IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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

v.

UNITED STATES,
Defendant-Cross-Appellant.

2020-1912, -1914

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

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

v.

UNITED STATES,
Defendant-Appellee.

2020-1934

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

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

v.

UNITED STATES,
Defendant-Appellee.

2020-1936

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

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

v.

UNITED STATES,
Defendant-Appellee.

2020-1938

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

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

v.

UNITED STATES,
Defendant-Appellee.

2020-1954

Appeal from the United States Court of Federal Claims in No. 1:18-cv-00670-MMS, Chief Judge Margaret M. Sweeney.

CSS, LLC,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellant.

2020-1955

Appeal from the United States Court of Federal Claims in No. 1:13-cv-00371-MMS, Chief Judge Margaret M. Sweeney.

ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

2020-2020

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

JOSEPH CACCIAPALLE,
Plaintiff-Appellant,

MELVIN BAREISS, on Behalf of Themselves and All Others Similarly Situated, BRYNDON FISHER, BRUCE REID, ERICK SHIPMON, AMERICAN EUROPEAN INSURANCE COMPANY, FRANCIS J. DENNIS,
Plaintiffs

v.

UNITED STATES,
Defendant- Appellee.

2020-2037

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

NON - CONFIDENTIAL JOINT OPENING BRIEF OF THE PLAINTIFF-APPELLANT PRIVATE SHAREHOLDERS

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-1934; 20-1936; 20-1938; 20-1954; 20-1955

Short Case Caption Owl Creek Asia I, L.P., v. U.S.

Filing Party/Entity Owl Creek Asia I, L.P., (see attachment A)

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

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

Date: 10/23/2020

Signature: /s/ Lawrence D. Rosenberg

Name: Lawrence D. Rosenberg

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☐ None/Not Applicable
Owl Creek Asia I, L.P.	None	None
Owl Creek Asia II, L.P.	None	None
Owl Creek I, L.P.	None	None
Owl Creek II, L.P.	None	None
Owl Creek Asia Master Fund, Ltd.	None	None
Owl Creek Credit Opportunities Master Fund, L.P.	None	None
Owl Creek Overseas Master Fund, Ltd.	None	None
Owl Creek SRI Master Fund, Ltd.	None	None
Mason Capital L.P.	None	None
Mason Capital Master Fund L.P.	None	None
Akanthos Opportunity Fund, L.P.	None	None
Appaloosa Investment Limited Partnership I	None	None

☑ Additional pages attached

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

☐ None/Not Applicable ☐ Additional pages attached

Bruce Bennett Jones Day		

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

☐ None/Not Applicable ☐ Additional pages attached

Fairholme Funds, Inc., et al. v. United States, Nos. 20-1912, 1914 (Fed. Cir.); 13-465 (Fed. Cl.)	Cacciapalle v. United States, No. 20-2037(Fed. Cir.); 13-466 (Fed. Cl.)	Arrowood Indem. Co. v. United States, No, 20-2020 (Fed. Cir.); 13-689 (Fed. Cl.)
Rafter v. United States, No. 14-740 (Fed. Cl.)	Washington Federal v. United States, No. 20-2190 (Fed. Cir.); 13-385 (Fed. Cl.)	Fisher v. United States, 13-608 (Fed. Cl.)

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

☑ None/Not Applicable ☐ Additional pages attached

ATTACHMENT A

(Filing Party/Entity Continued)

Owl Creek Asia II, L.P., Owl Creek I, L.P., Owl Creek II, L.P., Owl Creek Asia Master Fund, Ltd., Owl Creek Credit Opportunities Master Fund, L.P., Owl Creek Overseas Master Fund, Ltd., Owl Creek SRI Master Fund, Ltd.; Mason Capital L.P., Mason Capital Master Fund L.P.; Akanthos Opportunity Fund, L.P.; Appaloosa Investment Limited Partnership I, Palomino Master Ltd., Azteca Partners LLC, Palomino Fund Ltd.; and CSS, LLC

ATTACHMENT B

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2 .Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.
Palomino Fund Ltd.	None	None
Palomino Master Ltd.	None	None
Azteca Partners LLC	None	Palomino Fund Ltd., not a publicly held company, owns 100% of Palomino Master Ltd.'s stock.
CSS, LLC	None	None

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-2037

Short Case Caption Cacciapalle v. United States

Filing Party/Entity Joseph Cacciapalle

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

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

Date: 10/23/2020

Signature: /s/ Hamish P.M. Hume

Name: Hamish P.M. Hume

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

☐ Additional pages attached

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

☐ None/Not Applicable ☐ Additional pages attached

Todd Thomas, Boies Schiller Flexner LLP	Grant D. Goodhart, III, Kessler Topaz Meltzer & Check, LLP	Charles J. Piven, Brower Piven
Eric L. Zagar, Kessler Topaz Meltzer & Check, LLP	Jeremy A. Lieberman, Pomerantz LLP	Michael J. Barry, Grant & Eisenhofer P.A.
Lee D. Rudy, Kessler Topaz Meltzer & Check, LLP	Patrick V. Dahlstrom, Pomerantz LLP	

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

☐ None/Not Applicable ☑ Additional pages attached

Fairholme Funds, Inc., et al. v. United States, No. 20-1912, 1914 (Fed. Cir.), No. 13-465C (Fed. Cl.),	Arrowood Indem. Co. v. United States, No. 20-2020 (Fed. Cir.), 13-689 (Fed. Cl.)	Washington Fed. v. United States, No. 13-385C (Fed. Cl.), No. 20-2190 (Fed. Cir.)
Rafter v. United States, No. 14-740 (Fed. Cl.)	Akanthos Opportunity Fund v. United States, No. 20-1938 (Fed. Cir.), 18-369C (Fed. Cl.),	Fisher v. United States, No. 20-138 (Fed. Cir.), No. 13-608C (Fed. Cl.)
Reid v. United States, No. 20-139 (Fed. Cir.), No. 14-152C (Fed Cl.)	Owl Creek v. United States, No. 20-1934 (Fed. Cir.), No. 18-281C (Fed. Cl.)	Appaloosa Inv. v. United States, No. 20-1954 (Fed. Cir.), No. 18-370C (Fed. Cl.)

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

☑ None/Not Applicable ☐ Additional pages attached

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ATTACHEMENT TO CERTIFICATE OF INTEREST

Case Number: 20-2037

Short Case Caption: Cacciapalle v. United States

Filing Party/Entity: Joseph Cacciapalle

5. Related Cases (continued):

Arrowood Indemnity v. United States, No. 20-2020 (Fed. Cir.), No. 13-698 (Fed. Cl.)

CSS LC v. United States, No. 20-1955 (Fed. Cir.), No. 18-371C (Fed. Cl.)

Mason Capital LLP v. United States, No. 20-1936 (Fed. Cir.), No. 18-529C (Fed. Cl.)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-1912 & 20-1914

Short Case Caption Fairholme Funds, Inc., et al. v. The United States

Filing Party/Entity Appellants, Fairholme Funds, Inc., et al. (see Attachment A)

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

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

Date: 10/23/2020

Signature: /s/Charles J. Cooper

Name: Charles J. Cooper

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.
☐ None/Not Applicable	☐ None/Not Applicable	☐ None/Not Applicable
Fairholme Funds, Inc.	None	None
The Fairholme Fund	Fairholme Funds, Inc.	None
Acadia Insurance Company	None	W.R. Berkley Corporation
Admiral Indemnity Company	None	W.R. Berkley Corporation
Admiral Insurance Company	None	W.R. Berkley Corporation
Berkley Insurance Company	None	W.R. Berkley Corporation
Berkley Regional Insurance Company	None	W.R. Berkley Corporation
Carolina Casualty Insurance Company	None	W.R. Berkley Corporation
Continental Western Insurance Company	None	W.R. Berkley Corporation
Midwest Employers Casualty Insurance Company	None	W.R. Berkley Corporation
Nautilus Insurance Company	None	W.R. Berkley Corporation
Preferred Employers Insurance Company	None	W.R. Berkley Corporation

☑ Additional pages attached

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

☐ None/Not Applicable ☐ Additional pages attached

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

☐ None/Not Applicable ☑ Additional pages attached

Washington Federal v. United States, No. 13-385 (Fed. Cl.)	Cacciapalle v. United States, No. 13-466 (Fed. Cl.)	Fisher v. United States, No. 20-138 (Fed . Cir.)
Arrowood Indem Co v United States, No 13-698 (Fed Cl)	Reid v. United States, No. 20-139 (Fed. Cir.)	Rafter v. United States, No. 14-740 (Fed. Cl.)
Owl Creek Asia Master Fund, Ltd v United States, No 20-1934 (Fed Cir)	Akanthos Opportunity Fund, LP. v. United States, No. 20-1938 (Fed. Cir.)	Appaloosa Inv. Ltd. v. United States, No. 20-1954 (Fed. Cir.)

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

☑ None/Not Applicable ☐ Additional pages attached

ATTACHMENT A

List of Parties Represented by Counsel

Fairholme Funds, Inc., The Fairholme Fund, Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Continental Western Insurance Company, Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, Preferred Employers Insurance Company, and Andrew T. Barrett

ATTACHMENT B

1. Represented Entities (continued)	2. Real Party in Interest.	3. Parent Corporations and Stockholders.
Andrew T. Barrett	None	None

ATTACHMENT C

Related Cases (continued)

CSS, LLC v. United States, No. 20-1955 (Fed. Cir.); Mason Capital Master Fund L.P. v. United States, No. 20-1936 (Fed. Cir.)

FORM 9. Certificate of Interest

Form 9 (p. 1)
July 2020

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-2020

Short Case Caption Arrowood Indemnity Company v. US

Filing Party/Entity Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, Financial Structures Limited

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

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

Date: 10/23/2020

Signature: /s/ Richard M. Zuckerman

Name: Richard M. Zuckerman

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.
☐ None/Not Applicable	☐ None/Not Applicable	☐ None/Not Applicable
Arrowood Indemnity Company	Not Applicable	Arrowpoint Group, Inc.
"	"	Arrowpoint Capital Corp.
Arrowood Surplus Lines Insurance Company	Arrowood Indemnity Company	Transverse Insurance Group LLC
Financial Structures Limited	Not Applicable	Arrowood Indemnity Company

☐ Additional pages attached

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

☐ None/Not Applicable ☐ Additional pages attached

Michael H. Barr	Sandra D. Hauser	Drew W. Marrocco
Kiran Patel		

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

☐ None/Not Applicable ☑ Additional pages attached

Washington Fed. v. US, 13-385C (Fed. Cl.), 20-2190 (Fed.Cir.)	Fisher v. US, 13-608C (Fed. Cl.), 20-138 (Fed. Cir.)	Fairholme Funds v. US, 13-465C (Fed. Cl.), 20-1912, 1914 (Fed. Cir.)
Cacciapalle v. US, 13-466C (Fed. Cl.), 20-2037 (Fed. Cir.)	Reid v. US, 14-152C (Fed Cl.), 20-139 (Fed. Cir.)	Rafter v. US, 14-740C (Fed. Cl.)
Owl Creek v. US, 18-281C (Fed. Cl.), 20-1934 (Fed. Cir.)	Akanthos Opp. v. US, 18-369C (Fed. Cl.), 20-1938 (Fed. Cir.)	Appaloosa Inv. v. US, 18-370C (Fed. Cl.), 20-1954 (Fed. Cir.)

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

☑ None/Not Applicable ☐ Additional pages attached

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Attachment to Certificate of Interest

Case No. 20-2020

Short Case Caption: Arrowood Indemnity Company v. US

Filing Parties: Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, Financial Structures Limited

5. Related Cases (cont'd)

CSS LLC v US, 18-371C (Fed. Cl.), 20-1955 (Fed. Cir.)

Mason Capital LP v. US, 18-529C (Fed. Cl.), 20-1936 (Fed. Cir.)

TABLE OF CONTENTS

CONFIDENTIAL MATERIAL OMITTED

Material that was covered by and sealed pursuant to the terms of the governing protected order entered by the Court of Federal Claims—but was not, to counsel's knowledge, later revealed in open court or public filings—has been redacted in the nonconfidential opening brief for the Private Shareholders as follows:

- The material omitted on pages 8 and 9 contain quotes from the Board Minutes and Resolutions of Fannie Mae and Freddie Mac.
- The material omitted on pages 14 and 18 contains information from internal Treasury documents produced during jurisdictional discovery discussing the Treasury SPAs.

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF RELATED CASES

The following are "related cases" under Rule 47.5, pending in this Court: *Fairholme Funds, Inc. v. U.S.*, Nos. 20-1912 & -1914; *Owl Creek Asia I, L.P. v. U.S.*, No. 20-1934; *Mason Capital L.P. v. U.S.*, No. 20-1936; *Akanthos Opportunity Fund L.P. v. U.S.*, No. 20-1938; *Appaloosa Investment Limited Partnership I v. U.S.*, No. 20-1954; *CSS, LLC v. U.S.*, No. 20-1955 (*Owl Creek*, *Mason*, *Akanthos*, *Appaloosa*, and *CSS* are, together, the "*Owl Creek* Actions"); *Arrowood Indemnity Company v. U.S.*, No. 20-2020; *Cacciapalle v. U.S.*, No. 20-2037; and *Washington Federal v. U.S.*, No. 20-2190. These appeals are designated as companion cases, to be assigned to the same merits panel. Plaintiffs-Appellants in these related cases (excluding *Washington Federal*) file this joint brief in accordance with the Court's Order dated October 5, 2020. *See, e.g., Owl Creek* [ECF 30].

The following are "related cases," under Rule 47.5, pending in the Court of Federal Claims: *Fisher v. U.S.*, No. 13-608C, *pet. to appeal denied*, No. 20-138 (Fed. Cir.); *Reid v. U.S.*, No. 14-152C, *pet. to appeal denied*, No. 20-139 (Fed. Cir.); *Rafter v. U.S.*, No. 14-740C.

STATEMENT OF JURISDICTION

The Court of Federal Claims had jurisdiction over the *Owl Creek* Actions, *Arrowood*, *Cacciapalle*, and *Fairholme* under 28 U.S.C. § 1491(a)(1). The orders dismissing the complaints in the *Owl Creek* Actions, *Arrowood*, and *Cacciapalle* are final decisions appealable as of right under 28 U.S.C.§ 1295(a)(3). The *Owl Creek* Action complaints were dismissed on June 8, 2020, and those plaintiffs timely filed notices of appeal on June 18, 2020. The *Arrowood* complaint was dismissed on May 15, 2020, and the notice of appeal was timely filed on June 29, 2020. The *Cacciapalle* complaint was dismissed on June 26, 2020, and the notice of appeal was timely filed on July 17, 2020.

The Court of Federal Claims' order of December 6, 2019, dismissing the *Fairholme* complaint in part is an interlocutory order under 28 U.S.C. § 1292(d)(2). That court reissued its order for publication on December 13, 2019, and reissued it again on March 9, 2020, after granting motions, by both the plaintiffs and the United States, to certify an interlocutory appeal. On June 18, 2020, this Court granted the petitions of the plaintiffs and the United States for permission for an interlocutory appeal.

STATEMENT OF THE ISSUES[1]

I. When the United States changes the capital structure of a company that it controls, transferring the value of stock held by Private Shareholders to the class of stock held exclusively by the United States, whether the Private

[1] Additional issues are set forth in the Supplemental Briefs concurrently filed by some of the Private Shareholder plaintiffs.

Shareholders have a direct claim against the United States, or (as the Court of Federal Claims held) only derivative claims on behalf of the company.

II. The Court of Federal Claims held that, under the Tucker Act, claims by Private Shareholders of Fannie Mae ("Fannie") and Freddie Mac ("Freddie," and together with Fannie, the "Companies") for takings and illegal exaction were against the United States, and thus within that court's subject-matter jurisdiction, because the Federal Housing Finance Agency (the "Agency") remains the United States when acting as conservator of the Companies. If the United States contests that holding, this issue is presented: Whether the Court of Federal Claims has jurisdiction, under the Tucker Act, over Private Shareholders' claims that an amendment of a stock-purchase agreement between the Agency (as conservator for the Companies) and the United States Department of the Treasury ("Treasury") was a taking (or illegal exaction) by "the United States."

III. Whether the Court of Federal Claims erred in holding that the United States, as "conservator" (through the Agency) and shareholder (through Treasury) of the Companies, had no fiduciary duty to the private, non-government shareholders, and therefore erred in holding that the court lacked subject-matter jurisdiction over the Private Shareholders' claims that the United States breached that fiduciary duty by diverting to itself all future profits of the Companies.

IV. Whether the Court of Federal Claims erred in holding that private, non-government shareholders in the Companies were not third-party beneficiaries of the implied-in-fact contracts between the United States (via the Agency) and the Companies, by which the Companies consented to conservatorship, and therefore erred in holding that the court lacked subject-matter jurisdiction over the Private Shareholders' claim that the United States breached those implied-in-fact contracts by diverting to itself essentially all future profits of the Companies.

STATEMENT OF THE CASE

Private Shareholders' interests in the Companies were wiped out in August 2012 when Treasury, already a major shareholder in the Companies as of September 2008, seized for itself all of the economic value of the Private Shareholders' stock, through an agreement between Treasury and the Agency, the Companies' conservator. This "agreement" (the "Net Worth Sweep") amended Preferred Stock Purchase Agreements ("Treasury SPAs") from September 2008, by which Treasury, in return for a financing commitment, had received senior preferred stock as well as warrants to obtain (for a nominal price) a super-majority of common stock. Specifically, the Net Worth Sweep changed the quarterly dividend payable on Treasury's senior preferred stock from a percentage of liquidation value to the full net worth of the Companies, minus a small reserve that would shrink to zero by 2018 (making it impossible for shareholders to receive any distributions or value from their investment). In 2018, another amendment made clear that while a small reserve would stay in place, that also belonged to Treasury.

Treasury and the Agency executed the Net Worth Sweep even though by August 2012, the Companies had returned to profitability, and were in a position to start redeeming the Treasury senior preferred stock and resume dividends to private shareholders. Rather than allow that to happen, on August 17, 2012, Treasury and the Agency, through the Third Amendment to the Treasury SPAs, imposed the Net Worth Sweep and transferred the Private Shareholders' entire economic interests in the Companies to Treasury, despite longstanding background principles under which a conservator is a fiduciary charged with rehabilitating a company. Private Shareholders lost any possibility of receiving any dividends or other distributions, and thus lost the entire economic value of their property.

But the United States profited immensely from the Net Worth Sweep. Since the Companies began paying dividends under the Net Worth Sweep during the first quarter of 2013, they have transferred to the United States over $223 billion in dividends—over $120 billion more than Treasury could have received without the Net Worth Sweep. Appx518-19. In total, since Treasury invested in the Companies in 2008, it has received nearly $110 billion more in dividends than the total sum it had invested. *Id.*

To redress this appropriation, groups of private junior preferred shareholders here (including plaintiffs in a putative class action) (the "Private Shareholders") brought claims against the United States for seizing for itself their property. They allege takings, illegal exactions (in the alternative), breaches of fiduciary duty, and various contract claims.

A. HERA Authorized The Agency To Put The Companies Into Conservatorship.

Amid the 2008 financial crisis, Congress sought to improve oversight of Fannie and Freddie, the two private, for-profit, shareholder-owned corporations it had set up decades before to support the secondary-mortgage market. In the Housing and Economic Recovery Act ("HERA"), it established the Agency, whose powers included being appointed, by its Director, "as conservator or receiver for" the Companies. §§ 4511(a), 4617(a)(1).[2]

In crafting HERA, 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). HERA 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 "reorganiz[e], rehabilitat[e], or

[2] Section citations are of Title 12, U.S.C., unless otherwise indicated.

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 of HERA prescribe its handling of claims in liquidation. § 4617(b)(2)(E), (b)(3)-(9), (c). HERA 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. The Agency Placed The Companies Into Conservatorship In September 2008.

On September 6, 2008, acting under § 4617(a)(3), the Agency, with the consent of the Companies' respective Boards of Directors, placed the Companies under its conservatorship. Appx497-98, 530. The Agency did not make any findings to authorize itself to do so unilaterally. Appx497, 530. Rather, the Agency and

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Treasury requested that the Companies consent to conservatorship. Appx496-97, 530–31; Appx412. Discussion of Board Actions [redacted] Appx887; *see* Appx880–81.

In exchange for this consent, the Companies obtained the Agency's agreement to act consistent with conservatorship at common law and under FIRREA—preserving and conserving the Companies' assets, restoring the Companies to a sound and solvent condition, and in a reasonable period ending the oversight. The Agency itself made repeated, unequivocal statements about the nature of the conservatorship—both when imposing it and for three years after—reflecting this agreement. *See* Appx499–500, 502–03, 408–09, 413, 813, 747.

As an example, the Director, when he imposed the conservatorships and entered into the Treasury SPAs, told the public that conservatorship would "stabilize a troubled institution with the objective of returning the entities to normal business operations. FHFA will act as the conservator to operate the Enterprises until they are stabilized." Appx499–501. The Director also emphasized that "all preferred stocks will continue to remain outstanding" (Appx499; *see* Appx901), and that "shareholders are still in place" and that "going forward there may be some value" in the shares (Appx412–13). The Agency added, in a public fact-sheet, that "[s]tockholders will continue to retain all rights in the stock's financial worth"; and

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that, once the Director determined "that the Conservator's plan to restore the company to a safe and solvent condition has been completed successfully, the Director will issue an order terminating the conservatorship." Appx500; Appx877–78. Treasury likewise declared that "conservatorship does not eliminate the outstanding preferred stock." Appx901. The Agency reiterated such assurances throughout 2009, 2010, and 2011, including in testimony and regulations. Appx500–03, 888–89, 891, 893, 895. As late as November 2011, the Director told the Senate that, "[b]y law, the conservatorships are intended to rehabilitate the [Companies] as private firms." Appx503.

The Companies' Boards intended for the conservatorships to protect private shareholder interests. Discussion of Board Actions [redacted] Appx883–84. [redacted] Appx886. [redacted] *See* Appx881 [redacted] In its Form 8-K regarding the transaction, Freddie confirmed that stockholders would "retain all their rights in the financial worth of those instruments." Appx897.

C. The Treasury SPAs Gave Treasury A 10% Dividend And Warrants To Acquire 79.9% Of The Companies' Stock For A Nominal Amount.

On September 7, 2008, the day after it imposed the conservatorships, Treasury exercised temporary authority Congress had given it in HERA to purchase securities of the Companies, to enter into the Treasury SPAs. Appx413–14; Appx748; *see* §§ 1455(*l*)(4), 1719(g)(4). The Treasury SPAs initially allowed the Companies to draw up to $100 billion each from Treasury to avoid having negative net worth. Appx414–15, 421–22; Appx498–99; Appx749.

In return for this funding commitment, Treasury received (i) senior preferred stock with (a) an initial liquidation preference of $1 billion, which would increase by one dollar for every dollar drawn on Treasury's funding commitment, and (b) quarterly dividends on the outstanding liquidation preference at an annual rate of 10% if paid in cash or 12% if paid in-kind (that is, by adding to the liquidation preference the amount of dividends due); and (ii) warrants to buy up to 79.9% of the common stock of each Company for a nominal price. Appx415–18; Appx498–99.

The issuance of the warrants (along with the public statements noted above) conveyed to markets that the Agency and Treasury both intended that the existing capital structure of each Company remain in place underneath the new senior preferred stock—existing preferred stock becoming, in effect, "junior preferred stock," with value, and existing common stock also remaining in place, with value. *See* Appx412–13. Treasury would not have bothered taking warrants for common stock unless it expected those warrants would have value, and the only way that the warrants would have any value was if the junior preferred stock and the already-issued common stock had value.

While leaving the Companies' capital structure (below the senior preferred stock) intact, the Treasury SPAs gave Treasury control over the Companies and the Agency's conservatorship over them. Appx419–21; Appx499. From their inception in September 2008, the Treasury SPAs provided that, until the senior preferred stock was redeemed or paid in full, the Companies could not, without Treasury's consent: pay any dividend, except to Treasury, or make any other distribution; issue any stock, except to Treasury; terminate the conservatorship, except in connection with a receivership; transfer any assets, with limited exceptions; incur indebtedness that would bring its total indebtedness above 110% of its indebtedness as of June 30, 2008; or make any fundamental change in its corporate structure. Appx419–21; Appx499; Appx753–54.

In leaving the capital structures of the Companies intact, the Treasury SPAs fulfilled the mandate of HERA, which required that, in exercising Treasury's authority to purchase stock in Fannie and Freddie, "[t]o protect the taxpayers, the

Secretary of the Treasury shall take into consideration . . . [t]he need to maintain the corporation's status as a private shareholder-owned company." §1719(g)(1)(C)(v).

The day it entered into the Treasury SPAs, Treasury publicly conceded that it had taken control of the Companies, particularly through the warrants. Treasury issued a Notice exempting the Treasury SPAs from § 382 of the Internal Revenue Code and Treasury's implementing regulations. IRS Notice 2008-76 (Sept. 7, 2008), 2008 WL 4105230. Treasury thus avoided, for tax purposes, the consequences of the "change of control" that it had accomplished. 26 U.S.C. § 382.

In the sixteen months between entry into the Treasury SPAs and the expiration of Treasury's special authority at the end of 2009, Treasury and the Agency amended the SPAs, including to increase Treasury's commitment, to roughly $200 billion per Company. Appx500-01; Appx419–21. By the end of 2009, however, Fannie and Freddie had drawn only $60 billion and $51 billion, respectively. Appx501–02.

D. By 2012, The Companies Returned To Profitability.

After the conservatorships were imposed on them, the Companies were forced to dramatically write down the value of their assets and to incur substantial non-cash accounting losses in the form of loan-loss reserves and write-offs of deferred tax assets.[3] By June 2012, the Companies had drawn $161 billion from Treasury to make

[3] Loan-loss reserves reduce reported net worth to reflect anticipated future losses. Appx423-24. Deferred tax assets can be used to reduce taxable income on

up for the paper losses caused by these accounting decisions, even though there was no indication that the Companies' cash receipts would be insufficient to meet their cash expenses. Appx425–26. The Companies subsequently drew an additional $26 billion to pay dividends to Treasury. *Id*. Because of these transactions, the government's liquidation preference swelled to $189 billion. Appx391–92; Appx729–30.

But based on the Companies' performance, by the second quarter of 2012 it was apparent that their private shares still had value. The Companies were thriving, paying cash dividends on the senior preferred stock without drawing additional capital from Treasury. Appx391–92; Appx506. Based on the improving housing market and the high quality of the newer loans backed by the Companies, Treasury and the Agency knew the Companies would enjoy stable profitability for the foreseeable future and begin to rebuild significant capital. Appx426–28. For example, minutes of a July 2012 Fannie management meeting stating that the Company was entering "golden years" of earnings were circulated broadly within the Agency, and projections attached to the minutes showed Fannie's cumulative dividend payments to Treasury exceeding its total draws by 2020, with more than $115 billion of Treasury's commitment remaining available after 2022. Appx432;

future earnings. The book value of a tax asset depends on the likelihood that the corporation will earn sufficient income to use it. Appx423.

Appx503–04, 896; Appx872 Internal Treasury Comment Regarding Net Worth Sweep [redacted] Similar projections were shared with Treasury in early August 2012—less than two weeks before the Net Worth Sweep was announced. Appx430–31; Appx765.

This turn-around would have an exponential effect on the Companies' financial position: Not only would each Company generate profits from its operations, but those profits would enable each Company to recognize the value of its deferred tax assets, while faster prepayment and lower default expectations enabled each Company to reduce its loan-loss reserves. Indeed, at an August 9, 2012 meeting, just eight days before the Net Worth Sweep was imposed, Fannie's Chief Financial Officer told senior Treasury officials that release of the valuation allowance on Fannie's deferred tax assets would likely occur in mid-2013 and that, even without accounting for the profits Fannie would generate from its operations, the write-up of deferred tax assets would cause Fannie to report profits in the range of $50 billion. Appx431-32; Appx864-65. The government was keenly interested in the deferred tax assets, which would have catalyzed the Companies' capital rebuilding; indeed, Treasury discussed the deferred tax assets with its financial consultant as early as May 2012, and a key item on Treasury's agenda for the August 9, 2012, meeting was how quickly Fannie forecasted releasing its credit reserves. *See* Appx429-30.

E. Treasury And The Agency Execute The Net Worth Sweep Transferring To Treasury Private Shareholders' Entire Economic Interests.

On August 17, 2012, days after the Companies announced robust second-quarter earnings indicating that they had more than enough capital to pay the dividends on the Treasury SPAs, Treasury and the Agency, as conservator, executed the Net Worth Sweep. Appx437; Appx487, 489, 506–07. The Net Worth Sweep replaced the dividend payable under the Treasury SPAs with net-worth-sweeps—requiring the Companies to pay to Treasury their entire net worth (except for a small capital reserve amount) each quarter in perpetuity. Appx437; Appx506–07. By barring the Companies from building any equity, the Net Worth Sweep indefinitely barred dividends to any other stockholders and also barred any pay-down of Treasury's liquidation preference. Treasury and the Agency thus nationalized the Companies and expropriated not just their future earnings but also their retained capital, thereby depriving the Companies' Private Shareholders of all of their economic rights.

Treasury had hatched the idea for the Net Worth Sweep 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. Appx454–55; Appx903-06;

Appx874 (noting Agency official stating in early August 2012 that Treasury was making a "renewed push" to implement an amendment); Appx508, 510–12.

Treasury had made a substantial financial commitment to Fannie and Freddie since September 2008 (and in return received the senior preferred stock and associated dividends, warrants, and other rights). But it provided no meaningful consideration to the Companies or their shareholders in return for the Net Worth Sweep's transfer of the full value of the junior preferred stock and common stock to Treasury's senior preferred stock.[4]

Treasury and the Agency have claimed, both publicly and in courts, that the Net Worth Sweep was necessary to prevent a "death spiral" in which the Companies' increasing dividend obligations to Treasury would consume Treasury's funding commitment. *See* Appx451; Appx784. The "death spiral" narrative, however, cannot be squared with reality. By their terms, the Treasury SPAs permitted the Companies to pay dividends in kind, requiring no expenditure of cash and no draw on Treasury's funding commitment. Appx520. Moreover, documents and testimony obtained

[4] Treasury did give up the right to a periodic commitment fee, but that was not giving up anything of value, because the Net Worth Sweep gave Treasury the net worth of each Company each quarter. Whether Treasury received that amount solely as dividends, or partly as dividends and partly as a commitment fee, the result would be the same: Treasury would take it all. The commitment fee, moreover, was consistently waived by Treasury even before the Net Worth Sweep and could only be set with the agreement of Fannie and Freddie at a market rate. As of mid-2012, given market conditions and the other provisions of the agreements, the only appropriate market rate would have been zero. Appx438.

through jurisdictional discovery reveal that the Net Worth Sweep was imposed *after* the Companies had returned to stable profitability. Specifically, it was imposed *just days after* the government learned that the Companies were on the verge of reporting tens of billions of dollars in profits that would far exceed the 10% dividend, with that level of profitability continuing well into the future. *See* Appx503–06.

In fact, a few weeks before the Net Worth Sweep was consummated, the Agency's Acting Director told the Secretary of the Treasury that a change to the dividend structure of Treasury's stock was not needed because Fannie and Freddie "will be generating large revenues over the coming years, thereby enabling them to pay the 10% annual dividend well into the future." Appx451; Appx868. And an internal Treasury document finalized the day before the Net Worth Sweep was announced identified the Companies' "improving operating performance" and the "potential for near-term earnings to *exceed* the 10% dividend" as reasons for the Net Worth Sweep. Appx445 (emphasis added). Thus, the Net Worth Sweep was not adopted out of concern that the Companies would earn too little, but rather out of concern that they would earn *too much* and complicate the government's plans to shackle them in perpetual conservatorship and prevent their Private Shareholders from obtaining value from their investments. *See* Appx864.

Instead, the Net Worth Sweep was intended to benefit Treasury at the expense of the Private Shareholders. In a Treasury document, an official noted that the amended Treasury SPAs would put the Treasury "in a better position" because, rather than having "Treasury's upside . . . capped at the 10% dividend, now the taxpayer will be the beneficiary of any future earnings produced by the [Companies]." Appx445. Treasury also emphasized that "every dollar of earnings" would go to "taxpayers," to ensure the Companies were "wound down" rather than "rebuilding capital and return[ing] to the market" in their prior form." Appx511–12, 447, 439-40 (explaining that a Treasury official acknowledged in a 2010 memorandum to the Secretary that the government was "committ[ed] to ensur[ing] existing common equity holders will not have access to any positive earnings from the [Companies] in the future"); Appx907-08. A senior White House official closely involved in the process acknowledged that the "substance and intent" of the Net Worth Sweep was to "deprive [the Companies] of all their capital" to ensure that it never would be "feasible for them to return as private companies." Appx449–50, 828; Appx875 Internal Treasury Comment Regarding Net Worth Sweep [redacted]

In sum, the entire economic value of the Private Shareholders' interests was transferred to the government shareholder (Treasury), and no residual value in the Companies can be distributed to any of the private non-government stakeholders.

F. The Court of Federal Claims Dismissed Private Shareholders' Direct Claims.

Certain of the Private Shareholders filed their initial complaints beginning in July 2013. After jurisdictional discovery in *Fairholme*, the *Fairholme* plaintiffs filed their amended complaint on August 3, 2018. The *Owl Creek* (Appx377–78), *Mason* (Appx379), *Akanthos* (Appx380), *Appaloosa* (Appx381), and *CSS* (Appx382) plaintiffs filed their amended complaints on August 16, 2018. The *Arrowood* plaintiffs filed their amended complaint on September 17, 2018 (Appx383–84). The *Cacciapalle* plaintiffs filed their amended complaint on March 3, 2018 (Appx385–86). The Private Shareholders all allege direct claims for (a) the taking of their property in violation of the Fifth Amendment or, (b) in the alternative, an illegal exaction of their property in violation of the Fifth Amendment; and (c) breach of fiduciary duties. Some Private Shareholders plead additional contract claims, and the *Fairholme* plaintiffs also assert derivative claims. The *Cacciapalle* complaint is a putative class action.

On October 1, 2018, the government filed an omnibus motion to dismiss. The Court of Federal Claims set a coordinated briefing schedule and, in November 2019, held a single oral argument.

The court granted in part and denied in part the motion to dismiss as to *Fairholme*, on December 6, 2019, issuing an opinion, and then, later, dismissed the *Owl Creek* Actions on June 8, 2020, the *Arrowood* complaint on May 15, 2020, and the *Cacciapalle* complaint, on June 26, 2020. For this latter group of decisions, the court issued further opinions, based in substantial part on its opinion in *Fairholme*.

1. The lower court found that it had subject-matter jurisdiction under the Tucker Act, 28 U.S.C. § 1491, to adjudicate the Private Shareholders' constitutional claims, because the claims are against the United States. Specifically, it held that the Agency, as conservator, retained its federal-government character when it executed the Net Worth Sweep. *See, e.g.*, Appx20-25. In the *Fairholme* appeal, the government is cross-appealing this holding.

2. However, the Court of Federal Claims held that the Private Shareholders lacked standing to assert their direct takings and illegal-exaction claims, because these claims were "substantively derivative in nature because they are premised on allegations of overpayment," and therefore the harm was to the Companies. Appx38–41. The court reasoned that the Private Shareholders' claims were not "dual nature" claims under relevant law because "Treasury was not a controlling shareholder at the time the PSPA Amendments were executed." And, the court reasoned, Treasury and the Agency together did not constitute a control group because the court did not see how the two entities working together could constitute a control group when (in its view) they individually did not owe fiduciary duties. Appx72–73, 78. The court did not address the argument that, even if the claims do involve an overpayment, they are direct simply because shareholders were not all harmed *pro rata*. *Id.* at 78.

3. With respect to the Private Shareholders' claims of breach of fiduciary duty, immediately after holding that the Private Shareholders' claims of taking and illegal exaction were against the United States because conservators—including the FDIC and the Agency as conservators under their respective statutes—"have a fiduciary duty running to the corporation," the court nonetheless dismissed the fiduciary-duty claims for lack of jurisdiction, on the ground that they sounded in tort rather than, under the Tucker Act, being "founded upon" a statute or contract. Appx69-73.

The court reasoned that, as to the Agency, the Private Shareholders' fiduciary-duty claim was not founded on a statute because the "incidental powers" provision of HERA required the Agency as conservator only "to act in the interests of itself or the Enterprises." § 4617(b)(2)(J). Thus, the court found, despite antecedent law under FIRREA that a conservator is a fiduciary of a company, that HERA reflected "a clear intent" that the Agency "does not owe a fiduciary duty to shareholders because the conservator is not required to consider shareholders' interests." *Id.* at 20.

The court held that, as to Treasury, the Private Shareholders' breach of fiduciary duty claim was not founded upon a contract for several reasons. First, the lower court thought that a claim was only founded on a contract if it sought to enforce an explicit duty in the contract. Second, the court in any event refused, on this issue, to look to background "state-law principles" to inform the obligations Treasury assumed when it became a shareholder, even though elsewhere it recognized that the Companies are "organized under" the corporate laws of Delaware and Virginia. *Id.* at 2, 21, 28. Third, the court refused to find, under that background law, that Treasury through its initial stock-purchase agreement and relationship with the Agency had "effective" control of the Companies. *Id.* at 21.

4. Finally, the court dismissed the Private Shareholders' direct claims for breach of implied-in-fact contract, for lack of jurisdiction. In its *Fairholme* opinion, the court had denied the government's motion to dismiss a derivative implied-in-fact contract claim, holding the allegations sufficient to establish the formation and breach of an implied-in-fact contract Appx47–49. Because the allegations as to the formation and breach of an implied-in-fact contract (made as part of the direct claims) were essentially the same as those upheld by the court in its *Fairholme* opinion, the court necessarily would have held that the direct claims sufficiently pled the existence and breach of an implied-in-fact contract. However, instead of addressing that issue, the court focused on whether the plaintiffs, as Private Shareholders asserting direct claims, were third party-beneficiaries. The court held that the Private Shareholders had not sufficiently alleged that they were third-party beneficiaries. Appx74-75.

The court offered three reasons: First, the court said it did not matter that the Companies agreed to the conservatorships as serving the interests of shareholders, because "every action of a corporation is supposed to benefit its shareholders" and such "general benefit" does not make them third-party beneficiaries. *Id.* at 75 (internal quotation marks omitted). Second, in the court's view, the Private Shareholders only alleged contractual terms regarding the operation of the Companies, which were promises "directed at" the Companies rather than at shareholders. Third, the government statements that non-government stock would remain outstanding and that Private Shareholders would continue to hold an economic interest in their shares did not show an intention "to confer any specific benefit on plaintiffs independent of their role as shareholders." *Id.*

SUMMARY OF ARGUMENT

This case challenges a one-of-a-kind expropriation of equity, held by Private Shareholders in United States government-controlled corporations and expropriated by and for the benefit of the United States-government shareholder (Treasury). Under the challenged Net Worth Sweep, the government took the Private Shareholders' equity by zeroing out their rights to dividends and liquidation distributions and transferring those rights to itself. The Private Shareholders sued for damages, bringing direct claims for, among other things, taking, illegal exaction (in the alternative), breach of fiduciary duty, and breach of implied-in-fact contracts. In throwing out all of these claims on a motion to dismiss, the Court of Federal Claims made a host of errors of law. This Court should reverse and allow the claims to proceed to their merits.

I. In throwing out the Private Shareholders' direct constitutional claims on the ground that they are actually derivative, the lower court made several independent and mutually reinforcing errors. *First*, at the most basic level, the Private Shareholders plead that the government took *their* property (their shareholder rights) for *itself*, and they seek damages *for themselves*. Shareholders with "a direct personal interest in a cause of action" can bring actions "directly," and such a claim by an aggrieved property owner is as direct and personal as it gets. *Starr Int'l Co. v. United States*, 856 F.3d 953, 965-66 (Fed. Cir. 2017).

Second, one reaches the same conclusion by the doctrinal path of general corporate law. Under it, a claim is direct if the shareholders (rather than the corporation) "suffered the harm" complained of and the shareholders (rather than the corporation) would "benefit" from the "remedy." *Tooley v. Donaldson, Lufkin & Jenrette*, 845 A.2d 1031, 1033 (Del. 2004). The government's wiping out of the Private Shareholders exists independently of any harm (or benefit) the Net Worth Sweep imposed on the Companies. If they set records of profitability, the Private Shareholders' stake will remain at zero. And they seek damages for themselves to remedy that injury to themselves. A payment to the Companies would not help them, including because of the operation of the Net Worth Sweep itself.

Third, the same conclusion also follows from the more specific rule that rearrangements of the capital structure of a company that harm certain current shareholders and benefit others are direct. By definition, such rearrangements (which may not even harm the corporation) do not harm all shareholders, *pro rata*, yet that is necessary for a claim to be derivative. Given that Treasury was a shareholder before the Net Worth Sweep and, through it, rearranged the Companies' capital structure for its benefit, this rule applies straightforwardly.

Fourth, although it was not necessary for the lower court to consider the "dual nature" doctrine of Delaware corporate law—because the Private Shareholders' claims do not depend on an "overpayment" by the Companies to Treasury—that doctrine also straightforwardly confirms that the Private Shareholders' direct claims are direct. Under it, if a controlling shareholder or group harms the corporation but, in so doing, harms some shareholders for the benefit of the others, the harmed shareholders have a direct claim, even though a claim on behalf of the harmed corporation also exists. *E.g., Gatz v. Ponsoldt*, 925 A.2d 1265, 1278 (Del. 2007). Here, under HERA, the Agency as conservator dominated the Companies; on top of that, under the original SPAs, Treasury was a controlling shareholder (not least because of its warrants to purchase a super-majority of common stock for a pittance); and the two together, both federal agencies under the President, were a control group. The government then benefitted itself as shareholder—to the greatest economic extent possible—to the direct and corresponding expense of the Private Shareholders. Contrary to the lower court's reasoning, it is irrelevant that the Net Worth Sweep did not technically affect "voting power." That is not necessary and, anyway, given the conservatorship, no effective voting power even existed.

Finally, and in any event, important federal interests strongly support permitting Private Shareholders to proceed with their direct claims.

II. The Court of Federal Claims was right that it had subject-matter jurisdiction over Private Shareholders' takings and illegal exaction claims, as claims against the United States. Although Private Shareholders expect the government to challenge this holding, it is correct for at least three, analytically distinct, reasons.

First, the Agency is, under the express terms of HERA, an arm of the United States, and it does not lose that character for constitutional claims simply because it acts as conservator under HERA. One can see this under the Supreme Court's test for determining when a *corporation* is a federal instrumentality for constitutional claims even though Congress has said it is *not*. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995). That test is satisfied all the more here, including as shown by analogous precedent of this Court. *See Lion Raisins, Inc. v. United States*, 416 F.3d 1356 (Fed. Cir. 2005); *see also Slattery v. United States*, 635 F.3d 1298, 1309 (Fed. Cir. 2011) (en banc). And the court below correctly recognized that, although a federal agency as receiver might present a harder situation, the Agency's actions as conservator are meaningfully different and confirm that it remains the United States in carrying out that statutory role. *See, e.g., Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 282 (D.R.I. 2018).

Second, the Agency and Treasury were one of "two coordinated and coordinate parts" of the "same undertaking" to benefit the United States under the authority of the federal HERA. *Hendler v. United States*, 952 F.2d 1364, 1378 (Fed. Cir. 1991). And, *third*, Private Shareholders challenge the actions of Treasury, indisputably a part of the United States and an indispensable party to the Net Worth Sweep. That alone suffices for jurisdiction. *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1149 n.4 (Fed. Cir. 2014).

III. The court below erred in holding that the United States had no fiduciary duties to the Companies' private shareholders and therefore erred in holding that it lacked jurisdiction over the Private Shareholders' claims for breach of fiduciary duty. The fiduciary-duty claim is within the Tucker Act for two distinct but reinforcing reasons.

First, it is founded on a money-mandating statute. The Agency as "conservator" under HERA is a fiduciary to the Companies and their shareholders, including as shown by longstanding analogous law under FIRREA. In holding otherwise, the court below ignored this law and erroneously reasoned that HERA required the Agency to operate in the best interests only of itself or the Companies, to the exclusion of shareholders. But the statutory language on which the court focused is materially identical to that of FIRREA, and the distinction the court tried to draw (equating shareholders to bank depositors) fails. And that this is all money mandating is shown by a simple application of the rule of *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), in which the combination of the simple but significant statutory term "trust" and the authority to carry out a trust was enough. So too here with the combination of the simple but significant statutory term "conservator" and authority to carry out it.

Second, when Treasury through the original Preferred Stock Purchase Agreements, in 2008, became a controlling shareholder of the Companies, it took on a fiduciary duty to the Companies and its other shareholders founded on that contract. The lower court held otherwise based on, among other things, a crabbed view of the Tucker Act contrary to this Court's precedents; a blind eye to the practical reality of Treasury's control—a reality that Treasury itself publicly conceded when entering into the original SPAs; and an unexplained refusal to see any significance in the Agency's and Treasury's working together.

IV. The court below did not question that the Private Shareholders sufficiently pleaded the existence of an implied-in-fact contract between the Agency and the Companies by which the Companies consented to a conservatorship that would protect private shareholders' rights (the court refused to dismiss in *Fairholme* a derivative claim based on that contract), but it erred in holding that the Private Shareholders were not intended beneficiaries of that contract. The court apparently believed that shareholders *never* could be third-party beneficiaries of a corporate contract, but that is not the law, and, here, the alleged facts show that *both* parties *expressly* took special account of the interests of the shareholders other than Treasury. Indeed, the Agency repeatedly and publicly confirmed this for the next three years, and Private Shareholders reasonably relied on its promise as conferring a right on them.

ARGUMENT

I. THE PRIVATE SHAREHOLDERS HAVE STANDING TO ASSERT DIRECT CLAIMS FOR THE TAKING OF THEIR PROPERTY, AND THE COURT OF FEDERAL CLAIMS ERRED IN HOLDING TO THE CONTRARY.

All of the Private Shareholders plead direct claims for takings and (in the alternative) illegal exaction, alleging that the Net Worth Sweep transferred to Treasury 100% of their private-shareholder rights to receive dividends and distributions from the Companies, eviscerating the economic value of their shares and diverting it all to a special class of shares held exclusively by the government—a shareholder with total control of the Companies. The Court of Federal Claims dismissed all such claims for lack of statutory standing, holding that they were derivative (involving harm to the Companies and thus to be brought in the name of the Companies) rather than direct (to redress this harm that only the Private Shareholders suffered). *E.g.*, Appx38–41; Appx77–78. That holding was in error for several reasons, and, on *de novo* review, *Mercier v. United States*, 786 F.3d 971, 980 (Fed. Cir. 2015), this Court should reverse.

A. Private Shareholders May Sue Directly For The Government's Expropriation Of Their Stock.

Where a claim is based on federal law (as is the case for the Takings and Illegal Exaction claims), federal law controls whether it is direct, derivative, or both. *Starr Int'l Co. v. United States*, 856 F.3d 953, 965–66 (Fed. Cir. 2017). However, as this Court recognized in *Starr*, federal law in this context is informed by state law. *Id.* at 966.

Under federal law, shareholders "'with a direct personal interest in a cause of action' . . . can bring actions directly." *Starr*, 856 F.3d at 966 (quoting *Franchise Tax Bd. Of Calif. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990)). Similarly, Delaware courts in distinguishing direct from derivative claims begin by examining "the laws governing" the claim in question and ask whether that substantive law provides that the claim "belong[s] to the stockholder." *Citigroup, Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1126–27 (Del. 2016); *see also NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 176 (Del. 2015).

The Private Shareholders allege the taking and illegal exaction of the shareholder rights to dividends and other distributions that they, and they alone, owned. Because the Net Worth Sweep took property that they—and not the Companies—directly owned, Private Shareholders' claims were properly pleaded as direct.

This is not the first appeal in which private shareholders have challenged a federal trial court's determination that putatively direct claims concerning the Net Worth Sweep were substantively derivative. In *Perry Capital LLC v. Mnuchin*, the plaintiffs alleged that the Net Worth Sweep breached shareholders' contracts with the Companies. The district court ruled that those contract claims could only be asserted derivatively, in an analysis that in many respects mirrored the decision below. *See* 70 F. Supp. 3d 208, 235 & n.39, 239 n.45 (D.D.C. 2014). The D.C. Circuit reversed. 864 F.3d 591, 628 (D.C. Cir. 2017). It explained that the *Perry Capital* plaintiffs' claims for breach of their contracts with the Companies were "obviously direct 'because they belong to' the [shareholders] 'and are ones that only [the shareholders] can assert.'" *Id.* (quoting *Citigroup*, 140 A.3d at 1138). It was unnecessary to subject the contract claims to analysis under the legal standard that Delaware courts use to distinguish direct and derivative fiduciary duty claims, as claims that the Net Worth Sweep breached shareholders' own contractual rights "could not plausibly belong to the Companies," and the claims were therefore "*obviously direct*." *Id.* (emphasis added); *see also Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 528 (1984) (explaining that, to be derivative, a claim must be "founded on a right of action existing in the corporation" and one "in which the corporation itself is the appropriate plaintiff") (internal quotation marks omitted).

The same analysis applies here. The analysis of a takings claim should begin with identifying the property interest owned by the plaintiffs and analyzing whether the government has taken that property. *See A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152 (Fed. Cir. 2014). Where a plaintiff can show that it owned property that the government has taken and holds, then the plaintiff must have a direct takings claim. Private Shareholders are unaware of *any* case holding that a plaintiff lacks standing to bring a direct takings claim where that plaintiff has properly alleged that the government took and holds property that the plaintiff owned. Yet that is the counterintuitive result the trial court reached in this case.

Before the imposition of the Net Worth Sweep via an amendment of the Treasury SPAs, Private Shareholders owned the following property rights:

- The right to receive a dividend payment on their preferred stock for any quarter in which the Companies declared a dividend on common stock.

- The right to receive a distribution upon the liquidation of each Company, to the extent such liquidation yielded any value in excess of the amount of Treasury's outstanding funding to the Company plus $1 billion (the original definition of Treasury's liquidation preference from the September 2008 deal).

After the Net Worth Sweep, Private Shareholders do not own either of those property rights. Instead, Treasury owns them both: (1) It owns the exclusive right to all dividends paid by the Companies, including 100% of all dividends that exceed the 10% dividend that Treasury received under the original Treasury SPAs, no matter how large. (2) Likewise, Treasury owns the right to receive 100% of all proceeds from a liquidation of the Companies, no matter how large and regardless of how much those proceeds may exceed the value of the funding Treasury provided.

The following chart illustrates this transfer to the government of the ownership rights that Private Shareholders held:

Property Rights Taken By Treasury

	Treasury's Property	Private Shareholders' Property
Before Net Worth Sweep	Right to 10% dividend on Senior Preferred if paid in cash Right to 79.9% of common stock for nominal price Right to liquidation preference equal to actual funding amount plus $1 billion	Right to dividend in any quarter when dividend is paid on common stock Right to liquidation proceeds after Treasury is paid both actual funding amount and $1 billion
After Net Worth Sweep	**100% of all dividends**, no matter how much those dividends may exceed the original 10% dividend amount **100% of all liquidation proceeds**, no matter how much those proceeds may exceed Treasury's investment plus $1 billion	**ZERO** in dividends, no matter how much dividends paid to Treasury may exceed the original 10% dividend amount **ZERO** in liquidation proceeds, no matter how much those proceeds may exceed Treasury's investment plus $1 billion

Treasury now owns 100% of the property previously owned by Private Shareholders and all other non-governmental shareholders. The property taken was Private Shareholders' rights to dividends and liquidation distributions—rights that would have been triggered had Treasury or the Agency (or the Boards of the Companies after they exited conservatorship) ever authorized the Companies to pay dividends over and above the 10% dividend on Treasury's Senior Preferred Stock (which would have been the way for Treasury to receive value for the 79.9% of all common stock it had warrants to acquire).

In sum, Private Shareholders have a "direct personal interest" in the property that they allege was taken and/or illegally exacted. *Starr*, 856 F.3d at 966. Regardless of the merits of these claims—an issue not before the Court in this appeal—the alleged taking and illegal exaction are based on (a) *property that Private Shareholders owned*, that (b) is *now held by Treasury*. That claim is "obviously direct," and therefore the lower court's decision must be reversed.

B. The Net Worth Sweep Directly Harmed The Private Shareholders, Distinct From Any Harm To The Companies, By Transferring 100% Of Shareholders' Interest In Profits And Assets To Treasury.

While further analysis should not be necessary, the standard test that Delaware cases apply to determine whether claims are "direct or derivative" confirms that Private Shareholders have direct claims. The Delaware courts ask two questions: "who suffered the alleged harm (the corporation or the suing stockholders, individually)"; and "who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette*, 845 A.2d 1031, 1033 (Del. 2004). The Private Shareholders' direct claims readily satisfy both parts of this test.

1. Who suffered the alleged harm:

The respective complaints each identify the distinct injury that the Private Shareholders suffered, separate from any injury to the Companies. For example:

- "In August 2012, at a time when the housing market was recovering from the financial crisis and Fannie and Freddie had returned to stable profitability in a growing economy, the federal government took for itself the entire value of the rights held by Plaintiffs and Fannie's and Freddie's other private shareholders by forcing these publicly-traded, shareholder-owned Companies to turn over their entire net worth, less a small capital reserve, to the federal government on a quarterly basis forever—an action the government called the 'Net Worth Sweep' and that effectively nationalizes the Companies." (Appx388 (*Fairholme*)).

- "As a result of the Net Worth Sweep, Plaintiffs have been deprived of all economically beneficial uses of their Common and Preferred Stock in Fannie and Freddie. Plaintiffs are entitled to just compensation for the Government's taking of their property." (Appx447 (*Fairholme*)).

- "Under the Third Amendment, the Government has expropriated Plaintiffs' vested property rights and transferred their value to the Treasury. That constitutes a taking of private property and the Fifth Amendment requires that the Government pay just compensation to the Plaintiffs." (Appx808 (*Cacciapale*)).

- "By way of the Sweep Amendment, executed under the purported authority of the Recovery Act and by one arm of the federal government (Treasury) imposing its will and dominion over another arm (the Agency) under its control, the United States directly appropriated for itself Owl Creek's property interests in the Junior Preferred Stock." (Appx526 (*Owl Creek*)).

- "[T]he federal government took for itself the entire value of the rights held by Plaintiffs and Fannie's and Freddie's other private shareholders . . . This action is brought by Plaintiffs, holders of non-cumulative preferred stock ("Preferred Stock") issued by Fannie and Freddie seeking just compensation for the taking of their property by the United States of America. . . . ." (Appx726–27 (*Arrowood*)).

- "Treasury emphasized that the Net Worth Sweep would ensure that 'every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers.' … The necessary corollary to this, of course, is that nothing would be left for private shareholders." (Appx773-74 (*Arrowood*)).

The court below mistakenly viewed the essence of the Private Shareholders' claims as the allegation that the Companies were forced to make an "overpayment" to the Treasury. Appx40; Appx78–79; Appx239; Appx272. Based on that mischaracterization, the court incorrectly held that "plaintiffs' purported harms are merely the unavoidable result . . . of the reduction in the value of the entire corporate entity." Appx40; Appx78–79; Appx239; Appx275. It likewise held that "to prevail, plaintiffs would need to establish an injury to the Enterprises and any relief would accrue to the Enterprises." Appx38; Appx77; Appx238; Appx272.

That is not correct. Even if the Companies were not injured at all by the Third Amendment, the Private Shareholders still were. For example, even if the trial court somehow found as a fact that it was in the Companies' best interests to pay dividends each quarter equal to their net worth (minus a small reserve), the Private Shareholders would still be able to show that they were injured because those dividends were paid entirely to Treasury, not shared between Treasury and the Private Shareholders as the terms of the original Treasury SPAs required. And this injury of total exclusion from the Companies' capital structure would persist no matter how profitable they became. One can even indulge in the fantasy that the Net Worth Sweep was the key to leading the Companies into decades of prosperity, yet the Private Shareholders' injury would remain. It caused them to lose everything, no matter what. Under the Net Worth Sweep, they own zero, forever. No matter how much Fannie and Freddie earn, and no matter how well they are managed and do for themselves, the United States Treasury will receive all of the benefit, and private shareholders will receive none of it.

Consider the first quarter of 2013: Fannie paid Treasury a $59.4 billion dividend because of the Net Worth Sweep. Appx441. Had Fannie declared $59.4 billion in dividends under the original terms of the Treasury SPA, it would have paid the first $2.9 billion to Treasury based upon its Senior Preferred Stock (*i.e.*, the quarterly portion of the 10% dividend), and the remaining $56.5 billion would have been shared with the Companies' private shareholders, with a portion going to the junior preferred shareholders (the Private Shareholders here), a portion going to the private shareholders owning 20.1% of the common stock, and the lion's share going to Treasury because it had warrants to acquire 79.9% of the common stock. But Treasury was not content with capturing the lion's share of the excess dividend by owning 79.9% of Fannie's and Freddie's common equity; it wanted 100% of all distributions, and therefore it took away the dividend rights (and all other distribution rights) of all the private shareholders. By doing so, it injured the Private

Shareholders irrespective of whether paying these extraordinary dividends was good or bad for the Companies.

The lower court failed to recognize the categorical difference between (a) the injury suffered by a group of shareholders because all of their economic rights are taken from them and transferred to a dominant shareholder, and (b) the injury suffered by all shareholders based solely on a "bad deal" or "overpayment" made by the corporation. In the latter situation, when a corporation overpays for something, all shareholders are harmed, but only to the extent of their *pro rata* share of the corporation's own loss. Their injury is therefore viewed as derivative of the corporation's. By contrast, when (as here) one shareholder takes 100% of the remaining shareholders' rights to dividends and all other distributions, those remaining shareholders have (by definition) been deprived *in toto* of their rights. Their shares have not just lost value due to a bad deal by the corporation. They have been directly injured regardless of what the corporation received in exchange and how well it does in the future. They have been frozen out of any interest in the corporation, which now has only one owner with the ability to benefit. In that situation, the shareholders suffer a direct injury that is distinct from any harm that the corporation may or may not have suffered.

Consider the hypothetical that was presented to the lower court at oral argument, but ignored in its opinion: Suppose the Third Amendment had allowed the Companies to decide, based on their best interests, whether to pay each quarter's dividend to Treasury, while still providing that 100% of all dividends and other distributions that the Companies does decide to pay must be paid only to Treasury. Appx911. The Companies would have been allowed to rebuild capital and would not themselves have been injured. But the Private Shareholders would have suffered the same injury as in this case, and would clearly have had a direct claim to remedy it. It cannot logically be the case that the Private Shareholders lose that direct claim simply because the actual Third Amendment was even worse than the hypothetical one, and may have injured the Companies in addition to the distinct and independent injury it caused to the Private Shareholders.

The government argued that, because many of the complaints in these cases allege that the Net Worth Sweep injured the Companies, Private Shareholders did not also suffer a distinct, direct injury. But a claim can be direct "even if the corporation's rights are also implicated." *Alcan*, 493 U.S. at 336. The requirement under *Tooley* is that the shareholder sustain a "direct injury" that is "independent of any alleged injury to the corporation," not that the corporation escaped the challenged transaction unharmed. *Tooley*, 845 A.2d at 1039. "Courts have long recognized that the same set of facts can give rise both to a direct claim and a derivative claim." *Grimes v. Donald*, 673 A.2d 1207, 1212 (Del. 1996).[5] Thus, so long as Private Shareholders suffered direct injuries, they can maintain direct claims without regard to whether the Companies were also harmed.

2. Who would receive the benefit of any recovery:

The second prong of *Tooley's* test likewise confirms that Private Shareholders have direct claims. Private shareholders would (and should) "receive the benefit" of the remedy they request—an award of damages paid to them as compensation for having all their economic rights transferred to Treasury. *Tooley*, 845 A.2d at 1033. Payment of damages to the Companies would not compensate private shareholders for the loss of all their economic rights, because under the Net Worth Sweep they have zero further economic interest in the Companies. Even if the Companies received $10 trillion in compensation, that would not remedy the harm suffered by the private shareholders at all. Their injury can only be remedied through direct compensation for their direct claims.

[5] *Accord Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) (observing that "an action may lie both derivatively and individually based on the same conduct"); *U.S. Cellular Inv. Co. v. Sw. Bell Mobile Sys., Inc.*, 124 F.3d 218 (10th Cir. 1997) (table) (noting that "the same set of facts may result in direct and derivative claims"); *Borak v. J.I. Case Co.*, 317 F.2d 838, 844–45 (7th Cir. 1963), *aff'd*, 377 U.S. 426, 431 (1964); American Law Institute: Principles of Corporate Governance § 7.01(c), cmt. f ("[A] direct action is not precluded simply because the facts also give rise to a derivative action.").

Indeed, it is not clear that compensation to the Companies would even benefit the Companies themselves, for under the Net Worth Sweep the government would no doubt argue that any damages awarded to the Companies must be swept back to Treasury. Rather than making the Company (much less private shareholders) whole, this process would just shuffle funds from, and then back to, Treasury. Given that problem, the only effective relief would be an award of just compensation to the shareholders—a form of relief that would directly benefit Private Shareholders.

In sum, Private Shareholders challenge a transaction that transferred to Treasury all of their property rights to dividends and distributions from Fannie and Freddie. Regardless of how this transaction affected Fannie and Freddie, it directly injured private shareholders, and private shareholders will directly benefit if they are awarded just compensation. Accordingly, under *Tooley*, Private Shareholders have direct claims for the harm they suffered from the Net Worth Sweep.

C. Courts Have Long Recognized That Reallocations Among Shareholders Give Rise To Direct Claims Even When Less Extreme Than The 100% Reallocation Here.

While the total expropriation of shareholder equity that occurred here makes this an easy case for recognizing the direct nature of the claim, courts have for decades recognized the direct nature of claims challenging reallocations of equity among shareholders that are far less extreme than the zeroing out here. More than sixty years ago, in a portion of a dissent with which the majority did not disagree (nor has the Supreme Court since), Justice Frankfurter stated the rule for such cases: "[I]f a corporation rearranges the relationship of different classes of security holders to the detriment of one class, a stockholder in the disadvantaged class may proceed against the corporation as a defendant to protect his own legal interest." *Swanson v. Traer*, 354 U.S. 91, 99 (1957) (Frankfurter, J., dissenting).[6] Phrased more in terms of the *Tooley* test, a shareholder necessarily has a direct harm if he suffered "some individualized harm *not suffered by all* of the stockholders at large." *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008) (emphasis added). Disadvantaged shareholders are injured directly, for example, when denied "the right to a pro rata share of the common property," *Southern Pac. Co. v. Bogert*, 250 U.S. 483, 487 (1919), and when controlling shareholders opt to "pay dividends only to themselves," 12B FLETCHER § 5922. In the same way, when valuable rights are shifted from one existing class of shareholders to another, the disadvantaged shareholders suffer a direct, independent injury, which provides a basis for direct claims.

[6] *Accord Strougo v. Bassini*, 282 F.3d 162, 175 (2d Cir. 2002); *Jones v. H.F. Ahmanson & Co.*, 460 P.2d 464, 466–72 (Cal. 1969); *Deephaven Risk Arb Trading Ltd. v. UnitedGlobalCom, Inc.*, 2005 WL 1713067, at *8 & n.41 (Del. Ch. July 13, 2005); *Acker v. Transurgical, Inc.*, 2004 WL 1230945, at *1 (Del. Ch. Apr. 22, 2004); 12B FLETCHER CYCLOPEDIA OF THE LAW OF CORPS. § 5908 (2020) (reciting among examples of direct claims shareholder challenges to "recapitalization, redemption, or similar transactions unfairly affect[ing] minority shareholders").

The Supreme Court's decision in *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 160 (1957), further illustrates this rule. In that case, two controlling shareholders caused their corporation to exchange existing preferred stock (worth $33 million) for new preferred stock (worth $48 million), a transaction that benefited the controlling shareholders while simultaneously reducing the proportionate interests of common shareholders. After regulators approved the transaction, minority shareholders sued, arguing that the transaction violated shareholder-rights provisions of the Investment Company Act.

In holding that the suit could go forward, the Court in *Alleghany* explained, drawing on these underlying concepts, that the transaction did not involve simply "the indirect harm which may result to every stockholder from harm to the corporation." 353 U.S. at 160 (quoting *Pittsburgh & W. Va. Ry. Co.*, 281 U.S. at 487). Indeed, it was not clear there was any harm to the corporation. Regardless, the conduct of the controlling shareholders imposed distinct harms on the "minority common stockholders," who could therefore maintain a direct action. *Id.* at 158. *See also Pittsburgh & W.V. Ry. Co.*, 281 U.S. at 487 (explaining that cases of "reorganization . . . deal with the interests of investors" and thus are proper subjects for direct suits).

The Delaware Supreme Court's decision in *Gatz v. Ponsoldt*, 925 A.2d 1265, 1278 (Del. 2007), supports the same analysis. The case involved a transaction that, among other things, "produce[d] an increase of shares owned by the controlling shareholder and 'a corresponding decrease' in shares owned by the minority shareholders," which meant that, even if the corporation suffered some harm, that harm did not fall on all shareholders *pro rata*. *Id.* at 1278. A direct shareholder claim existed, apart from any claim the company might have, because the transaction involved "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 was 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.*

This case involves a far more extreme version of the injury recognized as direct in the cases cited above. Just as the conduct in *Alleghany* imposed distinct harms on the "minority common stockholders," 353 U.S. at 158, who could therefore maintain a direct action, so too the Net Worth Sweep imposed direct harms on the private shareholders here. And just as the harm in *Gatz* was not confined to an "equal dilution of the economic value and voting power" of all shareholders, but minority "shareholders [were] harmed, uniquely and individually, to the same extent that the controlling shareholder [was] (correspondingly) benefited," 925 A.2d at 1278, so too

Private Shareholders here were harmed uniquely and individually to the same extent that Treasury benefitted.

D. The Private Shareholders' Claims Also Are Direct Under Delaware's "Dual Nature" Doctrine.

The trial court nevertheless held that the Private Shareholders' direct claims were derivative by invoking cases from Delaware involving alleged corporate overpayments to controlling shareholders. It observed that such cases typically only give rise to derivative claims (unless the "dual nature" doctrine provides otherwise) and stated that the "gravamen" of Private Shareholders' direct claims is that "[t]he government, via the PSPA Amendments, compelled the [Companies] to overpay Treasury," such that "plaintiffs' purported harms are merely the unavoidable result . . . of the reduction in the value of the entire corporate entity." Appx40. It is not necessary to apply these cases to conclude that the Private Shareholders' direct claims here are in fact direct, but, in any event, the claims are direct under the dual-nature doctrine too.

As discussed in detail above, the trial court mischaracterized the Private Shareholders' direct claims, which do not depend on whether the Companies were forced to make an "overpayment" to the Treasury. The gravamen of the Private Shareholders' direct claims is actually that the government expropriated The Private Shareholders' property rights and full economic interest in the Companies to itself as shareholder, a harm separate and distinct from any harm to the Companies. The

Private Shareholders direct takings and illegal exaction claims would be the same even if the Net Worth Sweep caused no harm to the Companies, from an overpayment or otherwise. In contrast to the derivative claims being pressed by the *Fairholme* plaintiffs, the Private Shareholders' direct claims do not depend in any way on an overpayment by the Companies to Treasury.

But even if one misread the Private Shareholders' direct claims as depending on an overpayment by the Companies to Treasury, it would not matter. Particularly given the government's dominance over the Companies at the time of the Net Worth Sweep, those claims still would be direct, as "dual nature" claims—*both* direct and derivative, and therefore able to be pressed by both the shareholders (on their own behalf) and the corporations. *See* Appx39. The lower court further erred in refusing to treat Private Shareholders' claims as at least dual nature.

At the outset, it bears emphasis that this is a distinct and independent basis upon which Private Shareholders should have been permitted to maintain their direct claims. None of what has been said in the foregoing sections depends on applying the dual-nature doctrine under Delaware law. Moreover, despite language of some Delaware courts in describing this doctrine, it does not, for reasons already discussed, define the universe of cases in which a fact pattern can give rise to both direct and derivative claims. *See Grimes*, 673 A.2d at 1212 ("the same set of facts can give rise both to a direct claim and a derivative claim"); *Branzan Alternative*

Inv. Fund, LLLP v. Bank of New York Mellon Tr., 2015 WL 5693562, at *3 (D. Colo. Sept. 29, 2015) (explaining that under Delaware law "one set of facts may give rise to two separate harms and thus two separate claims, one derivative and the other direct"); *supra*, Part I.B. Regardless of whether a transaction has facts fitting within this doctrine, a transaction may generate multiple viable claims, some of which are direct and others of which are derivative.

1. As this Court has explained based on the Delaware Supreme Court's decisions in *Gentile* and *Gatz*, a claim is both direct and derivative for purposes of the dual-nature doctrine if "(1) the stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value" (that is, a controller harms the company), and "(2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders" (that is, the controller ensures that the harm to the company does not fall on all shareholders *pro rata*). *Starr*, 856 F.3d at 968 (quoting *Gentile*, 906 A.2d at 100); *see Gatz*, 925 A.2d at 1278 (restating rule). Those requirements are satisfied here.

Given that the Companies were in government conservatorship, were being operated by a government agency (the Agency), and were subject to the numerous strictures and constraints set forth in the Treasury SPAs, it is not plausible to assert that the government did not "actually exercise direction over the business and affairs of the corporation." *Starr*, 856 F.3d at 969. Moreover, Treasury on its own was a controlling shareholder. The Treasury SPAs allowed Treasury to prevent or allow numerous transactions that are normally subject to management's discretion. And they gave Treasury the right to acquire 80% of the common stock in the Companies for a nominal value. *See also infra*, Part III(B) (discussing Treasury's public recognition of its control based simply on its warrants). It is entirely formalistic to deny, as the lower court did here, that Treasury was a controlling shareholder. And regardless of the finding as to Treasury in particular, the government writ large had total control over the Companies—indeed, that was the only way it could force the Companies to agree to the one-sided terms of the Net Worth Sweep.[7]

This Court's decision in *Starr* provides an illuminating contrast. That case challenged the initial transaction agreed to between the government and AIG in early September 2008—not a transaction consummated years later, after the government

[7] As to some of the Private Shareholders, the court below held that they had waived any argument for statutory standing based on the status of the Agency and Treasury as a control group. Appx.76. The court misunderstood the procedural record, as these plaintiffs' opposition brief, in the section addressing this issue, both repeatedly discussed concepts of control directly (including the relationship of Treasury and the Agency) and cross-referenced their earlier discussions of the concept in their brief. *See Owl Creek* MTD Opp. 36–39. In any event, a new argument is not a new claim, and the lower court addressed the question, so there is no waiver here. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

had acquired its initial, controlling ownership interest. In *Starr*, the United States acquired 79.9% of AIG's equity in exchange for an $85 billion loan, and AIG shareholders challenged that transaction as an illegal exaction and taking without just compensation. This Court held that the shareholders lacked a direct claim under the dual-nature doctrine because (in contrast to the cases in which Delaware courts have applied the dual-nature doctrine) the United States did not then control AIG. 856 F.3d at 972. As this Court explained, "'control' does not necessarily require the self-dealing party to be a pre-existing majority stockholder," but "Delaware law has consistently held that a party has control only if it acts as a fiduciary, such as a majority stockholder or insider director or actually exercises direction over the business and affairs of the corporation." *Starr*, 856 F.3d at 969. But, in the Court's view, the government had been just an "outside third part[y] with leverage," neither having a fiduciary duty nor "actually exercise[ing] direction over the AIG's corporate conduct." *Id*. Thus, "[w]hile there of course may be instances in which the government does exercise the requisite 'control,' the circumstances" there did "not arise to that level." *Id*.

But here, the government not only was in control but also used that control to reallocate *all* shareholder rights from the Private Shareholders to itself, and in the form of *direct, perpetual payments* of essentially all Company profits. The redistribution of economic interests here was not just a portion of what the Private

Shareholders owned; it was *total—all* the economic rights they owned, the government re-allocated to itself. This case therefore presents facts far more severe not only than in *Starr* but also than in *Gatz* and *Gentile*. Indeed, neither the Delaware courts nor this Court has ever confronted a case this egregious: Private Shareholders are unaware of any, and the government never has claimed to identify any.

Starr also does not apply to this case for another reason that has nothing to do with control: *Starr* involved an archetypical feature of derivative claims, which is that "each . . . shareholder was affected in a proportional measure." 856 F.3d at 964 n.16.[8] The government, when it loaned the money to AIG, was not a shareholder. The deal involved creating new equity for the government in exchange for its loans, not transferring existing equity from one group of current shareholders to another. As this Court explained: "There is a material difference between a new issuance of equity and a transfer of stock from one party to another. Newly issued equity necessarily results in 'an equal dilution of the economic value and voting power of the corporation's outstanding shares,'" a defining feature of a derivative claim. *Id.* at 967 (quoting *Gentile v. Rosette*, 906 A.2d 91, 100 (Del. 2006)). "[A]ny dilution

[8] More precisely, when *not* all of the shareholders are harmed in the same way, *pro rata*, the harm is direct, but when they *are* all harmed *pro rata*, the harm is likely derivative but might not be. *Tooley*, 845 A.2d at 1037 (stating that, although "an injury to the corporation tends to diminish each share of stock equally," a "direct, individual claim of stockholders that does not depend on harm to the corporation can also fall on all stockholders equally, without the claim thereby becoming" derivative).

in value of the corporation's stock is merely the unavoidable result . . . of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction." *Starr*, 856 F.3d at 967. And that is precisely what, as discussed above, did *not* happen here. Unlike in *Starr*, the transaction at issue in this case *increased* the value of some of the corporations' existing shares (the senior preferred stock owned by Treasury) while reducing the value of the shares owned by the Private Shareholders.

Two trial-court decisions on which the lower court relied (one predating *Tooley*) likewise do not apply in light of the actual basis of the Private Shareholders' direct claims. In *Protas v. Cavanagh*, the cause of the stockholder plaintiffs' injury was that the "corporation's funds [had] been wrongfully depleted" as a result of "overpayment for the Preferred Shares." No. CIV.A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012). And in *Hometown Fin., Inc. v. U.S.*, the court explained "that the only way plaintiffs may have suffered, if at all, from a loss of profits by the thrift is through a diminution in the value of their stock or through foregone dividends from the thrift." 56 Fed. Cl. 477, 486 (2003). Here, in contrast, as explained above, the challenged transaction did not injure all the Companies' shareholders in the same way and on a *pro rata* basis.

2. The trial court also thought the dual-nature doctrine inapplicable because the Net Worth Sweep "did not involve the issuance of new shares, and shareholder voting power was not reallocated under the [Third] Amendments." Appx39. This too was an error of law.

Dilution of voting rights is an additional basis for showing a direct claim—not a necessary precondition for one. This is clear from the very "dual nature" cases on which the lower court relied, particularly *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016). *See MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *13 (Del. Ch. May 5, 2010) (applying the same test to preferred stock with no voting rights); *see also Oliveira v. Sugarman*, 152 A.3d 728, 747-79 (Md. 2017) (recognizing that, under Delaware law, a direct claim exists "when minority shareholders have suffered a substantial decrease in the value of their stock due to share dilution").

The court in *El Paso Pipeline* held, based on a limited-partnership agreement, that a limited partner's claim of overpayment against the general partner was not direct but rather belonged to the partnership. Initially, then, the case turned (in relevant part) on whether and how to apply *Tooley* and extend the rule of *Gentile* and *Gatz*, developed as background law for corporations, "in the limited-partnership context"—in which (a) conflicts of interest between the general partner and limited partners are inherent; (b) any duties owed to the limited partners are purely contractual, not common-law fiduciary duties such as the duties that corporate directors, officers, and controllers bear; and (c) that contract (the partnership agreement) determines both how to address the inherent conflicts of interest and who has a given cause of action. *Id.* at 1251; *see id.* at 1260 ("[C]ases involving limited partnerships often present unique facts relating to the provisions and structure of the limited partnership agreement and how it defines the rights and responsibilities of the limited partners"). In the corporate context itself, the principles of *Tooley*, *Gentile*, and *Gatz* continue to directly control. *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 251 (Del. 2019).

More to the point, the limited partner only alleged loss to the partnership, and, thus, any harm he suffered was just "in the form of the proportionally reduced value of his units." *El Paso Pipeline*, 152 A.3d at 1261. The Delaware Supreme Court unsurprisingly emphasized this, drawing on the general rule in the corporate context: "Where all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative." *Id.*; *see supra* Pts. I.B & I.C (discussing this rule). Indeed, the case had gone to trial, and the limited partner "presented evidence of harm *only* as to the Partnership, not to the individual unitholders." 152 A.3d at 1261; *see also id.* at 1265 ("Brinckerhoff never presented evidence at trial of specific harm suffered by the limited partners, as the Court of Chancery stated").

Beyond that, the limited partner also 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. In "declin[ing] to further expand [the dual-nature claim doctrine] in the limited partnership context," the court emphasized that "there was no plausible argument that the transaction had the effect of increasing the voting power or control of the general partner at the expense of the unaffiliated unitholders. From the start, the derivative plaintiff has sought only monetary relief for the limited partnership." *Id.* at 1251.

In the context of an overpayment claim that did not even include an allegation (much less proof) of harm to the limited partner distinct from harm to the partnership, it made sense to highlight the absence of loss of control as well. Similarly, in the context of a claim by a common stockholder, if there were a loss of voting power, that would be a simple way to show a harm that the stockholder suffered independently of any harm to the corporation (and that did not harm every shareholder proportionally). Reallocation of voting power among shareholders does not harm the corporation, whereas, as discussed above, reallocation of economic value among shareholders might be accompanied by (even if not depending on) harm to the corporation, presenting a less clear picture. But an indicator is not a requirement; it can be sufficient without being necessary.

Indeed, the Delaware Supreme Court in *Gentile* expressly and unanimously rejected the Chancery Court's holding in that case that a reduction in voting power needs to be "material," meaning dropping from majority to minority. 906 A.2d at

101-02. It explained: "A rule that focuses on the degree or extent of the expropriation, and requires that the expropriation attain a certain level before the minority stockholders may seek a judicial remedy directly, denigrates the gravity of the fiduciary breach and condones overreaching by fiduciaries." *Id.* at 102. Yet reducing voting power that already is in the minority means reducing voting power that is *useless* for controlling the company (particularly when, as in *Gentile* itself, a majority shareholder exists, *id.* at 95). So loss of "control" cannot be the real question. Rather, a loss of (even non-controlling) voting power is a marginal piece of the plaintiff's overall discriminatory, and thus direct, economic injury. The cases' evidentiary observations—describing all that happens when a common shareholder suffers expropriation—do not establish a requirement for a court to acknowledge a direct claim.

The trial court's focus on voting rights also ignored the extraordinary facts of this case. That there was no new issuance of equity makes it even more clear that what happened here was an expropriation of Private Shareholders' property rights. The government should not be permitted to dodge the economic substance of the Net Worth Sweep. To think it relevant that the Net Worth Sweep did not diminish Private Shareholders' voting rights is a pure formalism. The government has taken 100% of the economic property rights that the voting rights are intended to protect. Telling Private Shareholders they have no direct claims because their voting rights were not diminished is akin to telling a homeowner she lacks standing to complain about a robbery because the robber took all of the homeowner's property (including the house itself), but let the homeowner keep the burglar alarm.

Under the trial court's view, a controlling party could evade liability for direct claims by taking *more* rights and equity than the controlling parties took in *Gentile* and its progeny. But it is unimaginable that those cases would have come out differently if the controlling party had somehow managed to expropriate the *entire* economic interests held by the other shareholders, diverting *all* company profits and assets to itself, while leaving them a shell of voting rights.

E. In Any Event, Important Federal Interests Compel Finding That The Private Shareholders Have Direct Claims.

As this Court explained in *Starr*, federal law must govern the question of whether Private Shareholders have a direct claim. And the "presumption" that federal law incorporates state law does not apply if it "would frustrate specific objectives of the federal programs." *Starr*, 856 F.3d at 966; *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). Here, as detailed above, general principles of corporation law support the conclusion that Private Shareholders have direct claims for the taking and illegal exaction of their property rights. But even if that were not so, the federal interests at stake should lead to a reversal.

First, this case presents a well-founded allegation of a gross violation of private property rights arising out of the unprecedented government expropriation of billions of dollars of private property. Further, it involves an extraordinary and unprecedented attempt by the government to use its control over two corporations to transfer to itself 100% of the corporations' future profits and assets. The extent to which the Constitution permits such overreaching governmental conduct is a question of obvious and extreme importance and should not be relegated to a lawsuit that plaintiffs cannot litigate on their own behalf.

Second, the principles of Delaware law that the lower court applied were not developed to address government action, particularly not the government's takeovers of 100% of the economic rights of private shareholders. Those cases address claims of fiduciary breach brought against private parties. In trying to determine when shareholders have a direct claim, the cases sometimes focus on the question whether the shareholder accused of misconduct owed a fiduciary duty not only to the company, but also to all the minority shareholders. *See Gentile*, 906 A.2d 91; *Gatz*, 925 A.2d 1265. By contrast, the government *always* owes a duty not to take private property without just compensation (or in violation of law). So the state law cases may give the impression of a test that is harder to meet than it should be once one recognizes that this case involves action by the government to expropriate private property rights.

Third, the shareholder standing principles at issue here are not based on Article III, but instead on what courts formerly described as "prudential standing."

Such principles are not meant to prevent valid claims from proceeding, but rather to ensure that they are brought by the plaintiff best-placed to do so. *See generally North Shore Gas Co. v. E.P.A.*, 930 F.2d 1239, 1242 (7th Cir. 1992) (Posner, J.) ("An important purpose of rules of standing is to identify the best-placed plaintiff and give him a clear shot at suit."). Here, Private Shareholders are appropriate plaintiffs to sue for the expropriation of their investments through a self-dealing transaction that removed them from the Companies' capital structure.

Fourth, the Court should have in mind the government's contention that, under HERA's Succession Clause, only *the Agency* may bring derivative claims against *the Agency* during conservatorship. If the Court agrees with the government on that issue, and then also agrees that all the Private Shareholders' claims are derivative, *no one* can vindicate the important federal constitutional and statutory policies that underlie the Private Shareholders' claims. Under the government's arguments, *private shareholders* cannot sue, because all claims pertaining to the Net Worth Sweep are derivative; *the Companies* cannot sue, because they are under the Agency's control; and *the Agency* cannot sue (even imagining it would want to), because it cannot sue itself. *See United States v. ICC*, 337 U.S. 426, 430 (1949) (recognizing the "general principle that no person may sue himself"); *SEC v. Fed. Labor Relations Auth.*, 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring). Particularly if the Court concludes that the Succession Clause bars all derivative claims, it should deem the Private Shareholders' claims to be direct as a matter of federal law to vindicate the federal policies that underlie them.[9]

II. THE LOWER COURT CORRECTLY HELD THAT THE PRIVATE SHAREHOLDERS' CONSTITUTIONAL CLAIMS, ARISING FROM AN AGREEMENT BETWEEN TWO FEDERAL AGENCIES FOR PUBLIC PURPOSES, ARE AGAINST THE UNITED STATES.

The Private Shareholders agree with the Court of Federal Claims' holding that their takings and illegal-exaction claims are against the United States and thus within its jurisdiction. *See, e.g.*, Appx24–25; Appx68–69. They recognize, however, that this Court must assure itself of subject-matter jurisdiction and that, here, as the government's second issue in its certified appeal in *Fairholme* confirms, that question is likely to be presented in these appeals. Thus, without waiving any arguments that might be appropriate in reply to any government challenges to

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[9] The Court of Federal Claims further held, in the alternative, that the Private Shareholders' claims could not "be deemed to be derivative" and thus held permissible under the "conflict of interest" exception this Court established in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1294–95 (Fed. Cir. 1999), saying there was "no authority for the recharacterization." Appx80. (This exception is at issue in the interlocutory appeal this Court granted in *Fairholme*.) But the premise of the court's dismissal was that claims the Private Shareholders pleaded as direct are, in fact, derivative, that what the court considered "the substance" controls over "the label." Appx75. Thus, the court itself has recharacterized the claims. The Private Shareholders' argument is simply that, in such case, the recharacterization should be taken to its logical conclusion. If this Court reverses on standing, this argument is moot. If, however, it affirms on the primary question of standing, discussed in this section, it should reach this secondary question and reverse. Private Shareholders also, of course, reserve the right to seek to amend their complaints to conform to the lower court's recharacterization.

jurisdiction, they here briefly explain why the Court can have confidence that the holding of the court below was correct, on its own terms and under this Court's precedent.

A. The Court Correctly Determined That The Private Shareholders' Claims Are Against The United States Because The Agency Is An Arm Of The United States.

1. Congress has made the Agency simply "an agency of" (and thus part of) the United States, and added that, when it is "acting as conservator," "*the Agency* shall not be subject to the direction or supervision of *any other agency* of the United States" in exercising "the rights, powers, and privileges of the Agency." § 4511(a); § 4617(a)(7) (emphasis added); *see also Fed. Hous. Fin. Agency v. Royal Bank of Scotland Grp. PLC*, No. 3:11-cv-01383, 2012 WL 3580522, at *2 (D. Conn. Aug. 17, 2012) (in case involving Agency as conservator, explaining that, "[l]ike the SEC, the FHFA is an independent federal agency"). As the court below recognized, given the nature of its conservatorship, the Agency does not lose its federal-government character for constitutional claims simply because it acts as conservator (even if it might do so when instead acting as receiver).

In *Lebron*, the Supreme Court established that, even if an entity is a *corporation* and Congress says it is *not* part of the government, it nevertheless is a federal instrumentality, at least for determining the constitutional rights of citizens, if Congress (1) created it by special law, (2) to further governmental objectives, and

(3) retains permanent government authority to appoint a majority of its directors. 513 U.S. at 399; *see also Slattery v. United States*, 635 F.3d 1298, 1309 (Fed. Cir. 2011) (en banc) ("*Slattery II*") ("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").

Here, where Congress has said that the Agency *is* a federal agency, and also said that it remains so when it is when acting as conservator, *Lebron* confirms that Congress should be taken at its word: (1) Congress created the Agency by special law (HERA); (2) the Agency furthers public purposes, including, as the government and the court below recognized, in executing the Net Worth Sweep as conservator to benefit Treasury and taxpayers, *e.g.*, Appx56; and (3) the federal government (the President, with the advice and consent of the Senate) retains permanent authority to appoint the Agency's single director.

This Court's subsequent precedent in *Lion Raisins, Inc. v. United States* is consistent with and reinforces this logic in an analogous situation. 416 F.3d 1356 (Fed. Cir. 2005). In that case, the Court held that a government instrumentality (the Raisins Administrative Committee), established and subject to the control of a principal officer (the Secretary of Agriculture), under authority vested in him by federal statute, was the United States for purposes of a takings claim (and it did not matter that the Committee did not receive federal appropriations). *See id.* at 1358–59, 1364, 1368. It was enough that it was an "arm[]" of the government carrying out "governmental functions." *Id.* at 1363 (internal quotation marks omitted). Here, under *Lion Raisins*, even if one were to (counterfactually, *see* § 4617(a)(7)) imagine the Agency-as-conservator as distinct from the Agency itself, it would not matter: The Agency-as-conservator is, at least (like the Committee), a government instrumentality established by and subject to the complete control of a principal officer (the Director), under authority vested in him by the federal HERA (§ 4617(a)) for government purposes. *See also Slattery II*, 635 F.3d at 1309.

Relatedly, the Agency is plainly an "agent" of the United States, including when acting as conservator. (This is distinct from any question whether it is an agent of some *sub-part* of the United States, such as Treasury. *Cf.* Appx64.) An agenc*y* of the United States is an agen*t* of the United States, certainly where it is controlled by a federal official under authority vested in him by federal statute. *Lion Raisins*, 416 F.3d at 1358–59, 1364, 1368. That is consistent with the common-law rule that an agency relationship exists where one entity "acts as a representative of or otherwise acts on behalf of another" and the principal "has a right to control the actions of the agent." *Restatement (Third) Of Agency* § 1.01 cmt. c (2006). As noted above, the Agency is expressly an agency of the United States, whose actions are controlled by the Director (a presidential appointee), acting under authority Congress vested in him through HERA and under the ultimate control of the President, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020); *Collins v. Mnuchin*, 938 F.3d 553, 587 (5th Cir. 2019) (en banc), *cert. granted*, No. 19-422 & 1953 (U.S. July 9, 2020). All of that remains just as true when the Agency acts as a conservator of one of the Companies as when it carries out any other of its statutory duties. If not thus part of the *principal*, it is at least an agent of that principal. Accordingly, by any measure, the Agency as conservator is the United States here.

2. The court below relied on background law as analyzed in recent case law and scholarship to reach this conclusion that the Agency, as a conservator, does not lose its government character. The court emphasized the characteristics of the "role[ ] of a conservator." Appx24. As the Agency itself "has described" it, the court recognized, a conservatorship's purpose is "to establish control and oversight of a company to put it in a sound and solvent condition" so it may continue its operations. *Id.*; *see* 76 Fed. Reg. 35724, 35727, 35730 (June 20, 2011). In the context of FIRREA (on which Congress based HERA), an earlier court likewise explained that the "purpose of a conservator is to maintain the viability of a troubled institution and place it in a sound and solvent condition." *Gibraltar Fin. Corp. v. Fed. Home Loan Bank Bd.*, 1990 WL 394298, at *5 n.7 (C.D. Cal. June 15, 1990). Given this task of continuing and restoring operations (not winding-down, liquidating, and paying claims), a conservator has "a fiduciary duty running *to* the corporation itself," like that of a director or officer. *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 283 (D.R.I. 2018); *see Gibraltar*, 1990 WL 394298, *2–3 (recognizing "the same fiduciary duties" as "officers and directors," which "entail an obligation of the highest good faith to the corporation and its shareholders").

This posture, the court below explained, is "meaningfully different" from that of a receivership (Appx24), which involves the narrow task of "preserv[ing] a company's assets, for the benefit of creditors, in the face of bankruptcy." *Sisti*, 324 F. Supp. 3d at 282 (quoting Goldman, *The Indefinite Conservatorship of Fannie Mae and Freddie Mac is State-Action*, 17 J. Bus. & Sec. L. 11, 23 (2016)). Given that task, a receiver takes on the fiduciary duties *of* the company it oversees, including the duty that an insolvent company owes to its creditors. As a result, a receiver might be thought of as "stepping into the shoes" of the company, and thus, for that purpose, as *being* the company and even ceasing to be itself. *Id.*; *see* Appx24.

Even then, however, under this Court's precedent, the FDIC, a government corporation and the paradigmatic federal receiver, "does not automatically lose its governmental status when it acts as receiver" of a failed bank. *Slattery v. United States*, 583 F.3d 800, 827 (Fed. Cir. 2009) ("*Slattery I*"), *vacated and reinstated in relevant part*, *Slattery II*, 635 F.3d at 1300, 1321. Indeed, this Court has recognized that the FDIC as receiver remains the government particularly when it acts outside its prescribed task of disposing of a bank's assets and resolving claims involving it, such as by retaining a liquidation surplus. *Id.* at 827–28; *see Citizens Cent. Bancorp, Inc. v. United States*, No. 15-1539C, 2017 WL 10544024, at *6 (Fed. Cl. Sept. 7, 2017) (finding receiver with "special powers" not provided to non-government receivers to be the United States).

It follows that, whatever might be the case had the Agency appointed itself as a receiver of the Companies (on an analogy to the FDIC's role as receiver for banks), the Agency at least remains the government when it appoints itself as a conservator of the Companies and carries out that role under HERA. Appx24. In so holding, the court below followed the lead of other courts. *Sisti*, 324 F. Supp. 3d at 281 n.8 (collecting cases treating Agency-as-conservator as the government and so holding); *Royal Bank of Scotland*, 2012 WL 3580522 at *4 (noting that "courts have treated federal agencies acting in their capacities as receivers or conservators differently from private litigants" and holding that Agency-as-conservator was not a private party). If a federal corporation "does not automatically lose its governmental status when it acts as receiver" for a bank, even less should a federal agency automatically lose its governmental status when it acts as conservator. *Slattery I*, 583 F.3d at 827.

This is particularly true for the Agency as conservator here, including by comparison to *Sisti* and *Royal Bank of Scotland*: In *Sisti*, the plaintiff challenged foreclosures carried out by service providers of the Companies, thus actions taken in the ordinary course of their businesses, 324 F. Supp. 3d at 275–77; and in *Royal*

Bank of Scotland the Agency was merely bringing a claim (a securities suit) on behalf of the Companies, 2012 WL 3580522, at *1. Here, the Agency carried out an unprecedented transfer of wealth from the Companies and Private Shareholders to a fellow federal agency, in the name of benefitting taxpayers.

Confirming this reasoning is the reality that a federal agency or corporation when acting as a conservator *goes beyond* its "normal regulatory and supervisory activities and assume[s] control of the operations" of the institutions at issue, yet even those "normal" activities are indisputably governmental. *Gibraltar*, 1990 WL 394298, at *3. For example, the Agency has the power to issue cease-and-desist orders to the Companies regarding their ongoing operations. § 4631. When the Agency acts as conservator for the Companies, those ongoing operations continue, and its authority to direct them is even greater. Its authority and discretion also exceed those of a receivership, in which duties are more prescribed. *See* § 4617(b)(2)(E), (b)(3) to (9). This logic applies all the more when, as here, the Agency as conservator is alleged to have acted beyond what any private conservator could do. *Cf. McAllister v. RTC*, 201 F.3d 570, 579 (5th Cir. 2000) ("a conservator only has the power to take actions necessary to restore a financially troubled institution to solvency").

B. In Any Event, The Agency Was, With Treasury, One Of "Two Coordinate And Coordinated Parts Of The Same Undertaking" To Benefit The United States, Which Suffices Under This Court's Precedent.

Under other precedent of this Court, the joint work of the Agency as conservator and of Treasury further confirms that the Private Shareholders' claims are against the United States. In *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), the U.S. Environmental Protection Agency ("EPA") issued an order under the authority of the federal Superfund law ("CERCLA") authorizing itself and the State of California to enter plaintiffs' property, and the EPA and California did so, in accordance with a cooperative agreement. *Id.* at 1367, 1369–70, 1374–75. When the plaintiffs sued for a taking, they challenged the activity as a whole, over half of which California had carried out, but the Claims Court accepted the government's argument "that the United States was not responsible for" the State's activities. *Id.* at 1367.

This Court reversed. It firmly rejected the United States' effort to deny the nature and disaggregate the unity of its actions—whether done directly by the EPA or through another—and it did not matter that California might not be a common-law agent of the United States. *Id.* at 1378. What mattered was that the actions of the EPA and California "were two coordinate and coordinated parts of the same undertaking." *Id*. Because the California officials were acting "under the authority granted by CERCLA" and in coordination with the EPA, their activities were "attributable to the Federal Government for purposes of takings law just as are the activities of EPA itself." *Id.* at 1379. It thus was "immaterial" whether California might have had authority "to act on its own initiative." *Id.*; *see Preseault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996) (*en banc*, plurality) ("when the Federal Government puts into play a series of events which result in a taking of private property, the fact that the Government acts through a state agent does not absolve it from the responsibility"); *see also Slattery II*, 635 F.3d at 1315 ("the jurisdictional criterion is" whether "the government entity" is "acting on authority of the United States").

The logic of *Hendler* applies here even more compellingly. The Agency-as-conservator and Treasury together carried out the "coordinate and coordinated" work of the "same undertaking" of imposing the Net Worth Sweep on the Companies, via their agreement to amend the Treasury SPAs, and both acting under the authority of the federal HERA. (Indeed, they acted as a control group over the Companies.)

The only material differences are that, here, *both* of the government entities at issue are federal (the Agency and Treasury are under the same head, the President, and the Agency lacks California's alternative source of authority) and the property came into the *sole* possession of the federal government. *See also Slattery I,* 583 F.3d at 828 (finding FDIC, as receiver, to be United States where it retained liquidation surplus); *Collins*, 938 F.3d at 590 (following *Slattery* as to Net Worth

Sweep, because "[i]t transferred the wards' assets to the government"); *Texas State Bank v. United States*, 423 F.3d 1370, 1377 (Fed. Cir. 2005) (explaining that where a "government command to a third party results in the transfer of alleged private property to the United States . . . the United States must bear responsibility if a direct government appropriation would itself constitute a compensable taking"). But those differences *strengthen* the case for jurisdiction. The work of the federal Treasury and the federal Agency on the Net Worth Sweep should be acknowledged as the single undertaking it plainly was, and that undertaking was wholly the work of the United States. It would be inappropriate to hide one's eyes from this.

C. At A Minimum, Under This Court's Precedent, The Essential Role Of Treasury Sufficed To Establish Jurisdiction.

The Private Shareholders' constitutional claims are against the United States under this Court's precedent for the further simple reason that they challenge the actions of Treasury, indisputably a part of the United States and an indispensable party to the Net Worth Sweep. In *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014), car dealers sued for a taking based on Treasury's financing agreements with private car manufacturers, alleging that Treasury had pressed the manufacturers to terminate dealers' franchise agreements. *Id.* at 1149. Because Treasury had taken the challenged action, there was no question that the plaintiffs' claims were against the United States (regardless of whether their theory of liability would ultimately prevail). *Id.* at 1149 n.4 (noting "no lack" of jurisdiction).

Similarly here, the Private Shareholders' claims are against the United States because they challenge the actions of Treasury. And that logic applies all the more because Treasury worked not with a private party but rather with another federal agency (the Agency, as conservator) and to directly benefit the United States.

The Court of Federal Claims acknowledged, but did not address, the parties' dispute as to whether the court could "exercise jurisdiction based on allegations of Treasury's involvement," deeming that issue "immaterial in light of the court's determination . . . that the [Agency]—the other party involved in the PSPA Amendments—"is the United States." Appx14. The court merely noted that, if allegations based on Treasury's involvement were sufficient the jurisdictional discovery the court had authorized as to whether the Agency was the "United States" for purposes of the Tucker Act "would have been unnecessary (and unwarranted)." *Id*.

That is incorrect: For one thing, it overlooks that the discovery order pre-dated this Court's decision in *A&D Auto*. In any event, plaintiffs are not limited to a single jurisdictional theory. In determining whether to grant jurisdictional discovery, the court merely addressed one of the bases upon which subject matter jurisdiction could be grounded, found that the jurisdictional discovery was relevant to that alleged basis and did not consider whether there might be an alternative basis. Having found that jurisdictional discovery was relevant to one potential ground for subject matter jurisdiction, it would have been improper to deny jurisdictional discovery unless the court specifically held, after full briefing, that the jurisdictional discovery was not necessary because the court had subject matter jurisdiction on grounds as to which there was no factual dispute. The allegations against Treasury are sufficient for jurisdiction.

III. THE LOWER COURT ERRED IN HOLDING THAT THE UNITED STATES HAD NO FIDUCIARY DUTY TO THE COMPANIES' PRIVATE SHAREHOLDERS, AND THEREFORE ERRED IN HOLDING THAT IT LACKED JURISDICTION OVER THEIR CLAIM OF BREACH OF FIDUCIARY DUTY.

The Private Shareholders' claims of breach of fiduciary rest on two distinct (albeit reinforcing) jurisdictional bases under the Tucker Act. Either suffices, and the lower court erred in rejecting both. On *de novo* review, *Northrop Grumman Computing Sys., Inc. v. United States*, 709 F.3d 1107, 1111 (Fed. Cir. 2013), this Court should reverse.

A. HERA, Read In Light Of Antecedent Law Under FIRREA, Makes The Agency, When "Conservator" Of A Company, A Fiduciary To The Company And Its Shareholders, And Answerable In Damages For Breaching That Duty.

The Tucker Act's grant of jurisdiction for claims based on an act of Congress encompasses claims "based on federal [law] mandating compensation by the federal government for damages sustained." *Newby v. United States*, 57 Fed. Cl. 283, 291 (2003). Here, the nature of a "conservator" under HERA establishes that the Agency, when it gives itself that role, takes on a fiduciary duty to shareholders of the company to be conserved, and that, under Supreme Court precedent, HERA is money-mandating for violations of that duty.

First, in essentially all respects, the provisions of HERA for conservators and receivers are the same as those of FIRREA, from which Congress drew, often verbatim, in crafting HERA. *Cf.* § 4617(a)&(b), *with* § 1821(c)&(d); *see* Appx70 (generally recognizing this). That includes how they state the powers of a "conservator" (and "receiver") while neither defines those terms. Under both statutes, a "conservator" obtains total control of an entity, with a view to preserving and conserving its assets, making it sound and solvent, and carrying on its business. *Cf.* § 4617(b)(2)(A), (B), &(D), *with* § 1821(d)(2)(A), (B) & (D).

Under FIRREA, the FDIC as a *regulator* does not have a fiduciary duty to the regulated entity, but that is distinct from "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*, 1990 WL 394298, at *2. Soon after FIRREA's enactment, the court in *Gibraltar* answered that question in the affirmative: "The case law, and common sense, indicates that a duty does arise in such a circumstance." *Id.* The court found nothing in FIRREA (under which FDIC could act as conservator), or prior law (under which FSLIC could serve in that role), to indicate a "need to permit [the governmental agency] 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. No court interpreting FIRREA has disagreed with this settled legal principle. *See 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 Bank's creditors and to Bancorp," the bank's holding company.); *id.* at 201 n.5 (referring to "the FDIC's fiduciary relationship to" the bank's holding company); *E.I. Du Pont de Nemours & Co. v. FDIC*, 32 F.3d 592, 595 (D.C. Cir. 1994) (holding that FDIC as receiver took on fiduciary duty of bank).

This proposition carries over to HERA. *Sisti*, 324 F. Supp. 3d at 282-83 (looking to FIRREA in concluding that conservators under HERA "have a fiduciary duty"); *see* 76 Fed. Reg. at 35727, 35730 (providing that "the essential function of a conservator [under HERA] is to preserve and conserve the institution's assets" and that "[a] conservator's goal is to . . . return [a regulated entity] to a safe, sound and solvent condition").

In holding that HERA does not establish a fiduciary relationship of the Agency to the Companies' shareholders, the Court of Federal Claims declined to consider "the implications of the word 'conservator,' the [Agency]'s control over the Enterprises, or the [Agency's] other powers." Appx70. Instead, the Court relied entirely on one subsection of HERA, which states:

> (J) *Incidental* powers. The Agency may, as conservator or receiver—
>
> (i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this section, and such incidental powers as shall be necessary to carry out such powers; and
>
> (ii) *take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity or the Agency*.

§ 4617(b)(2)(J) (emphasis added). From these *incidental* powers, the court concluded that "Congress provided in HERA that the FHFA-C is *only* required to act in the interests of itself or the Enterprises." Appx70.

The lower court's interpretation contravenes the plain meaning of § 4617(b)(2)(J), which only empowers the Agency to take actions that are elsewhere "authorized by this section," meaning that when the Agency exercises powers conferred elsewhere in § 4617 it is subject to the *additional requirement* that it use its powers to advance "the best interests of the regulated entity or the Agency." And when the Agency acts "as conservator"—as it must to rely on § 4617(b)(2)(J) outside the receivership context—its powers are specifically defined and delimited by § 4617(b)(2)(D), which sets forth the Agency's "[p]owers as conservator":

> (D) *Powers* as conservator. The Agency may, as conservator, take such action as may be—
>
> (i) necessary to put the regulated entity in a sound and solvent condition; and
>
> (ii) appropriate to carry on the business of the regulated entity and *preserve and conserve the assets and property* of the regulated entity.

§ 4617(b)(2)(D) (emphasis added). Because when it acts "as conservator" the Agency is required to seek to preserve and conserve the Companies' assets, the incidental power conferred on the Agency in § 4617(b)(2)(J) is entirely consistent with recognizing that it has a fiduciary duty to shareholders. This reading of § 4617(b)(2)(J) is confirmed by the fact that the provision confers a power that is labeled "[i]ncidental"; confronted with a similarly structured statute in *Brannan v. Stark*, 342 U.S. 451, 463 (1952), the Supreme Court rejected an interpretation of an "incidental" powers provision that would have swallowed much of the rest of the statute: "We do not think it likely that Congress, in fashioning this intricate . . . machinery, would thus hang one of the main gears on the tail pipe."

And the incidental power conferred by § 4617(b)(2)(J) must be read in the overall context of HERA, which mandates that, in exercising its authority to purchase stock in the Companies, "[t]o protect the taxpayers, the Secretary of the Treasury shall take into consideration … *[t]he need to maintain the corporation's status as a private shareholder-owned company."* §1719(g)(1)(C)(v) (emphasis added). Most fundamentally, when Congress repeatedly used the word "conservator" in HERA without defining it (just as it had not in FIRREA), it necessarily provided that courts in determining its meaning throughout HERA would draw from background law, particularly under FIRREA; and under that law, as noted above, the word conveys a fiduciary duty. Thus, nothing in HERA suggests that the

Agency's responsibility to "preserve and conserve the assets and property"—a power premised on "[t]he need to maintain each Company's status as a private shareholder-owned company"—is undermined by an "incidental power" to act in the "best interests of the regulated entity or the Agency."

In *Collins*, the *en banc* Fifth Circuit acknowledged "the traditional view of a conservator as a fiduciary" and read HERA's best-interests language within its incidental-powers clause as just a "modest addition" to traditional powers, one that "may appear to depart from" the traditional view but that does not. More precisely, the *en banc* Fifth Circuit insisted on reading it in context rather than in isolation: "[T]he best-interests clause modifies FHFA's authority 'as conservator or receiver,' and it only affects actions that are otherwise 'authorized by [§ 4617].'" 938 F.3d at 580. Thus, the Agency, incidentally, "may pursue its own interests only within the conservator's enumerated powers" and its overall character as conservator. *Id.*

One confirmation of this is that FIRREA's incidental powers clause is in this respect the *same* as HERA's—allowing the FDIC to act in its own interests, § 1821(d)(J). As noted above, however, that has not kept courts from finding the FDIC to owe fiduciary duties. The court below simply ignored this considered decision by Congress to use the same language in HERA that it used in FIRREA.

The court below also erred in the distinction it did seek to draw from FIRREA—that in its incidental powers clause it mentions "depositors," whereas

HERA does not mention "shareholders," the supposed analogue. But banks have shareholders too, as well as depositors, and FIRREA too omits "shareholders" from its incidental-powers clause, yet that has not deterred courts from holding that the FDIC as a conservator has a fiduciary duty to shareholders. *Gibraltar* itself involved a claim by a shareholder, as did *Golden Pacific Bancorp*. 1990 WL 394298, at *1; 375 F.3d at 201. And it is unremarkable to recognize, as the court in *Gibraltar* did, that a conservator "'step[s] into the shoes' of the officers and directors" of a bank; that it "therefore owe[s] the same fiduciary duties as those officers and directors"; and that such duties "entail an obligation" not only to the corporation but also to "its shareholders." 1990 WL 39498, at *2. That is simply bedrock corporate law. *E.g.*, *Daily Income Fund, Inc.*, 464 U.S. at 535 n.11; *Strougo v. Bassini*, 282 F.3d 162, 173 (2d Cir. 2002).

The foregoing analysis is further confirmed by the extensive control that the Agency exercises over the Companies during conservatorship. In *United States v. Mitchell*, 463 U.S. 206 (1983), the Supreme Court interpreted federal statutes and regulations granting the United States "comprehensive responsibilities . . . in managing the harvesting of Indian timber," *id.* at 222 (quotation marks omitted), to require the United States to act as a fiduciary for the benefit of Native Americans when exercising this authority. Key to the Court's analysis was its conclusion that a "fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians." *Id.* at 225 (emphasis added). Likewise here, when the Agency, as conservator, assumes comprehensive control over the Companies, a fiduciary relationship necessarily arises.

Second, under the rule of *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), this fiduciary duty is one for whose breach a claim for damages against the United States is a proper remedy. Although the court below did not reach this question, it follows straightforwardly.

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" to be money mandating. *Id.* at 477; *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1327–31 (2020) (restating and applying *White Mountain* test; rejecting dissent's "magic words" test, while acknowledging its concession that some categories of claims can fall within the Tucker Act, including "breach-of-fiduciary-duty claims"). The Supreme Court in *White Mountain* held that a statute does permit "a fair inference that the Government is subject to duties as a trustee and liable in damages for breach" where it (1) "expressly defines a fiduciary relationship" (there, merely 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"). 537 U.S. at 473, 474–75, 477; *id.* at 480 (Ginsburg, J., concurring). These elements sufficed because "elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property" has a "fundamental" duty "to preserve and maintain trust assets." *Id.* at 475 (internal quotation marks omitted).

Here, the Agency as a "conservator" under HERA satisfies both requirements. The statutory term "conservator" expressly defines a fiduciary relationship, as shown above, much as did the term of art "trust" in *White Mountain*. *See* § 1717(c)(1) (Fannie's organic statute, authorizing it to administer "such *trusts*, receiverships, *conservatorships*, liquidating or other agencies, or other *fiduciary* and representative undertakings and activities . . . as might be appropriate") (emphases added); *Conservator*, Black's Law Dictionary (10th ed. 2014) (defining "conservator" as a "guardian, protector, or preserver," "the modern equivalent of the common-law guardian"). And the statute expressly gives the government conservator complete control over the Companies. § 4617(b). That is enough.

B. Once Treasury Obtained *De Facto* Control Over The Companies Through Its Initial Stock Purchase Agreements With The Agency-As-Conservator, It Took On A Fiduciary Duty "Founded . . . Upon" That Express Government Contract.

Private Shareholders also allege that Treasury's initial Treasury SPAs with the Agency, the day after the Agency appointed itself conservator, "are contracts that gave the United States (via Treasury) control over the Companies and over the Agency as conservator of the Companies," and that the United States "thereby assumed fiduciary duties to … non-controlling shareholders." Appx528–29. The Court of Federal Claims' three main reasons for holding that these allegations fail to establish jurisdiction under the Tucker Act are all wrong as a matter of law. *Owl Creek* MTD Op. 21–23.

First, the lower court was wrong that the Tucker Act has some implicit directness requirement, *i.e.*, that the fiduciary duty be stated in the terms of the contract rather than arising from those terms as a matter of law. Appx71. The statute itself grants jurisdiction for any claim "founded . . . upon" a contract. § 1491(a)(1). And the lower court cited no authority for reading a directness requirement into this broad and general language.

Instead, the court just invoked the alleged purported general need to read the Tucker Act narrowly. Appx61. This Court, however, has described the Tucker Act as a "broad jurisdictional grant" in its authorizing "judgment upon any claim against the United States founded . . . upon any express or implied contract with the United

States." *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1367 (Fed. Cir. 1998); *see Biltmore Forest Broad. FM, Inc. v. United States*, 80 Fed. Cl. 322, 328 (2008) (The "Tucker Act is a broad grant of jurisdiction to the Court of Federal Claims," and "[w]ithdrawal of Tucker Act jurisdiction is strictly construed."), *aff'd*, 555 F.3d 1375 (Fed. Cir. 2009); *see also Lion Raisins*, 416 F.3d at 1362, 1364, 1366–68 (similar, in context of taking claim). And in *McAbee Construction, Inc. v. United States*, No. 93-1383, 1994 U.S. App. LEXIS 5976 (Fed. Cir. Mar. 29, 1994), this Court held a claim was founded upon contract even though it did not seek to enforce a specific duty in a contract, because the contract "created and limited the rights of the parties." *Id.* at *6.

The court below did not cite these cases. And the one, older case it did cite, *Smith v. Orr*, 855 F.2d 1544 (Fed. Cir. 1988), is not on point. This Court in *Smith*, in simply choosing between two options for reading the Little Tucker Act's $10,000 cap for jurisdiction in the federal district courts, chose the narrower option to prevent circumventing Congress's intention in directing substantial claims to the Claims Court. *Id.* at 1552. Neither that holding nor its purpose applies here; nor did *Smith* purport to lay down a general rule of crabbed reading of the Tucker Act. (If anything, *Smith* suggests the opposite.)

Thus, the proper question for applying the "founded upon" requirement is simply the *genesis* of the fiduciary duty. Given that, as alleged, 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 … non-controlling shareholders" (Appx528–29 (emphasis added)), Private Shareholders' claim is "founded . . . upon" those contracts. The government itself, in related litigation, recognized this:

> 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 action" within the exclusive jurisdiction of the Court of Federal Claims.

Treasury Mot. Dismiss 44, *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). The court below did not ask the government to explain its change, nor did the government otherwise attempt to do so.

Second, it is unclear why the lower court questioned the appropriateness of looking to state law principles to help determine the obligations Treasury assumed when it chose to become a shareholder in the Companies; the logic of such reliance on state law principles is straightforward. State law can of course inform the contours of federal law, and that is particularly appropriate on questions involving "corporation law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97–99 (1991);

see Starr, 856 F.3d at 965–66. The Court of Federal Claims itself both recognized that the Companies were organized under state corporations law (as Congress directed) and drew from that law to help determine whether the Private Shareholders' direct claims were direct or derivative. Appx52, 71.

Yet the court did not try to explain why the question of duties arising from buying corporate stock and acquiring corporate control differs in kind, and it does not. Corporate charters and bylaws, including the corporate law that comes along with them, are contracts among a corporation's shareholders, to which all shareholders are deemed to consent when they invest in the corporation. *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 955 (Del. Ch. 2013); *see Aleynikov v. Goldman Sachs Group, Inc.*, 765 F.3d 350, 366 (3d Cir. 2005) (endorsing *Boilermakers Local 154*). By investing in the Companies through the Treasury SPAs, Treasury "bought into" that law governing corporate shareholders, which imposes fiduciary duties on controllers.

Third, under any reasonable application of corporate law to the circumstances here, since 2008, "Treasury and FHFA [have been] controlling shareholders with fiduciary duties to the remaining public shareholders of Fannie and Freddie." Solomon & Zaring, *After the Deal: Fannie, Freddie, and the Financial Crisis Aftermath*, 95 B.U. L. Rev. 371, 391 (2015); *see also Sisti*, 324 F. Supp. 3d at 283 n.9 (recognizing that Treasury in 2008 became the "dominant shareholder"). This issue is explained above, in connection with statutory standing (Argument I). Here, Private Shareholders add only that Treasury itself has recognized its status as a controlling shareholder in its own tax regulations and other administrative guidance. Indeed, Treasury did so on the very transaction at issue.

In general, for federal-income tax purposes, an "ownership change" occurs when significant shareholders increase their ownership interests in a corporation by at least 50% during the preceding 3-year period. *See* 26 U.S.C. § 382(g)(1). If a corporation experiences an "ownership change," § 382 of the Internal Revenue Code (26 U.S.C.) generally limits the *post*-change income that the corporation may offset with *pre*-change net-operating-loss carryovers—which means § 382 may increase the corporation's tax liability and thereby decrease its profit. As an example, Fannie and Freddie by 2012 had over $50 billion of deferred tax assets—a sum that represented "a significant portion of the losses" they had recorded before the Net Worth Sweep—and the government in deciding to impose that amendment focused on the expected tax savings that the Companies would realize from utilizing these assets. Appx494, 503-06, 511, 518 (discussing these).

Under certain circumstances, Treasury regulations issued under § 382 treat options (including warrants) as having been exercised when issued, "[f]or purposes of determining whether an ownership change occurs." 26 C.F.R. § 1.382-4(d) (titled, "Treatment Of Options As Exercised"); *see also id.* § 1.382-4(d)(9)(i) (defining the term option to include warrants). Significant factors to consider when determining whether to treat an option as exercised include the difference between the exercise price and the value of the underlying stock (that is, whether and to what extent the option is "in the money") and, relatedly, the likelihood that the option will be exercised. *Id.* § 1.382-4(d)(6)(i) & (ii).

The warrants issued to Treasury have a nominal exercise price. Through the initial stock-purchase agreements, Treasury obtained (among other things) warrants for 79.9% of the common stock of Fannie and Freddie, "exercisable at any time and from time to time through September 7, 2028 at a price of $0.00001 per share." Fed. Home Loan Mortgage Corp., Current Rep. (Form 8-K) (Sept. 6, 2008). Upon the announcement of these agreements in September 2008, Freddie's shares closed at $0.88 per share, and Fannie's at $0.73. Thus, the warrants enabled Treasury to purchase a *large supermajority* of the Companies' common shares at more than *99.9% below* the then-market price, and, with their fixed exercise price, the warrants would become even more exceedingly valuable as that price rose.

Indeed, the very day Treasury entered into the agreements with Fannie and Freddie, it publicly conceded that, through the agreements, particularly the warrants, it had taken control of the Companies. It did so by issuing a Notice, effective immediately, exempting the Companies from § 382 and Treasury's own implementing regulations. *See* IRS Notice 2008-76 (Sept. 7, 2008), 2008 WL 4105230. Notice 2008-76 accomplished this by providing that "the term 'testing date' (as defined in § 1.382-2(a)(4)) shall not include any date on or after the date on which the United States . . . acquires, in a Housing Act Acquisition, stock . . . or an option to acquire stock in the corporation." *Id.* § 2. (A "Housing Act Acquisition" is a Treasury purchase, under the authority of HERA, of securities of a Company. *Id.* § 1.) By perpetually suspending any "testing date," Treasury "turned off" § 382 and exempted Fannie and Freddie from the tax consequences of Treasury's substantial investment, which, otherwise, § 382 and its regulations would require to be acknowledged as an ownership change. However, by issuing such extraordinary relief, Treasury thereby conceded what was obvious—that, with the initial Treasury SPAs, it joined the Agency in accomplishing the federal government's complete control of the Companies.

Treating Treasury's warrants as having been exercised is also consistent with longstanding and generally applicable tax principles. It is the economic substance of a transaction, rather than its form, that generally determines its tax consequences. *See, e.g.*, *Comm'r v. Court Holding Co.*, 324 U.S. 331 (1945). Treasury regulations interpreting the Internal Revenue Code apply this general principle to options to acquire stock (such as a warrant), treating the holder as the current owner of the underlying stock when the reality of the transaction warrants, particularly by considering the extent to which the option is "in the money" at issuance. *See, e.g.*, 26 C.F.R. § 1.1504-4(b)(2) & (g); *see also, e.g.*, Rev. Rul. 82-150, 1982-2 C.B. 110.

These authorities make clear that ownership of an option that is overwhelmingly in-the-money is tantamount to current ownership of the underlying equity. The warrants Treasury obtained in Fannie and Freddie should satisfy any definition of "in-the-money" so as to represent current ownership of stock in Fannie and Freddie under general tax principles.[10]

For all of these reasons, the Court of Federal Claims erred in dismissing the Private Shareholders' fiduciary duty claims.

[10] The Court of Federal Claims erred when it held that some Private Shareholders waived part of their argument for a fiduciary duty—that Treasury formed a "control group" with the Agency. Appx72-73. The court misunderstood the procedural record, as those Private Shareholders in their Opposition to the government's motion to dismiss, in the sub-section addressing the fiduciary duty Treasury took on, twice cross-referenced their earlier discussions in their brief of the control group. *See Owl Creek* MTD Opp. 28 (cross-referencing Part I.C of Argument, described as "detailing Treasury's control"); *id.* at 29 (again cross-referencing Part I.C); *id.* at 22–24 (Part I.C of Argument, discussing Delaware law regarding control groups and arguing that "Treasury and the Agency in working together to impose the Net Worth Sweep operated as a control group"). In any event, a new argument is not a new claim, and the lower court addressed the question, so there is no waiver here. *See Lebron*, 513 U.S. at 379.

IV. THE LOWER COURT ERRED IN HOLDING THAT PRIVATE SHAREHOLDERS WERE NOT THIRD-PARTY BENEFICIARIES OF IMPLIED-IN-FACT CONTRACTS BETWEEN THE UNITED STATES AND THE COMPANIES, AND THUS THAT IT LACKED JURISDICTION OVER THEIR CONTRACT CLAIMS.

The Court of Federal Claims erred in holding that the Private Shareholders were not third-party beneficiaries of the implied-in-fact contracts between the United States (via the Agency) and the Companies. It therefore erred when it held that it lacked subject-matter jurisdiction, under the Tucker Act, over Private Shareholders' claim for breach of those implied-in-fact contracts, by which the Companies consented to a traditional conservatorship that would include preserving non-government shares. Because Private Shareholders plead facts sufficient to establish that the implied-in-fact contract was made, that they are third-party beneficiaries of that contract, and that the contract was breached, they properly stated a claim for breach of the implied-in-fact contract. *Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1361 (Fed. Cir. 2016) ("intended third-party beneficiary" may sue for breach of contract). The Court of Federal Claims has subject matter jurisdiction, and, on *de novo* review, *Northrop Grumman*, 709 F.3d at 1111, this Court should reverse.

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*, No. 09-63C, 2010 WL 4689883, at *3 (Fed. Cl. Nov. 9, 2010) (internal quotation marks omitted); *see City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998) (stating elements). 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 quotation marks omitted), *aff'd sub nom. AG Route Seven P'ship v. FDIC*, 104 F. App'x 184 (Fed. Cir. 2004). Here, the lower court did not dispute that the Private Shareholders sufficiently alleged a contract between the United States and the Companies. *See* Appx75; Appx529–32. Private Shareholders thus do not further address that question, while reserving all their rights regarding it.[11]

A third party is the beneficiary of a contract if the contract "reflect[s] the express or implied intention of the parties to benefit the third-party." *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997). The "circumstances" need to "indicate that the promisee intends to give the beneficiary the benefit of the promised performance," as opposed to the beneficiary's benefit simply being "incidental."

[11] In *Fairholme*, the Court of Federal Claims denied the government's motion to dismiss a derivative implied-in-fact contract claim, holding that the government "fail[ed] to establish that plaintiffs inadequately pleaded mutuality of intent to contract." Appx47–49. The implied-in-fact contract allegations in *Fairholme* are essentially the same as in the *Arrowood* and the *Owl Creek* Actions. *Compare* Appx478–84 *with* Appx530-32 (*Owl Creek*) and Appx796–98 (*Arrowood*). Just as the *Fairholme* Complaint was sufficient to allege the implied-in-fact contract, so are the complaints in these related cases.

Restatement (Second) of Contracts § 302(1)(b) & (2) (1981) ("Restatement"). A court "in determining the parties' intention should consider the circumstance surrounding the transaction as well as the actual language of the contract." *Id.* rptr's note. The third party need not be identified in the contract, "but must fall within a class clearly intended to be benefited." *Montana*, 124 F.3d at 1273.

"One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him." *Id.* (citing *Restatement (Second) Contracts* § 302(1)(b) & cmt. d). Such intent also can "be inferred from the actions of" the responsible government officers and from other "circumstances providing" such officers "with appropriate notice that the contract provision at issue was intended to benefit the third party." *Constructora Guzman, S.A. v. United States*, 145 Fed. Cl. 656, 660 (2019).

The reasoning of the court below was, essentially, that the Private Shareholders, because they are shareholders of the Companies, cannot be third-party beneficiaries of a contract between the Companies and the government. *See Owl Creek* MTD Op. 25. That is not the law, nor do the jurisdictional facts and allegations justify that framing.

The law is simply that the *mere* fact of being a shareholder of a company that contracted with the United States does not suffice to make the shareholder a third-party beneficiary of that contract. *E.g., Glass v. United States*, 258 F.3d 1349, 1354

(Fed. Cir. 2001). When a contract makes "no reference to" the shareholders, it is not enough that it was made with an awareness of the shareholders and that they all would benefit indirectly as the company benefitted under it. *FDIC v. United States*, 342 F.3d 1313, 1319 (Fed. Cir. 2003).

But that is not what Private Shareholders have alleged. Rather, the alleged facts do "reflect[ ] an intention to benefit the [Private Shareholders] directly," an intention on which those shareholders could reasonably rely. *Glass*, 258 F.3d at 1354.

First, the way in which the contracting parties intended to benefit the Private Shareholders was not simply that, if the government carried out a traditional conservatorship in accordance with the common law and FIRREA, it would benefit the Companies, which in turn would benefit their shareholders. It was, more precisely, that, as the Companies lived under a conservatorship completely controlled by the government (the Agency), which would involve also introducing the government (Treasury) as a major shareholder, the government would not destroy the rights of the other, *Private Shareholders*. This is not a general benefit arising indirectly from the effect of the conservatorship on the Companies, and it is not even a benefit that would accrue to all shareholders. Correspondingly, the harm that the Net Worth Sweep inflicted on the Private Shareholders in effectively cancelling their shares—one from which the *government* shareholder *directly* *benefitted*—is the precise harm that the Companies contracted against, and it harms the Private Shareholders regardless of the Net Worth Sweep's effect on the Companies. *Cf. supra* Part I (explaining why Private Shareholders' claims are direct).

What the government did here appears to be unique in the history of corporate malfeasance, and nothing in this Court's precedents or otherwise forecloses the Private Shareholders from proceeding on allegations showing the special concern for them when the then-private Companies' boards consented to the conservatorships. As a general rule, "[a] shareholder may sue as an individual on a corporate contract where the shareholder is a person for whose benefit the contract was made." 12B FLETCHER CYCLOPEDIA OF THE LAW OF CORPS. § 5911 (2020); *see id.* § 5921 (similar). Consistent with this, this Court in *Pacific Gas & Electric Co. v. United States* recognized, in discussing its precedent in *H.F. Allen Orchards v. United States*, 749 F.2d 1571 (Ct. Cl. 1984), that members of an association could be third-party beneficiaries of the association's contract if they had some property interest in the subject of the contract (there, water). 838 F.3d at 1362; *see Hunter v. Old Ben Coal Co.* 844 F.2d 428, 433 (7th Cir. 1988) (similar, mining rights); *Restatement* § 302 illus. 14 (employee members of labor union as third-party beneficiaries of collective bargaining agreement between union and employer).

So long as the facts show "a specific, identifiable benefit" to the third parties, they are beneficiaries, even if also shareholders. *Pacific Gas*, 838 F.3d at 1362. For example, in *Silberberg v. Becker*, 191 A.3d 324, 334 (D.C. 2018), the District of Columbia's highest court held that the minority shareholders could be third-party beneficiaries of a contract between the corporation and its majority shareholders. And, although a merger agreement may often simply benefit the acquired corporation as a whole, and thus only indirectly benefit (all of) its shareholders, its terms can cause selling shareholders to be third-party beneficiaries. *E.g.*, *Home & City Sav. Bank v. Rose Associates I, L.P.*, 572 N.Y.S.2d 458 (App. Div. 1991).

Here, as detailed above in the Statement of the Case, the Boards of the Companies, in deciding whether to consent to the conservatorships, directly considered the effect on Private Shareholders; and, correspondingly, the government, in announcing the conservatorships, not only confirmed the conservatorships' general nature but also, more specifically, directly confirmed that non-government stock would remain outstanding, retain all its rights, and not be eliminated. So *both* parties to the contract *expressly* had the third-party Private Shareholders in mind. That shows an intended "specific, identifiable benefit" to those shareholders, independent of how the conservatorship generally affected the Companies and, thus, the shareholders as a whole (including the government).

Second, the facts also show that the Private Shareholders were "reasonable in relying on the [Agency's] promise as manifesting an intention to confer a right on" them, which confirms their status as third-party beneficiaries. *Restatement* § 302 cmt. d. The mere fact of consent was significant, as it meant that the government had *not* purported to find anything in the Companies' circumstances that would have authorized it to *compel* a conservatorship, in which the status of shareholders might be more precarious. (The Agency actually had found the opposite of such circumstances, just a few weeks before. Appx497.) Particularly in that context, the government's public position at the time of the contract, confirmed by its conduct and repeated public statements for the next nearly four years, establishes this reasonableness. *Supra* at 8–9. So also does the Boards' undisputed fiduciary duty to the shareholders in entering into the conservatorship—a duty they had in mind and likely would have breached had they (unnecessarily) consented to a conservatorship that left their shareholders open to evisceration. HERA does not *restrict* the ability of the Agency or Companies to agree on terms for the Companies' consent to a conservatorship; protection of Private Shareholders would be a reasonable area in which to seek protection in a government conservatorship, particularly given a large government investment; and, when entering into the contract, neither the Companies nor the government said anything inconsistent with the Private Shareholders' being third-party beneficiaries.

Indeed, the government appears to concede, in the *Collins* case in the Supreme Court, that the provision of HERA allowing suit within 30 days to challenge the Agency's self-appointment as conservator (§ 4617(a)(5)(A)) would allow a private shareholder to sue (on behalf of the Companies) to challenge an appointment. *See Collins v. Mnuchin*, Br. for the Fed. Parties 30, No. 19-563 (U.S.). Yet, here, none of the myriad shareholders sought to do so within that window, contesting the consent the Boards had given. Given shareholders' status as beneficiaries under the agreement leading to the conservatorship, this made sense. Under that status, established by the allegations here, they could have confidence in the conservatorship to which their Boards had agreed.

"In determining jurisdiction, a court must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011). Here, it is undisputed that both parties to the contract agreed that the stock held by Private Shareholders would remain outstanding, retain all its rights, and not be eliminated. It was thus at least reasonable to infer that the contracting parties intended to confer a specific benefit on the Private Shareholders. The Court of Federal Claims erred in failing to draw that reasonable inference.

CONCLUSION

The Court should reverse the Court of Federal Claims' dismissal of the complaints in the *Owl Creek* Actions, *Cacciapalle*, and *Arrowood*, and its dismissal of the direct claims alleged in *Fairholme*.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 20-2020

Short Case Caption: Arrowood Indemnity Company v. US

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UNITED STATES COURT OF APPEALS
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