground that it too sounds in tort. The count alleges a dual source of duty, corresponding to the two agencies whose conduct violated it: Treasury's fiduciary duty arose from its Treasury SPAs;

and the Agency's fiduciary duty arose from its conservatorship under the Recovery Act. Compl. ¶¶ 124-25. Although either source would suffice, both support jurisdiction here.

1. The Tucker Act grants jurisdiction over claims founded on a contract with the United States. 28 U.S.C. § 1491(a)(1). The Treasury SPAs "are contracts that gave the United States (via Treasury) control over the Companies and over the Agency as conservator of the Companies," and the United States "thereby assumed fiduciary duties to Owl Creek and other non-controlling shareholders." Compl. ¶ 125; *see supra* Pt. I.C (detailing Treasury's control).

Although the government dismisses the logic of this allegation in a single paragraph that cites no authority, it is straightforward. MTD 44. The question is the *genesis* of the fiduciary duty, as the government itself once recognized:

> A claim that Treasury owes the plaintiffs a fiduciary obligation is, at heart, a claim that Treasury *assumed such obligations in entering into the PSPAs*. Thus, because *a contract is the source of the alleged rights* that the plaintiffs assert, their "breach of a fiduciary duty claim is essentially a contract claim" within the exclusive jurisdiction of the Court of Federal Claims.

Treasury Mot. Dismiss 44, in *Perry Capital LLC v. Lew*, No. 1:13-cv-01025, Dkt. 31-1 (D.D.C. Jan. 17, 2014) (quoting *Albrecht v. Comm. on Employee Benefits*, 357 F.3d 62, 68-69 (D.C. Cir. 2004)) (emphases added); *cf. Newby v. United States*, 57 Fed Cl. 283, 293 (2003) ("Whether an action sounds in tort, however, is determined . . . by the character of the underlying dispute."). In pleading Count III here, the Junior Preferred Plaintiffs pointed to the government's position, but its motion ignores this. Compl. ¶ 129. The government's failure to respond is telling.

The D.C. Circuit in *Perry Capital* reasoned that, "[a]lthough any fiduciary duty … arose from [Treasury's] purchase of shares pursuant to the [Treasury SPAs]," that doesn't mean they are imposed "by" the Treasury SPAs, 864 F.3d at 619, but the question under the Tucker Act here is whether the claim is "founded … upon" a contract; as Treasury once conceded, it is,

given that the contract is "the source" of the fiduciary duties. Moreover, the Junior Preferred Plaintiffs here seek only damages, and the D.C. Circuit recognized that the type of relief sought bears on the nature of the claim. *Id.*

Nor does it matter that the Treasury SPAs disclaim any third-party beneficiary. *See* MTD 44. The claim here relies on general corporate law that underlies such contracts: As discussed above in Part I.C, a shareholder who controls a company with respect to a transaction, including having control from a pre-existing contract, assumes a fiduciary duty to act fairly toward non-controlling shareholders. *See also Sisti*, 324F. Supp. 3d at 283; *cf. Starr Int'l Co. v. United States*, 856 F.3d 953, 969 (Fed. Cir. 2017) (finding absence of fiduciary duty in absence of pre-existing contractual relationship), *cert. denied*, 138 S. Ct. 1324 (2018). That rule applies to Treasury in entering into the Sweep Amendment, given the control rights in the Treasury SPAs as initially drafted in 2008. In entering into the initial stock-purchase agreement, Treasury did not *have* to acquire *de facto* control, becoming a "dominant shareholder," *Sisti*, 324 F. Supp. 3d at 283 n.9; but when it did, it also thereby acquired a fiduciary duty. That does not sound in tort; it is "founded upon" that agreement.

2. The Tucker Act also grants jurisdiction over claims "based on federal [law] mandating compensation by the federal government for damages sustained." *Newby*, 57 Fed. Cl. at 291. Here, the control that the Agency acquires when appointing itself conservator establishes a duty to shareholders, and the Recovery Act in this context is such a money-mandating statute.

Although the decision to *impose* a conservatorship might be that of a regulator (not subject to fiduciary duties), the *conduct* of a conservatorship presents a distinct question—"whether any duty arises where a governmental agency has assumed control of the day-to-day operations of a financial institution and has therefore ventured beyond its normal regulatory or

supervisory role." *Gibraltar Fin.*, 1990 WL 394298 at *2. "The case law, and common sense, indicates that a duty does arise in such a circumstance." *Id.* The court in *Gibraltar Financial* found nothing in FIRREA to indicate a "need to permit FSLIC to function in its capacity as conservator with impunity, leaving all shareholders in a financial institution bereft of the protections provided by the fiduciary duties imposed upon those who control such institutions." *Id.* at *3; *see also Golden Pac. Bancorp v. FDIC*, 375 F.3d 196, 201 (2d Cir. 2004) ("It is undisputed that, as a receiver, the FDIC owes a fiduciary duty to the [corporation's] creditors and to [the corporation]."); *DuPont v. FDIC*, 32 F.3d 592, 595 (D.C. Cir. 1994) (similar). And FIRREA is on point, including having the same language about a conservator or receiver's incidental power to consider its own interests. *Cf.* § 1821(d)(2)(J), *with* § 4617(b)(2)(J); *see Sisti*, 324 F. Supp. 3d at 282-83 (looking to FIRREA in concluding that conservators under Recovery Act "have a fiduciary duty"). The court in *Perry Capital*, which the government cites, failed to grapple with this. MTD 44.

Under the rule of *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), this fiduciary duty arising from the Agency's control as conservator under the Recovery Act is one for whose breach a claim for damages against the United States is a proper remedy. It is only necessary that a statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained," a standard "demonstrably lower than . . . for the initial waiver of sovereign immunity." *Id.* at 472. One needs a "fair inference," not "a plain and explicit statement." *Id.* at 477; *see also Starr Int'l Co., Inc. v. United States*, 121 Fed. Cl. 428, 463-66 (2015) (similar), *aff'd in part & vacated in part on other grounds*, 856 F.3d 953. *White Mountain* held that a statute does permit "a fair inference that the Government is subject to duties as a trustee and potentially liable in damages for breach" where it (1) "expressly defines a fiduciary

relationship" (there, by using the word "trust") and (2) gives the United States "discretionary authority to make direct use of portions of the trust corpus" (meaning the government has "control," rather than just a "bare" trust, such that it can "discharge the management responsibility"). *Id.* at 473, 474-75, 477, 480 (Ginsburg, J., concurring). These elements sufficed because "elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets." *Id.* at 475 (internal quotation marks omitted).

Here, this rule leads to the same conclusion. *First*, the Recovery Act makes the Agency "conservator," and then does not define that term, § 4617(a)&(b); as discussed above in Part I.B as well as this part, it is a term of art conveying elementary common-law notions of trusteeship—like the mere "in trust" in *White Mountain* itself—which in turn have long applied to conservators (and similarly to receivers) under FIRREA's identical statutory language. *Second*, the Agency-as-conservator has, and has used, the authority to oversee the "trust corpus" of the Companies, through its legal control over them, and thus may fairly be held responsible to "discharge" its fiduciary responsibilities. The Agency here is "a fiduciary actually administering trust property," and thus accountable in damages for failing in the "fundamental common-law dut[y]" "to preserve and maintain" it. *See White Mountain*, 537 U.S. at 475.

The government never mentions *White Mountain*, much less applies its rule. Instead it vaguely refers to "Indian law" and briefly quotes a decision issued just after *White Mountain*. *See* MTD 43. But *Franklin Savings*, rather than directly stating, much less applying, the rule of *White Mountain*, followed two cases that the Supreme Court there had *distinguished*. 56 Fed. Cl. at 751-53. The decision did not address the implications of "receiver" or "conservator" as common-

law terms of art, species of trust. Instead, it oddly focused on the "regulatory" authority in FIRREA (perhaps because the plaintiff in his scattershot complaint objected to even the imposition of a receivership, in addition to the receiver's liquidating of the S&L in accordance with FIRREA's directives). *See id.* at 752-54; *see also id.* at 723, 732, 747. Here, in any event, the issue is not "pervasive regulation" by a standing regulator, *id.* at 754; it is complete control by an appointed conservator, a context in which, under the rule of *White Mountain* in light of background law, accountability for damages is ordinary and expected.

C. The Junior Preferred Plaintiffs have alleged facts plausibly establishing all elements of breach of an implied-in-fact contract, involving the United States, to which they were intended third-party beneficiaries.

The government also challenges jurisdiction over Count IV on the ground that no implied contract of which the Junior Preferred Plaintiffs are intended beneficiaries exists on the alleged facts. MTD 42-43; *id.* at 77-78. The government is wrong.

1. An implied-in-fact contract is "founded upon a meeting of minds and is inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *U.S. Home Corp. v. United States*, 2010 WL 4689883, at *3 (Fed. Cl. Nov. 9, 2010) (internal quotation marks omitted). The elements are (1) mutuality of intent to contract; (2) unambiguous offer and acceptance; (3) consideration; and (4) actual authority. *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998). A court asks whether the parties' "conduct indicates that" they, "in fact, took upon themselves corresponding obligations and liabilities and, viewed objectively, came to" a "meeting of the minds." *AG Route Seven P'ship v. United States*, 57 Fed. Cl. 521, 528 (2003) (internal quotations omitted), *aff'd sub nom. AG Route Seven P'ship v. FDIC*, 104 F. App'x 184 (Fed. Cir. 2004).

Here, the Complaint shows the government made an unambiguous offer to place the Companies into conservatorship, and the Boards unambiguously accepted. Compl. ¶¶ 33, 40,

131, 133-35; *see* A083. [redacted] A083; *see* A075. The government needed to bargain for consent to avoid challenges. *See* § 4617(a)(3)(I), (a)(5) (permitting a Company that does not consent to conservatorship to sue within 30 days); Compl. ¶¶ 33, 40, 134. [redacted] *Id.* ¶¶ 132-33, 135; *see* A079-82; *see also* A075-76.

Indeed, if the Recovery Act authorized the government's actions in imposing the Sweep Amendment, then an obvious explanation for the Agency's repeated, unequivocal statements about the nature of its conservatorship—for three years before imposing it—is that the Agency was reflecting its agreement with the Companies not to exercise its full statutory powers but instead to act consistent with conservatorship as familiar from common law and FIRREA. *See* Compl. ¶¶ 54-56 (documenting such statements); A085-86, A089, A092, A095; *infra* Pt. IV.A.1. And that deal—avoiding Company challenges to the conservatorship in exchange for conducting a traditional conservatorship—includes consideration, a "bargained-for exchange." *Frymire v. United States*, 51 Fed. Cl. 450, 459 (2002); *see also* Compl. ¶ 134 (describing this exchange).

Nor can there be any question that the Agency had authority to so contract for the United States. "The authority of the executive to use contracts in carrying out authorized programs is … generally assumed." *United States v. Winstar Corp.*, 518 U.S. 839, 890 n.36 (1996) (internal quotation marks omitted). And the Recovery Act grants the Agency "incidental powers,"

§ 4513(a)(2)(A); § 4617(b)(2)(J), as well as authority to put the Companies into conservatorship with consent, § 4617(a)(3)(J), and then carry out a traditional conservatorship, § 4617(b)(2)(D).

The government, however, disputes whether the Junior Preferred Plaintiffs have pleaded mutuality of intent, arguing that the Agency possessed the statutory power to place the Companies into conservatorship without consent; that intent cannot be inferred through the government's encouraging the Boards to consent; and that the Complaint alleges the Boards consented to avoid litigation. MTD at 77-78. But even if the Agency *might* have forced a conservatorship, it did not do so (or even make findings for doing so), and it did not want to do so. Its "encourage[ment]" of the Boards was for this very purpose of preventing litigation—it was *bargaining* for the Boards' consent. And the Junior Preferred Plaintiffs allege not that the Boards consented to avoid litigation but rather that they consented to secure a conservatorship in the best interests of the Company and its shareholders. Compl. ¶¶ 133-34.

2. The Junior Preferred Plaintiffs are third-party beneficiaries of this contract. A third-party beneficiary exists if a contract "reflect[s] the express or implied intention of the parties to benefit the third-party." *State of Mont. v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997). The third party need not be identified in the contract, "but must fall within a class clearly intended to be benefited," and does if "the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him." *Id.*

The government argues that "shareholder status alone cannot support a claim for third-party beneficiary status," invoking *Glass v. United States*, 258 F.3d 1349 (Fed. Cir. 2001), and *Castle v. United States*, 301 F.3d 1328 (Fed. Cir. 2002). MTD at 42-43. But all they held was that the *mere* fact of being a shareholder of a company that contracted with the United States did

not make one a third-party beneficiary. *Glass*, 258 F.3d at 1354 (finding shareholders were "incidental beneficiaries" at most); *Castle*, 301 F.3d at 1338 (similar).

Here, however, the alleged facts do "reflect[ ] an intention to benefit the [non-government shareholders] directly," an intention on which they could reasonably rely. *Glass*, 258 F.3d at 1354. The Boards consented to the conservatorship, in part, because one that returned the Companies to a "sound and solvent" condition would serve the interests of the shareholders to whom the Board had a fiduciary duty. Compl. ¶ 132. [redacted]

[redacted] A080-81. [redacted]

[redacted] A082. [redacted]

[redacted] *See* A076 [redacted] *see also* A098 (confirming in Freddie Form 8-K that stockholders "will retain all their rights in the financial worth of those instruments").

The government's own statements were in accord. For example, in the press release announcing the conservatorships, Director Lockhart emphasized that "all preferred stocks will continue to remain outstanding." Compl. ¶ 45; A101. The Agency's FAQs, the same day, affirmed that "[s]tockholders will continue to retain all rights in the stock's financial worth." Compl. ¶ 46; A073. And Treasury Secretary Paulson emphasized that "conservatorship does not eliminate the outstanding preferred stock." A104.

III. THE RECOVERY ACT DOES NOT STRIP THE JUNIOR PREFERRED PLAINTIFFS OF "STANDING" WHERE NONE OF THEIR CLAIMS PURPORTS TO BE OR IS DERIVATIVE.

The Recovery Act's Succession Clause makes the Agency, as conservator, succeed to "all rights, titles, powers, and privileges of … any stockholder … of [the Companies] with respect to the [Companies] and the assets of the [Companies]." § 4617(b)(2)(A)(i). The government does not argue that this bars direct claims, and such claims are all that the Junior Preferred Plaintiffs have alleged. The government does contend that their direct claims are actually derivative, and so fail to state a claim. *See Perry Capital*, 864 F.3d at 624 (recognizing issue falls under Rule 12(b)(6)). This overlooks the differential treatment of stockholders, which underlies all four claims: The government has discriminated in favor of one, controlling stockholder—itself, in classic self-dealing. Moreover, plaintiffs seek damages for themselves, not for the Companies or all shareholders equally. Under these circumstances, the claims are direct, and, regardless, the Agency's conflict-of-interest would allow them.

A. The Junior Preferred Plaintiffs' claims are direct.

"A stockholder who is directly injured … retain[s] the right to bring an individual action for injuries affecting his or her legal rights as a stockholder." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004).[5] "[W]hether a stockholder's claim is derivative or direct" turns on "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." *Id.* at 1033. On the first, a court considers "whether the stockholder has demonstrated that he or she has suffered an injury that is not

[5] Fannie is a Delaware corporation, and Freddie a Virginia corporation. Compl. ¶¶ 23-24. Because Virginia law is not well developed on the direct-versus-derivative distinction, its courts would likely follow Delaware. *See, e.g., U.S. Inspect Inc. v. McGreevy*, 2000 WL 33232337, at *4 (Va. Cir. Ct. Nov. 27, 2000). The question is ultimately federal. *Starr*, 856 F.3d at 965-66.

dependent on an injury to the corporation." *Id.* at 1036. Notwithstanding the government's suggestion, this does not imply that a shareholder must show that the action did not also harm the corporation. *See, e.g.*, *Gatz v. Ponsoldt*, 925 A.2d 1265, 1278 (Del. 2007) (concluding "that the claims … are not exclusively derivative and could be brought directly"); *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006) (explaining that some claims are "both derivative and direct").

In *Gatz*, for example, the Delaware Supreme Court explained (relying on *Gentile*) that "a species of corporate overpayment claim" is both direct and derivative if (1) a controlling shareholder causes the corporation to issue excessive shares for assets of a lesser value, and (2) the exchange produces an increase of shares owned by the controlling shareholder and "a corresponding decrease" in shares owned by the minority shareholders. 925 A.2d at 1278. Such a claim is direct because it involves "an improper transfer—or expropriation—of economic value and voting power from the [minority] shareholders to the majority or controlling stockholder." *Id.* The resulting harm is not confined to an "equal dilution of the economic value and voting power" of all shareholders: Minority "shareholders are harmed, uniquely and individually, to the same extent that the controlling shareholder is (correspondingly) benefited." *Id.*

The facts alleged here are much like that scenario. The gravamen of the Complaint is not that the Sweep Amendment was "unfair" or constituted "waste or mismanagement" (MTD 29), but that the government as a controlling shareholder (including in collusion with itself as manager) effectively created a new security for itself entitling it to the Companies' entire net worth, without providing anything of comparable value to the Companies, while correspondingly reducing the rights of other shareholders. Compl. ¶¶ 106-07; *see supra* Pts. I & II.B. That *directly* harmed the *other* shareholders, as in *Gatz* and *Gentile*. And to remedy that direct injury, the Junior Preferred Plaintiffs are simply seeking damages, for themselves. Compl. at 48.

The Fifth Circuit in *Collins v. Mnuchin* recently held that such allegations—that "the transfer of all minority shareholder economic rights to a single, majority shareholder" (Treasury), harming "[m]inority shareholders … directly and uniquely" by "[d]ivesting" their "property rights"—described "a direct injury" conferring standing to challenge the Agency's structure. 896 F.3d 640, 654 (5th Cir. 2018) (per curiam). Furthermore, the Federal Circuit has repeatedly recognized a direct claim where a shareholder alleged deprivation of a contingent property interest in a bank. *See, e.g.*, *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1296 (Fed. Cir. 1999) (holding shareholder "possesse[d] a direct and cognizable property interest in a potential liquidation surplus and consequently ha[d] standing to sue for its taking"); *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 957 n.2 (Fed. Cir. 1992) (same).

Cases the government cites, for the proposition that claims for corporate waste or mismanagement are derivative, are inapposite. In *Pareto v. FDIC*, the court found the plaintiff's claim derivative because "[h]e *did not* allege a majority stockholders' breach of a fiduciary duty to minority stockholders, which resulted in the majority stockholders retaining a disproportionate share of the corporation's ongoing value." 139 F.3d 696, 699-700 (9th Cir. 1998) (emphasis added); *see also Cowin v. Bresler*, 741 F.2d 410, 416 (D.C. Cir. 1984) (finding claims derivative because stockholders "shared proportionately" in harm). Similarly, in *El Paso Pipeline GP Co., LLC v. Brinckerhoff*, the plaintiff only alleged loss to the partnership, and thus, any harm to him was just "in the form of the proportionally reduced value of his units." 152 A.3d 1248, 1261 (Del. 2016). He did not allege "that the Partnership's overpayment increased the General Partner's or the Parent's control at the expense of the limited partners." *Id.* at 1264. Here, by contrast, the Junior Preferred Plaintiffs do allege that the government used its control to extract economic value from shareholders other than itself, which increased its rights at the expense of

theirs and violated the government's fiduciary duty to them. Compl. ¶¶106-08. And in *Starr*, when the government obtained shares in AIG, it was *not* a controlling shareholder and did not otherwise "owe[] any fiduciary duties." 856 F.3d at 969. Here, however, for over three years, the government had controlled the Companies, not only as the controlling shareholder via the Treasury SPAs but also as conservator. Compl. ¶¶ 106, 126.

B. Even if plaintiffs' direct claims were deemed derivative, they still may assert them, under circuit precedent, because the Agency as conservator has a manifest conflict of interest.

Even if the Complaint's direct claims were deemed derivative, the Junior Preferred Plaintiffs still would have standing. Under circuit precedent, they could assert those derivative claims because the Agency has a manifest conflict-of-interest preventing it, as conservator, from adequately safeguarding shareholders' rights.

Before the Recovery Act, the Federal Circuit in *First Hartford* held that the Succession Clause in FIRREA (§ 1821(d)(2)(A)) can allow shareholders to maintain a derivative suit in the event of a conflict of interest, 194 F.3d at 1295, and the Ninth Circuit followed it in *Delta Savings Bank v. United States*, 265 F.3d 1017, 1022 (9th Cir. 2001). The Federal Circuit in *First Hartford* saw a "manifest" conflict because "the FDIC was asked to decide on behalf of the depository institution in receivership whether it should sue the federal government based upon a breach of contract, which, if proven, was caused by the FDIC itself." 194 F.3d at 1295. And the Ninth Circuit recognized a "common-sense, conflict-of-interest exception" where the FDIC would have to sue an "interrelated agenc[y] with overlapping personnel, structures, and responsibilities." *Delta Sav.*, 265 F.3d at 1022. Congress then used a materially identical Succession Clause in the Recovery Act (§ 4617(b)(2)(A)). Although the D.C. Circuit was not "convinced" by *First Hartford*, it controls as precedent here. *Perry Capital*, 864 F.3d at 625.

The Agency "cannot be expected to objectively pursue lawsuits" challenging the Sweep Amendment that the Agency itself and Treasury worked together to implement and that benefited the United States at the expense of other shareholders. *Delta Sav.*, 265 F.3d at 1023. The rationale for the conflict-of-interest exception is at its height where, as here, the claims are not about an agency's pre-conservatorship action as a regulator (*First Hartford*, 194 F.3d at 1295) or another agency's initiation of a conservatorship (*Delta Sav.*, 265 F.3d at 1021), but *against the conservator itself for self-dealing as conservator*.

Yet the government seeks to distinguish *First Hartford* and *Delta Savings* because they involved circumstances that predated the conservatorship. MTD 35. Those courts, however, doubted that the conservator or receiver *in the present* would fairly determine whether to sue. *First Hartford*, 194 F.3d at 1295 (basing its conclusion, "significantly, upon the conflict of interest faced by the FDIC in determining whether to bring suit"); *Delta Sav.*, 265 F.3d at 1022 (agreeing that "FDIC may be unwilling to bring a lawsuit against [interrelated agency]"). Past circumstances simply informed the present. All the more do the circumstances here.

Finally, the government's invocation of issue preclusion on the permissibility of derivative claims and availability of a conflict-of-interest exception, based on *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 229-33 (D.D.C. 2014), is meritless. MTD 37. Again, the Junior Preferred Plaintiffs do not assert derivative claims (and that case did not rule on characterization). *See Guenther v. Pac. Telecom, Inc.*, 123 F.R.D. 341, 347 (D. Or. 1987) (observing that judgment in a derivative suit will not preclude individual claims). Even if their claims were deemed derivative, that decision would not be preclusive in the face of Federal Circuit precedent. *See Af-Cap. Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1086 (9th Cir. 2007) (declining to apply issue preclusion to legal issue that was decided in sister circuit,

"whose jurisdiction is coordinate with ... that of [our court]"; was "of general interest"; and was "[un]resolved by the [] Supreme Court"); *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002) (similar); *Alexander Hosp., Inc. v. United States*, 5 Cl. Ct. 62, 69 (1984) (recognizing that issue preclusion "is an equitable doctrine," inapplicable "when it would be unjust"). And, in any event, the Junior Preferred Plaintiffs were not "fully represented in the previous action," in which the plaintiffs did not allege illegal exaction or breach of implied-in-fact contract; they did not bring their direct takings claim in a representative capacity (or satisfy procedures for doing so); and the holding on the fiduciary-duty claim was simply that they could not represent the Companies. *See Saxton v. FHFA*, 245 F. Supp. 3d 1063, 1074-75 (N.D. Iowa 2017) (so holding), *aff'd*, 901 F.3d 954 (8th Cir. 2018); *see also Arduini v. Hart*, 774 F.3d 622, 634 (9th Cir. 2014) (suggesting same rule).

IV. EACH COUNT ALLEGES AN AT LEAST PLAUSIBLE CLAIM FOR RELIEF DUE TO THE GOVERNMENT'S IMPOSITION OF THE SWEEP AMENDMENT.

On the merits, the government contends that all four of the Junior Preferred Plaintiffs' counts fail to state a claim. MTD 50-78. "When deciding a motion to dismiss a complaint" under Rule 12(b)(6), "the court must accept the material facts alleged in the complaint to be true, draw all reasonable inferences in favor of the plaintiffs, and decide whether it is plausible that plaintiffs have a valid claim for relief." *Colonial Chevrolet Co., v. United States*, 123 Fed. Cl. 134, 137 (2015). "Plausibility at the pleading stage is distinct from probability," and "a well-pleaded complaint may proceed" even if the court thinks ultimate recovery "very remote or unlikely." *Id.* (internal quotation marks omitted). Each count readily meets this standard.

A. The Complaint alleges a plausible claim for taking, under any analysis.

With respect to Count I, the Sweep Amendment was a taking for much the same reason that this Court has jurisdiction on the ground explained above in Part I.B: By acting beyond the

bounds of any previously known conservatorship, including conservatorships under FIRREA's longstanding language that is materially identical to the Recovery Act's, and for the direct benefit of the Treasury, the United States contravened settled principles protecting private property held in trust. It thereby took for public use the property of the shareholders other than itself. Indeed, the government's own words across three years—repeatedly and publicly, including in testimony and in regulatory statements—confirm the property and its taking here.

The government can commit a taking in any of three ways: by directly appropriating property, physically invading real property, or regulating owners' use of their property. *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 537 (2005). Each of the first two is a "paradigmatic taking": The government *takes* property literally. *Id.* The last involves regulation, of an owner who retains possession, that "goes too far," either depriving the owner of all economically beneficial use and so being "tantamount to a direct appropriation or ouster," or failing the *Penn Central* balancing test. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Lingle*, 544 U.S. at 537-39. By contrast, a direct appropriation or physical invasion is "a *per se* taking, without regard to other factors." *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015).

Here, the Sweep Amendment works a taking under any mode of analysis. Compl. ¶¶ 99-105, 114-15. Junior preferred shareholders have a property interest in their stock, which continues in conservatorship. The Amendment directly appropriated that property; it deprived the owners of all economically beneficial use of it; and it at least went "too far."

1. Junior preferred stock of the Companies is a property interest, which continues to exist under conservatorship.

a. A stock certificate is "a unit of interest in the corporation based on a contribution to the corporate capital." 2 *Cox & Hazen on Corporations* 718 (2d ed. 2003). The Federal Circuit has recognized that "shares of stock" are "property," *Golden Pac.*, 15 F.3d at 1073, and that "a

shareholder's direct interest in a liquidation surplus is a cognizable property interest the taking of which by the federal government gives rise to standing to sue," *First Hartford*, 194 F.3d at 1283; *see also Keller v. Wilson & Co.,* 190 A. 115, 124 (Del. Ch. 1936) ("[O]ne who invests his money in cumulative preferred stock relies largely upon the right to receive the stipulated dividends at some time."). Here, the plaintiffs owned junior preferred stock, purchased after (or, in some instances, before) the Agency appointed itself conservator and before it and Treasury imposed the Sweeps. *E.g.* Compl. ¶¶ 11, 13-20, 96. Their certificates accordingly gave them property rights in the Companies—to the value of increases in equity, to dividends reasonably paid, and to any liquidation surplus. *Id.* ¶¶ 26, 96-98, 112.

b. Contrary to the government's argument (parroting the district court's discussion in *Perry Capital*, notwithstanding its holding that it lacked jurisdiction), this property right did not vaporize when the Agency made itself conservator. MTD 51-54. "The existence of a property interest is determined by reference to existing rules or understandings stemming from an independent source such as state law," and a government "may not sidestep the Takings Clause by disavowing traditional property interests long recognized under" background principles derived from applicable law. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998); *e.g.*, *Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 511 (Fed. Cir. 2011) (recognizing need to "look to existing rules and understandings and background principles derived from an independent source, such as state, federal, or common law, that define the dimensions of the requisite property rights") (internal citations omitted).

The "existing rules and understandings" and "background principles" here, derived from both the "common law" and longstanding practice under federal law (FIRREA), were that shareholders retained property rights in a company under conservatorship, because the

conservator's inherently temporary role, which he had a *fiduciary duty* to faithfully pursue, was to *preserve and conserve* the company's assets and property, put it in a *sound and solvent* condition, and ultimately *restore* it to normal operations. We have detailed that law above, in Parts I.B.2-4 and II.B.2, and the government does not dispute it.

Nor does the Recovery Act dispense with it: On the contrary, it uses the bare term "conservator," thus implicitly drawing on and certainly not throwing out the background principles defining that term of art; and in detailing the authority of the Agency as conservator, it uses language materially identical to that in FIRREA, which "had always been interpreted to mean that FDIC has a mandatory duty to preserve and protect the assets of banks when acting as conservator." Compl. ¶ 102; *cf.* § 4617(b)(2)(B), (D), (J), *with* § 1821(d)(2)(B), (D), (J); *see* 76 Fed. Reg. 35724 (Agency in 2011 issuing final rule under § 1367 that does not specially define "conservator" and reiterates background principles). The Recovery Act even confirms that, in the radical situation of receivership, involving wind-down and liquidation, shareholders retain substantive and procedural protections, again consistent with background principles, particularly borrowed from FIRREA; and that only "as receiver" can an agency liquidate a company. *Cf.* § 4617(b)(2)(E), (b)(3), (c)(1), *with* § 1821(c)(13)(B)(i), (d)(2), (d)(3), (d)(11). Finally, shareholders' stock is not cancelled during conservatorship, and they retain the ability to sell it, as property. Indeed, even in receivership (when stock is cancelled, § 4617(b)(2)(K)), a shareholder retains the right to payment for certain claims, further reinforcing background principles. *Cf.* §§ 4617(b)(9), (c), (e), *with* § 1821(d)(10), (d)(11), (i).

It does not matter for determining the property interest *before* the Sweep Amendment that the Agency *at some point might* impose it under the Recovery Act. All that inheres "in the title," so as to "defeat a property interest," is "specific regulation." *Piszel*, 833 F.3d at 1374-75; *A&D*

Auto, 748 F.3d at 1152 ("If a challenged restriction was enacted after the plaintiff's property interest was acquired, it cannot be said to 'inhere' in the plaintiff's title."). That is why *A&D Auto* rejected the government's argument that, given certain bankruptcy law, the dealers' franchise agreements were not "valid and compensable property interests": The "challenged government action" was "requiring dealer terminations as a condition of financial assistance to the automakers," and *that* action "did not predate the acquisition of the plaintiffs' interest." 748 F.3d at 1153; *see Piszel,* 833 F.3d at 1374 (similar, involving Recovery Act).

The government's own words across three years confirm this. Compl. ¶¶ 7; 45-46, 48 (2008); 50, 52 (2009); 54-56 (2010-11). For example, the day he appointed the Agency conservator, the Director emphasized that conservatorship was "designed to stabilize a troubled institution with the objective of returning the entities to normal business operations"; and the Agency assured the public that "[s]tockholders will continue to retain all rights in the stock's financial worth" and the Director would "issue an order terminating the conservatorship" once the Companies were "restore[d] . . . to a safe and solvent condition." *Id.* ¶¶ 45-46. That month, the Director reiterated these understandings and promises in public testimony to Congress, including that "*both the preferred and common shareholders have an economic interest in the companies*." *Id*. ¶ 48 (emphasis added). And in mid-2011, the Agency detailed these points in the Federal Register in issuing a final rule implementing § 1367, emphasizing that "the Conservator is charged with rehabilitating the regulated entity" and that its "goal" was "to continue the operations of a [Company], rehabilitate it and return it to a safe, sound, and solvent condition."

Id. ¶ 55. This was "one of the primary objectives" and the "essential function of a conservator." 76 Fed. Reg. at 35727. Again, the Director told Congress the same thing. Compl. ¶ 56.[6]

c. Nothing in the two cases the government emphasizes, *Golden Pacific* and *California Housing*, is to the contrary. Most simply, *First Hartford* subsequently confirmed that shareholders have a constitutionally protected property interest in any surplus, even a contingent surplus, from a government-administered receivership. *See* 194 F.3d at 1288, 1296. If a government receiver could not liquidate a company and then take any surplus from shareholders for itself without facing a takings claim, then it inexorably follows that a government conservator cannot strip all economic value from other shareholders for itself and avoid a takings claim.

The cases themselves merely involved challenges to being *placed* into conservatorship or receivership (not at issue here), and in any event rejected those challenges because the action—in *Golden Pacific*, for example, imposing an FDIC receivership due to a "run on the Bank," 15 F.3d at 1069—was *consistent with* background law (unlike here). The plaintiffs were asserting one property right—the "right to exclude"—when existing understandings and background principles did *not* include it. *Id.* at 1073-74; *see Cal. Housing*, 959 F.2d at 958-59. The court was not adopting, without occasion and *in the face of* background law, the radical notion that initiating a conservatorship or receivership removes *all other* sticks from the bundle of rights. *See also Piszel*, 833 F.3d at 1375 (explaining these cases as involving not "defeat[ing] a property interest" but merely the extent to which, as to a property interest, a regulatory regime could bear on *Penn Central* balancing); *First Hartford*, 194 F.3d at 1287-88 (relying on *Cal. Housing*). (The other

[6] That the Sweep Amendment contravenes property rights does not mean that the government lacked authority to impose it—the government may take property for public use so long as it provides compensation. Compl. ¶ 114; *supra* Pt. II.A. This answers Part VIII.E of the government's brief, to the extent it applies to the Junior Preferred Plaintiffs.

cases the government string-cites likewise just involved normal application of established regulations, not deviation from background property rights. MTD 51, 53.) Indeed, under the government's logic, a police officer who executed a proper warrant could roam around and seize *anything* from a home, and a tax collector who obtained a proper lien for an amount could garnish and *empty* a bank account.

2. Through the Sweep Amendment, the government is directly appropriating private property.

Through the Sweep Amendment, the government directly appropriates to its own use, every quarter with no end in sight, all of the Companies' profits, which proportionally belong to stockholders. This is a *per se* taking.

a. In *Lingle*, the Supreme Court recognized that the "paradigmatic taking" can be either "a direct government appropriation or physical invasion of private property." 544 U.S. at 537. Then in *Horne* it reaffirmed "the established rule of treating direct appropriation[s] of real and personal property alike." 135 S. Ct. at 2427-28. "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." *Id.* at 2426. Thus, if the government appropriates private property, of whatever sort, there is no need for further inquiry: It must pay compensation for any loss. Courts "do not ask . . . whether [the taking] deprives the owner of all economically valuable use." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002).

Accordingly, the Supreme Court has found a taking when, for instance, the federal government seized part of a leased warehouse (*United States v. Gen. Motors Corp.*, 323 U.S. 373, 382-84 (1945)); when a county took the interest on court fees paid into a bank account (*Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-64 (1980)); when a State required lawyers to deposit client funds into IOLTA accounts and transferred the interest to

charity (*Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003)); and when federal planes used private airspace to approach a government airport (*United States v. Causby*, 328 U.S. 256, 267 (1946)). In each case, the property owner retained economically beneficial use, *see Brown*, 538 U.S. at 224 (principal); *Webb's*, 449 U.S. at 158 (principal); *Causby*, 328 U.S. at 259 (use of property for anything but a chicken farm); *Gen. Motors*, 323 U.S. at 375 ("some 93,000 square feet" of leased warehouse); but in each case the government had expropriated private property and thus committed a taking. In *Webb*, in particular, the Court had no trouble finding a taking given that the "county's appropriation of the beneficial use of the fund is analogous to the appropriation of the use of private property" in *Causby*. *Webb's*, 449 U.S. at 163-64. Similarly, if the government took $100 from every U.S. bank account that contained more than that, no one would think it permissible because the government did not take every cent.

A taking occurs under "a *per se* approach" whenever the government takes funds "linked to a specific, identifiable property interest such as a bank account." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 614 (2013). After all, taking the money in a bank account is no different from taking title to that account; the account is just a mechanism for accessing the money, and the money becomes the government's either way. *Webb's*, 449 U.S. at 163-64; *Phillips*, 524 U.S. at 172. Similarly, the government takes the property right created by a contract by withholding the *funds* owed under the contract. *Lynch v. United States*, 292 U.S. 571, 579 (1934). It does not matter whether the government leaves the owner the piece of paper linked to the funds. Because the property is the financial claim to which the paper entitles its owner, the government must provide just compensation when it impairs that claim.

b. Here, in the same way, a stock certificate (*see* Compl. ¶¶ 97-98) is property that provides mechanisms for accessing a proportion of the economic value that inheres in a

company, creating a claim on a share of the company's net assets. Moreover, just as the owner of principal in a bank account also owns the interest that accrues on that principal, since interest "follows the principal," *Webb's*, 449 U.S. at 162, a shareholder owns a proportional claim to increases in the company's value—if the company pays out earnings as dividends or reinvests them, for example. In either case, the stock grants its holder a property right to benefit proportionately from the company's success. Yet the government "directl[ly] appropriate[es]" to itself the Companies' net worth every quarter. *Lingle*, 544 U.S. at 537. It "extinguish[es] any possibility that any shareholder other than the United States will receive any value from the Companies." Compl. ¶ 62. That ouster is a paradigmatic taking.

c. The government invokes the line of cases derived from *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923). MTD 55-58. It is not clear whether the government means to attack the Junior Preferred Plaintiffs, given that it focuses on and cites complaints only from the plaintiffs who sued in the District of Columbia, but, in any event, that line is not on point here.

The rule of these cases is merely that, when the government directs its police power at property that it owns or controls, a third party, whose expectations the act defeated, does not have a claim for lost value of its own property (including a contract). In *Palmyra Pacific Seafoods LLC v. United States*, 561 F.3d 1361 (2009), for example, the Federal Circuit, after surveying the cases, explained the rule with the hypothetical of a company's buying rights to private land next to a federal wilderness, expecting to run tours there, and claiming a taking when the government closes the wilderness. *Id.* at 1370; *see A&D Auto*, 748 F.3d at 1153-54 (explaining rule as involving action "directed to a third party" that has "merely unintended or collateral" effects on plaintiff or affects "a general class"). Here, however, the Junior Preferred Plaintiffs object to the government's *targeting and taking their own property*, not to the

incidental effects of actions directed elsewhere. (The government's invocation of this authority, which concerns *regulatory* action, does, however, confirm that the Sweep Amendment was an act of the United States. *See supra* Pt. I). Additionally, that targeting and taking does not merely involve an expectation to continue some activity authorized under a personal contract (such as, in *Palmyra*, 561 F.3d at 1365-66, a fishing operation) but rather the loss of a property interest that can be sold or transferred like any other property.

It does not matter that these tradable "proprietary rights" happen to be documented in the form of a "profit-sharing contract" (stock certificate). *Cox & Hazen on Corporations* at 718-19. To adapt *General Motors,* it is irrelevant to the ability of a warehouse tenant to hold the government liable for taking, when it seizes some of the warehouse, whether the seizure also frustrated the tenant's lease with the private landlord. Nor is it relevant to the ability of the holder of a bank account to hold the government liable for taking, when it seizes some of the balance, whether the seizure frustrated the holder's account agreement with the bank. Either way, the government has directly appropriated property.

3. The Sweep Amendment also deprives shareholders of all economically beneficial use of their stock.

The Sweep Amendment also—by definition—deprives the Companies' shareholders of all economically beneficial use of their stock, providing an additional basis for finding a taking apart from a *Penn Central* balancing. Initially, there is no reason to exclude personal property, tangible or intangible, from the "wipe-out" doctrine, nor does the government argue otherwise. MTD 59-60. Although the doctrine began in a case involving real property, the Federal Circuit has "applied the categorical test to personal property." *A&D Auto* 748 F.3d at 1151 (collecting cases). No court has held that the categorical rule applies to some but not all personal property; and, in any event, neither of the two out-of-circuit decisions that *A&D Auto* noted as viewing the

rule as applying only to land involved holdings. *See id.* This Court in *Love Terminal Partners v. United States*, applied the rule to a leasehold interest, an "intangible property right[]." 126 Fed. Cl. 389, 408, 424 (2016) *rev'd on other grounds*, 889 F.3d 1331 (Fed. Cir. 2018).

The analysis here is straightforward: Once the government imposed the Sweep Amendment, it alone enjoyed the right to participate in the Companies' financial success, receiving all profits and exclusively retaining any liquidation surplus. That "eliminate[s] any possible investment return" and thus any economically beneficial use. Compl. ¶ 104.

The government seems to argue both that the shares *still* have value, MTD 60, and that the shares had *no* value after it imposed the conservatorship, MTD 61. Apart from being inconsistent and irreconcilable, the arguments also fail on their own terms. We have explained above (IV.A.2) the irrelevance of just retaining pieces of paper; beyond that, the government contends the shares "retain beneficial use" because they "retain value as traded equities" and "the share prices have fluctuated since [the Agency] placed the [Companies] into conservatorship." MTD 60. Price fluctuation *before* the Sweep Amendment is hardly relevant, except to evidence that value did exist to be wiped-out, because, as discussed above (IV.A.1), investors pre-Sweep could expect the Agency to conduct a temporary conservatorship consistent with background property rights—as it said it would. That the government in 2008 sought to and did obtain warrants to purchase a super-majority of the merely common stock also suggests that value remained.

As to the period after, the Junior Preferred Plaintiffs have alleged that (a) the Sweep immediately destroyed two-thirds of the market value (as measured by the trading price) of their shares; (b) immediately before the Sweep, that market value (as measured by the trading price) was understated, so the two-thirds loss was too; (c) given that the Sweep inherently eliminates

any possible investment return, it necessarily "extinguished any existing market value"; and (d) any remaining "trading value" is thus "necessarily attributable to the possibility that litigation success could result in a return on the Junior Preferred Stock." Compl. ¶ 104. They also have alleged, using the government's own words, how the government's claims, then and now (MTD 61), that the Treasury SPAs before the Sweep had trapped the Companies in perpetual thrall to Treasury can only be a pretext, *see id.* ¶¶ 57, 84, 89-95, 115—including alleging (among other things) that, if the Companies "had been permitted to repay principal during this period [of 2013 through 2017], they would have had sufficient quarterly profits in excess of the 10% dividend to *fully redeem* the Treasury Senior Preferred Stock and to rebuild capital." *Id.* ¶ 93. The government may disagree, and introduce evidence, but those alleged facts at least *state a claim* for a wipe-out. *Cf. Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1114 (Fed. Cir. 2015) (discussing trial evidence and findings on extent of loss under wipe-out claim).

Finally, the mere ability to *sell* property is not a "beneficial *use*" of it. As the Federal Circuit recognized in a land case, "[t]ypical economic uses enable a landowner to derive benefits *from* land *ownership* rather than requiring a landowner to sell the affected parcel." *Lost Tree*, 787 F.3d at 1117 (emphasis added); *id.* ("When there are no underlying economic uses, it is unreasonable to define land *use* as including the sale of the land."). Here, selling the right *not* to participate in the Companies' earnings is not an economically beneficial use; and whatever limited value there is in being able to sell the stock, the government cannot escape its obligation to pay just compensation by leaving property owners a "token interest," *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). As a corollary, the ability to sell the property that the government *is now* depriving of all economically valuable use, because the deprivation *might someday* end (for whatever reason), does not exempt the government from liability for its present

deprivation. *See Lost Tree*, 787 F.3d at 1118 (rejecting argument that value from "speculation," "based solely on the possibility" of favorable judgment, could defeat claim). That would absurdly mean that "value resulting from" speculation that the deprivation would end "would defeat the very *Lucas* claim on which the speculation was based." *Id.*

4. The Sweep Amendment in any event fails *Penn Central* balancing.

At a bare minimum, the Sweep Amendment is a taking under a *Penn Central* balancing, which weighs three factors: (a) the extent to which the government's action interferes with investment-backed expectations; (b) the economic impact of the government action on the owners; and (c) the character of the government action. *E.g.*, *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The first two factors have more weight, and the second can be "so overwhelming" as to be dispositive. *Lingle*, 544 U.S. at 538-40; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). Here, all three weigh on the side of a regulatory taking.

a. For the reasons detailed above in this Part IV.A (as well as I.B), the plaintiffs had strong investment-backed expectations that the Agency, which *was* embracing a true conservator's role—like FDIC's under a materially identical law—*would not* deliberately dissipate their ownership stake in the Companies' assets for the government's direct benefit. Indeed, the Treasury SPAs themselves had established that the government would *not* have a 100% stake in the Companies, yet the Sweeps *de facto* give it just that. Shareholders also had reasonable expectations that the Companies would recover (as did the government) and that the conservatorship would end (as the Agency had promised). Compl. ¶¶ 99-102, 113; *see id.*¶¶ 46, 56-59.

That a conservatorship might be analogized to an inherently regulated circumstance (*see* MTD 63-67) begs the question. The rule from the Federal Circuit's leading decision, *Cienega Gardens v. United States*, 331 F.3d 1319 (2003), which the government does not cite, is this: "A

business that operates in a heavily-regulated industry should reasonably expect certain types of regulatory changes that may affect the value of its investments. But that does not mean that *all* regulatory changes are reasonably foreseeable or that regulated businesses can have *no* reasonable investment-backed expectations whatsoever." *Id.* at 1350. To "bolster restrictions or eliminate loopholes in an existing regulatory regime" is one thing, *Piszel*, 833 F.3d at 1374-75; to take an "unprecedented" action based on a "new . . . understanding" is quite another, *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1191 (Fed. Cir. 2004).

Here, again, the government's own words—repeatedly, publicly, in testimony and in regulations, across three years leading up to the Sweep Amendment—confirmed for shareholders what decades of background law established: that a conservatorship would not license the Agency to do whatever it wished (*see supra* Pts. II.C.2, IV.A.1.b)—certainly not to set a company on the brink of insolvency—but rather constrain (or at least prompt) it to aim at *restoring* the ward. In that thick context, the Treasury-enriching Sweep Amendment, secretly prepared and then dropped on the public nearly four years after the conservatorship began and more than two years after Treasury's SPA authority had expired, was hardly among the "certain types of regulatory changes" to expect. It was, rather, an "unprecedented" and fundamental change.

b. The "economic impact" for junior preferred shareholders is total, as the Sweep Amendment *eliminates* the beneficial use of their stock; it at a minimum erased well over a majority of its market value. Compl. ¶¶ 103-05, 115; *see supra* Pt. IV.A.2-3. Every quarter, the government seizes the Companies' net worth (but for a *de minimis* reserve added in 2017). Shareholders have no means of receiving *any* money from the Companies in the form of dividends or realizing *any* gains that would result if the Companies reinvested their earnings; the

government also has locked in its liquidation preference, at nearly $200 billion. *Id.* ¶ 95. (More than 15 times the approximately $12 billion market capitalization of the Companies.)

The scale of destruction is also vast: As the Complaint spells out, Treasury by the end of 2017 had received over $120 billion more under the Sweep Amendment than it would have received under the Treasury SPAs if they had not been amended—money that otherwise would have benefitted the Companies and thus their owners. *See* Compl. ¶¶ 92-94. Even that figure assumes the Companies would not have fully redeemed the Treasury Senior Preferred Stock, yet, as alleged, they could have. *Id.* ¶ 93.

c. The "character" of the government's action (if relevant given the weight of the first two factors) is naked and unprecedented self-dealing. Compl. ¶ 114. The government in stripping *more than $120 billion of additional funds* from the Companies has filled its coffer with them, and can continue the looting forever, leaving the Companies in "a lucrative limbo," "bled of their profits quarter after quarter in perpetuity." *Collins*, 896 F.3d at 679 (Willett, J., dissenting in part). It similarly has enabled itself to receive, as of the end of 2017, *nearly $100 billion more than its outlay* under the Treasury SPAs and more than $200 billion in dividends under the Sweep Amendment alone. *See* Compl. ¶¶ 84, 92-95, 115. The government also enables itself to obtain from shareholders massive off-budget revenue and thereby avoid political accountability for instead raising taxes, cutting spending, or expanding deficits. That forcing of "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" is precisely what the Takings Clause bars. *Lingle*, 544 U.S. at 537.

The government's timing confirms its opportunism. It decided to impose the Sweep Amendment just when, in the summer of 2012, the Companies had returned to sustained profitability and ceased drawing on their commitments. Compl. ¶¶ 88-89; *see id.* ¶¶ 58, 70.

Fannie's then-CFO, for one, found the connection obvious. *Id.* ¶ 73. It was also obvious that, as a result of their revival, the Companies would be able to—as they did—recognize massive deferred tax assets, in the order of $100 billion; indeed, Fannie's anticipation of doing so, at a meeting in August 2012, led to Treasury's "renewed push" to begin the Sweeps, which it did days later—ensuring that that recognition increased the diversion to itself. *Id.* ¶¶ 57 (last bullet), 59, 71, 90. Had the government merely wanted its full "upside," it could have exercised its warrants to purchase 79.9% of the common stock for a nominal price and allowed the Agency to end the conservatorships, while continuing to collect any dividends on its senior preferred—all actions *consistent with* the Companies' health and shareholders' property rights.

By collusively enriching itself in this way, the government also spited other shareholders. Since at least late 2010, Treasury had internally been seeking to "ensure existing common equity holders will not have access to any positive earnings from the [Companies] in the future." Compl. ¶ 63. A few days before executing the Sweep Amendment, its officials internally reiterated their goals to "ensure that the [Companies] will not be able to rebuild capital as they are wound down" and to "tak[e] all of their profits going forward." *Id.* ¶ 72. Afterward, the government *boasted* about this nationalizing purpose—telling the public the Sweeps ensured that "every dollar of earnings each firm generates is used to benefit taxpayers" and that the Companies did *not* "retain profits, rebuild capital, and return to the market in their prior form." *Id.* ¶ 76. And the Director declared: "I don't lay awake at night worrying about what's fair to the shareholders." *Id.* ¶ 83 (last bullet).

The Sweeps thus hardly involved *helping* the Companies function as the private, shareholder-owned entities that Congress established. *See also supra* Pt. IV.A.3; Compl. ¶¶ 23-24. This combination of massive aggrandizement of government and open disregard of

shareholders instead smacks of bad faith. *See Tahoe-Sierra*, 535 U.S. at 333 ("[W]ere it not for the findings" that the government "acted diligently and in good faith, we might have concluded that the agency was stalling" and found a taking.). All of this is more than enough to state a takings claim under *Penn Central*, along with the direct appropriation and wipe-out here.

B. The Complaint alleges a plausible claim for illegal exaction in the alternative.

In the alternative (if the Recovery Act did not authorize the Sweep Amendment), the Complaint states a plausible claim that the Sweep Amendment is an illegal exaction. Such a claim "may be maintained when the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum that was improperly paid, exacted, or taken from [him] in contravention of the Constitution, a statute, or a regulation." *Piszel*, 833 F.3d at 1382 (quoting *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996)). "Illegal exaction concerns the 'recovery of monies that the government has required to be paid contrary to law,'" so there must be a transfer of funds. *Id.* at 1382 (quoting *Aerolineas*, 77 F.3d at 1572). However, as "in effect" in *Piszel* and *Aerolineas* indicates, a claim "lies even where money is not paid by the plaintiff directly to the government." *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1364 (Fed. Cir. 2002).

1. The Sweep Amendment meets these elements. *First*, under it, the transfer of monies directly to the government is obvious—hundreds of billions of dollars paid from the Companies to Treasury. And that transfer "in effect" is made by the Companies' owners other than Treasury, the non-government shareholders, because they have a property right in a portion of those diverted monies for the reasons detailed immediately above in Part IV.A, and the Sweeps eviscerate it. Compl. ¶ 119. It is no different in principle than if the government had ordered a bank to hand over all of the funds it held—that would be "in effect" a forced payment by the bank's account holders.

Second, this forced payment, if not statutorily authorized, was and is *ultra vires*. Compl. ¶ 118. The Junior Preferred Plaintiffs recognize that the circuit courts to consider whether the Recovery Act authorized the Sweep Amendment have held that it did. *E.g.*, MTD 16-18. (Those holdings undergird the takings claim.) But a plaintiff may plead takings and exaction in the alternative, *Rith Energy v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001); *Figueroa v. United States*, 57 Fed. Cl. 488, 496 (2003); and, here, there is ample reason to do so given, among other things, that those holdings have come over vigorous dissents, *Collins*, 896 F.3d at 678-93 (Willett, J., dissenting in part); *Perry Capital*, 864 F.3d at 634-48 (Brown, J., dissenting). Because those dissents ably and extensively articulate the grounds for holding the Sweep Amendment not to be authorized, plaintiffs will sketch them here.

As set out above, prior to the Recovery Act, the law was uniform that a conservator's duty was to preserve and conserve assets of a troubled company, to rehabilitate it into solvency and soundness, and to restore it to normal operations. When Congress enacted the Recovery Act in 2008, it borrowed FIRREA's nearly twenty-year-old language on conservators and receivers (among other things), including language on a conservator's authority as well as its incidental powers. *Supra* Pts. I.B.2-4, II.B, IV.A.1.b; Compl. ¶¶ 32-35. There is thus every reason to read the Recovery Act as FIRREA has been. The government itself did that for years, publicly explaining the Agency-as-conservator as constrained like the FDIC-as-conservator—under the terms of the Recovery Act. *See* Compl. ¶¶ 45, 48, 50, 54-56 (collecting statements). Particularly stark is the Agency's emphasis in issuing a rule in mid-2011: It referred to its "*statutory charge*" and "*statutory mission* to restore soundness and solvency to insolvent regulated entities and to preserve and conserve their assets and property." 76 Fed. Reg. at 35726, 35727 (emphases

added). And the Director at the end of 2011 assured Congress of his "statutory responsibility" to so act. Compl. ¶ 56.

Yet the Sweep Amendment is not even arguably lawful under this background understanding. The government has emphasized that it is not. *Supra* Pt. I.B.4; MTD 73.

Moreover, in specially authorizing Treasury to purchase securities of the Companies and determine their terms, conditions, and amounts, Congress did so only through the end of 2009. Compl. ¶ 37; *see id.* ¶ 51 (noting Christmas Eve 2009 amendment). Treasury once acknowledged that this "constrained" its ability thereafter "to make further changes to the [Treasury SPAs]." *Id.* ¶ 53. Thus, if the Recovery Act ever authorized a Sweep, it at least did not after 2009.

Perhaps, in the face of all of this, Congress did slip into the Recovery Act authority to do as the government has claimed only since the Sweep Amendment and now has persuaded circuit courts to accept. But, normally, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). And even if Congress did here, the "lawfulness" of the Sweep Amendment still crashes against the Agency's violation of the Appointments Clause and related principles of separation of powers. *Dep't of Transp.*, 135 S. Ct. at 1228; *Collins*, 896 F.3d at 659-76; Compl. ¶ 118.

2. The government briefly objects that an exaction claim depends on a money-mandating statute, and that the Recovery Act is not such a statute. MTD 70-71. That is not required for the type of claim here. *See Ontario Power Generation v. United States*, 369 F.3d 1298, 1301 (Fed. Cir. 2004). But even if it were, *cf. Starr*, 856 F.3d at 976-81 (Wallach, J., concurring in part and concurring in result), we have shown that the Recovery Act is such a statute in this context. *Supra* Pt. II.B.2.

C. The Complaint alleges a plausible claim of breach of fiduciary duty.

Count III alleges that the United States through the Treasury SPAs and the Agency's conservatorship "assumed," and then through the Sweep Amendment breached, "fiduciary duties to . . . non-controlling shareholders, including (at a minimum) a duty not to manage the Companies for the United States' own pecuniary and policy interests at the expense of the interests of the shareholders other than the United States . . . ." Compl. ¶ 125. The grounds, which answer the government's arguments that it does not state a plausible claim (MTD 71-75), are set out above, particularly in Part II.B. Although the government describes its arguments in terms of pre-emption, these claims arise under federal law, not state law.

D. The Complaint alleges a plausible claim of breach of contract.

Count IV alleges that the government has breached an implied-in-fact contract of which the plaintiffs are third-party-beneficiaries. The grounds, which answer the government's arguments that it does not state a plausible claim (MTD 77-78), are set out above in Part II.C.

CONCLUSION

The government's motion to dismiss should be denied in its entirety, and this case should proceed to the merits.

Respectfully submitted:

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