No. 17-194C
(Chief Judge S. Braden)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

AMERICAN BANKERS ASSOCIATION; and WASHINGTON FEDERAL, N.A., Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS AND MOTION FOR PARTIAL SUMMARY JUDGMENT

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Pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court dismiss the February 9, 2017 complaint filed by plaintiffs American Bankers Association (ABA) and Washington Federal, N.A. (Washington Federal) (collectively, plaintiffs) for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. In the alternative, the United States respectfully requests, pursuant to RCFC 56, that the Court grant it partial summary judgment on Counts I and II of the complaint because the undisputed facts establish that there was no contract between either Washington Federal or the ABA, and the United States.

INTRODUCTION

In 2015, Congress amended section 7 of the Federal Reserve Act to change the statutory dividend rate for Federal Reserve Bank capital stock held by member banks with assets over $10 billion. Under the guise of an action for damages, plaintiffs now seek to invalidate that amendment for all banks who became part of the Federal Reserve System prior to 2015. First,

plaintiffs allege that the United States breached a contract with them – a contract that in their view, entitles them to a six percent annual dividend rate forever. Plaintiffs also allege that the United States effected a taking of the right to a perpetual six percent annual dividend rate. But there was not, nor could there have been, a contract entitling plaintiffs to a perpetual six percent annual dividend rate.

Statutes and regulations completely control the critical right at issue in this case: the right to Federal Reserve Bank stock dividends. By alleging the existence of a contract, plaintiffs seek to set in stone the Federal Reserve Act's original, six-percent dividend rate. But, the alleged contract is a fiction. The conduct alleged to have created a dividend contract reflects nothing more than the parties' statutory and regulatory obligations. As a result, the hallmarks of a contractual undertaking are entirely missing here: (1) there is no indication the Government intended to contract; (2) there are almost no terms set forth in the purported offer and acceptance; (3) there were no negotiations between the parties and therefore no bargained-for exchange or consideration; and, (4) there is no allegation that the Federal Reserve Bank of San Francisco or its representative had authority to bind the United States by contract.

Understandably, then, plaintiffs cannot establish any of the elements required for the existence of a valid contract requiring the United States to pay six-percent dividends to Federal Reserve members.

Likewise, plaintiffs' complaint fails to allege facts demonstrating that Congress, when it amended the statutory dividend rate, effected an uncompensated taking under the Fifth Amendment. Washington Federal's entitlement to six-percent dividends is not a compensable property interest regardless of whether the claim is analyzed as a statutory entitlement or a contractual term. But, even if there were a cognizable property interest, the Government's

actions did not effect a taking of that interest because Washington Federal (1) could not have a reasonable investment-backed expectation in a six-percent dividend, (2) did not suffer a sufficiently adverse economic impact, and (3) cannot establish a categorical taking of its property. Plaintiffs' takings claim must, therefore, fail.

Ultimately, plaintiffs' real disagreement here is with the judgment of Congress in amending the Federal Reserve Act's dividend provision. But this Court is not the appropriate venue for that disagreement. The Court must not, therefore, validate plaintiffs' disagreement by finding a breach of contract where no contract exists, or an uncompensated taking where no valid property interest exists. Plaintiffs' disagreement must be directed to Congress – the only body authorized to revise the Federal Reserve Act.

QUESTIONS PRESENTED

1. Whether the ABA lacks standing to assert the claims in the complaint where the trade association does not allege that it is in privity of contract with the United States and does not meet the test for associational standing.

2. Whether the Court lacks jurisdiction under the Tucker Act where plaintiffs do not have an express or implied contract with the United States.

3. Whether plaintiffs have stated a claim upon which relief may be granted for breach of contract and breach of the duty of good faith and fair dealing where plaintiffs do not have a contract with the United States.

4. Whether, in the alternative, the United States is entitled to summary judgment on plaintiffs' claims for breach of contract and breach of the duty of good faith and fair dealing because there are no genuine issues of material fact in dispute and the United States is entitled to judgment as a matter of law.

5. Whether plaintiffs have stated a claim upon which relief may be granted for an uncompensated taking under the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

I. Nature Of The Case

This is an action pursuant to the Tucker Act, 28 U.S.C. § 1491, for money damages. The plaintiffs contend: (1) the Federal Reserve Bank of San Francisco and Washington Federal entered into an express or implied-in-fact contract; (2) the United States breached this contract in 2016 when it provided dividends below six percent; (3) the United States breached the duty of good faith and fair dealing when Congress amended the statutory dividend rate for Federal Reserve Bank stock; and (4) the United States engaged in an uncompensated taking when it amended the statutory dividend rate for Federal Reserve Bank stock in 2015.

II. Statement Of Facts

A. The Federal Reserve System

Congress established the Federal Reserve System in 1913 in the Federal Reserve Act (the Act) "to oversee federal monetary policy through its influence over the availability of credit." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 26 (2007) (citing the Federal Reserve Act §§ 2, 9, 38 Stat. 252, 259). "A principal function of the Federal Reserve System has been to determine and implement monetary policy 'so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.'" *Texas State Bank v. United States*, 423 F.3d 1370, 1372 (Fed. Cir. 2005) (quoting 12 U.S.C. § 225a). The Act "required national banks and permitted state banks to become Federal Reserve member banks[.]"[1] *Watters*, 550 U.S. at 26.

[1] "National banks" are organized under and governed by The National Bank Act, 12 U.S.C. §§ 21-261d, and are identifiable by the word "national" in their name.

The Federal Reserve System is composed of (1) a seven-member Board of Governors (Board), (2) regional Federal Reserve Banks (Reserve Banks), (3) the Federal Open Market Committee (FOMC), (4) the Federal Advisory Council, and (5) privately-owned commercial banks that are members of the Federal Reserve System. *Reuss v. Balles*, 584 F.2d 461, 462 (D.C. Cir. 1978). In section 11 of the Act, Congress enumerated powers of the Board. *See* 12 U.S.C. § 248. Congress also established twelve, regional Reserve Banks as independent corporate entities with certain enumerated powers. *See* 12 U.S.C. § 341.

Section 31 of the Federal Reserve Act "expressly reserved . . . [Congress's] right to amend, alter, or repeal this Act[.]" Federal Reserve Act § 30, 38 Stat. 271, 275 (redesignated without change as section 31 by Pub. L. No. 95-630, 92 Stat. 3641). Congress has amended the Act nearly 200 times since 1913. *See, e.g.*, Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 (1993) (amending section 7); Consolidated Appropriations Act FY 2000, Pub. L. No. 106-113, 113 Stat. 1501 (1999) (same).

B. National Banks Must Join The Federal Reserve System

Section 2 of the Act requires banks with national charters (national banks) to "become member[s] . . . of the Federal Reserve System by subscribing and paying for stock in the Federal Reserve bank of [their] district" in "a sum equal to six per centum of the [bank's] paid-up capital stock and surplus[.]"[2] 12 U.S.C. §§ 222, 282. Banks joining the Federal Reserve System pay $100 per share for Reserve Bank stock and are not permitted to transfer that stock. 12 U.S.C. § 287. A national bank may withdraw from the Federal Reserve System by converting to a state

[2] A state-chartered bank may, but need not, "become a member of the Federal Reserve System [by] mak[ing] application to the Board of Governors of the Federal Reserve System, under such rules and regulations as it may prescribe, for the right to subscribe to stock of the Federal Reserve bank organized within the district in which the applying bank is located." 12 U.S.C. § 321.

bank and exercising the right of withdrawal set forth in 12 U.S.C. § 328. *See also* 12 C.F.R. §§ 208.3(f) (voluntary withdrawal from membership), 209.3 (cancellation of Reserve Bank stock). Banks that withdraw from the Federal Reserve System receive a refund of their cash-paid Reserve Bank stock subscription plus interest earned, if any. 12 U.S.C. § 328.

The Board, in turn, promulgated regulations to implement the Act. *See* 12 U.S.C. § 248(i); 12 C.F.R. Part 209. Regulation I governs the issuance and cancellation of Reserve Bank capital stock. *See* 12 C.F.R. § 209.1. In pertinent part, 12 C.F.R. § 209.2(a) *requires* national banks joining the Federal Reserve System to "file with the Federal Reserve Bank [] in whose district it is located an application for stock [] in the Reserve Bank." Upon receipt of an application for issuance of Reserve Bank stock, section 209.2(b) *requires* "Reserve Bank[s] [to] issue the appropriate number of shares by crediting the bank with the appropriate number of shares on its books[.]"

The Board's Rules of Procedure set forth in detail the process by which banks joining the Federal Reserve System subscribe to Reserve Bank stock. *See* 12 C.F.R. Part 262. Specifically, applications for the issuance of Reserve Bank stock "*shall* be submitted in accordance with the pertinent form, if any, prescribed by the Board." 12 C.F.R. § 262.3(a) (emphasis added); *see also* 12 C.F.R. § 262.6 (Forms).

The form on which an institution converting into a national bank submits its application for Reserve Bank stock, FR 2030a, *requires* the institution to provide the following information: (a) the date, (b) the name and address of the bank, (c) the amount of the bank's paid-up capital and surplus (and a calculation of six percent of the total of paid-up capital and surplus), (d) the Reserve Bank to which the application is being sent, and (e) the signatures of the bank President or Vice President, as well as the Cashier, Secretary, or Treasurer of the bank. *See id.* The

regulations further *require* applying banks to send their applications "to the Federal Reserve Bank of the district in which the head office of the parent banking organization is located[.]"[3] 12 C.F.R. § 262.3(c).

C. Reserve Banks' Structure, Operation, And Enumerated Powers

Each of the 12 Reserve Banks has a nine-member board of directors, of which six are elected by the member banks and three are appointed by the Board. 12 U.S.C. §§ 302, 304. And, although the Board exercises "general supervision" over the Reserve Banks, 12 U.S.C. § 248(j), each Reserve Bank's board of directors exercises direct supervision and control. 12 U.S.C. § 301. "The directors enact by-laws regulating the manner of conducting general Bank business, and appoint officers to implement and supervise daily Bank activities." *Lewis v. United States*, 680 F.2d 1239, 1241 (9th Cir. 1982) (citing 12 U.S.C. §§ 341-361). Moreover, "[e]ach Bank is statutorily empowered to conduct these activities without day to day direction from the federal government." *Id.*

Section 4 of the Act directs that each Reserve Bank "shall become a body corporate and as such . . . shall have power," among other things, "[t]o make contracts." 12 U.S.C. § 341; *see* Compl. ¶ 36. Thus, as part of conducting general bank business, Reserve Banks contract as private entities on their own behalf, and are not subject to general Government contracting laws. Aside from the power to contract, section 341 authorizes each Reserve Bank "[t]o exercise by its board of directors, or duly authorized officers or agents, all powers specifically granted by the

[3] Although not available to national banks such as Washington Federal, the regulations provide for expedited consideration of Reserve Bank stock applications from state banks. Thus, under certain circumstances, completed Reserve Bank stock applications from eligible state banks "filed with the appropriate Reserve Bank will be deemed approved on the fifteenth day after receipt of the complete application by the Board or appropriate Reserve Bank[.]" 12 C.F.R. § 208.3(c)(2).

provisions of this chapter and such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by this chapter." *Id*.

D. Reserve Bank Payments, Dividends, And Surplus Funds

Section 4 of the Act authorizes the Board to levy assessments upon the Reserve Banks "sufficient to pay its estimated expenses and salaries of its members and employees." 12 U.S.C. § 243. After the payment of any Board assessments and other "necessary expenses," section 7 directs Reserve Banks to pay their stockholders an annual dividend on their paid-up capital stock. 12 U.S.C. § 289(a); *see* 12 C.F.R. § 209.4(e). Prior to 2016, section 7 directed Reserve Banks to pay all stockholders a six-percent dividend. 12 U.S.C. § 289(a) (1999). Also prior to 2016, section 7 generally permitted Reserve Banks to retain their net earnings in a surplus account, although the Board required Reserve Banks to remit a portion of surplus funds to the United States Treasury. *See, e.g.*, Federal Reserve Board Annual Report 2011, at 144 (such remittances to Treasury totaled over $75 million in 2011).[4] At all times, however, Congress expressly reserved its "right to amend, alter, or repeal [the Act]." Federal Reserve Act § 30, 38 Stat. 271, 275 (redesignated without change as section 31 by Pub. L. No. 95-630, 92 Stat. 3641).

E. The Fixing America's Surface Transportation Act Of 2015

On December 4, 2015, following bipartisan passage in the House and Senate, President Obama signed into law the Fixing America's Surface Transportation Act (FAST Act), Pub. L. No. 114-94, 129 Stat. 1312, "to fund surface transportation infrastructure planning and investment." Compl. ¶ 39. Among the means employed in the FAST Act for offsetting its cost, as required by the Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, 124 Stat. 8,

[4] *Available at* <https://www.federalreserve.gov/publications/annual-report/files/2011-annual-report.pdf> (last visited April 6, 2017).

sections 32202 and 32203 of the FAST Act amended section 7(a) of the Act (12 U.S.C. § 289(a)), changing the statutory dividend rate paid to Reserve Bank stockholders with assets of more than $10 billion and requiring the Reserve Banks to remit most of their surplus funds to Treasury for deposit in the general fund.[5] Under the amended statute, the largest banks receive "the smaller of" (1) a rate equal to 10-year Treasury notes sold at the most recent auction, and (2) six percent. FAST Act, § 32203(a)(1); Compl. ¶¶ 43-45. For banks with assets of $10 billion or less, the statutory dividend rate remained six percent. FAST Act, § 32203(a)(1); Compl. ¶ 44.

Of the "changes in revenue" proposed in the FAST Act, as scored by the Congressional Budget Office, the change in the "Federal Reserve Dividends" for large member banks was projected to yield $6.9 billion for the Fiscal Years 2016 to 2020; transferring Reserve Bank surplus funds over $10 billion to the general fund of the Treasury was projected to yield $53 billion over that same time.[6] Compl. ¶ 46.

Following enactment of the FAST Act, the Board published first an interim final rule and then a final rule in the Federal Register amending Regulation I to implement the changes to the Act's dividend provision. Compl. ¶ 50; 81 Fed. Reg. 9,082 (Feb. 24, 2016); 81 Fed. Reg. 84,415 (Nov. 23, 2016). As a result, Regulation I, 12 C.F.R. § 209.4(e), now mirrors the dividend provision of 12 U.S.C. § 289(a) (2016).

[5] The FAST Act is not the first time Congress has amended the surplus fund provisions in section 7 of the Act. *See, e.g.*, Pub. L. No. 106-113, § 302, 113 Stat. 1501 (1999); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

[6] *See* December 2, 2015 letter from Keith Hall, Director, Congressional Budget Office, to Hon. Bill Shuster, Chairman, Committee on Transportation and Infrastructure, U.S. House of Representatives, regarding cost estimate for H.R. 22, the FAST Act, *available at* <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr22_1.pdf> (last visited April 6, 2017).

F. Washington Federal's Membership In The Federal Reserve System

In June 2013, in connection with its change of charter to a national bank, Washington Federal submitted a form application for 479,609 shares of Federal Reserve Bank of San Francisco (FRB) stock. Compl. ¶ 27; Compl. Ex. A. Washington Federal's form FR 2030a stated that the bank's Board of Directors "desires to subscribe to the capital stock of the Federal Reserve Bank of the district in which the bank is located in accordance with the provisions of the act of Congress approved December 23, 1913, as amended, and known as the Federal Reserve Act[.]" Compl. Ex. A.

In July 2013, the FRB's Director of District Accounting, Richard Cabral, sent a letter to Washington Federal. Compl. Ex. B. Mr. Cabral's letter began: "We have processed your application to purchase 479,610 shares of Federal Reserve Bank Stock. This letter is to advise you of the charge of $24,048,444.75 processed on July 17, 2013, for payment amounting to 50% of the par value of the shares of Federal Reserve Bank Stock, plus accrued dividends from July 01, 2013 to July 17, 2013." Then, because Washington Federal was "a new member of the Federal Reserve System," Mr. Cabral highlighted "some important requirements concerning" Washington Federal's capital stock holdings:

> Each member bank is required to subscribe to Federal Reserve Stock in an amount equivalent to 6 percent of its capital and surplus. Although the par value of the stock is $100 per share, banks pay only $50 per share at the time of purchase, with the understanding that the other half of the subscription amount is subject to call at any time. Additionally, dividends will be paid semi-annually on the last business day of June and December. Dividends are paid at the statutory rate of 6 percent per annum, or $1.50 per share semi-annually. Dividend payments are documented by an advice that will be mailed to you.

Id. Finally, Mr. Cabral noted that Washington Federal would have to adjust its Reserve Bank stock holdings if changes occurred in Washington Federal's capital and surplus. *Id.*

After joining the Federal Reserve in 2013, Washington Federal received dividends from the FRB calculated at the dividend rates set forth in 12 U.S.C. § 289(a) and 12 C.F.R. § 209.4(e). Compl. ¶¶ 37, 53, 55. The FRB paid Washington Federal six-percent dividends between 2013 and 2015. Compl. ¶ 37. Following the FAST Act's revision of 12 U.S.C. § 289(a) and the Board's revision of 12 C.F.R. § 209.4(e), the FRB paid Washington Federal's 2016 dividends based on the 10-year Treasury note rate. In June 2016, the rate was 1.702 percent, and, in December 2016, it was 2.485 percent. Compl. ¶¶ 52, 55; Compl. Ex. D, E. In 2016, the FRB paid Washington Federal a total of $502,471.53 in dividends. Compl. ¶ 57.

Plaintiffs filed suit on February 9, 2017, alleging breach of contract (Count I), breach of the duty of good faith and fair dealing (Count II), and an uncompensated taking under the Fifth Amendment to the Constitution (Count III). ECF No. 1.

On March 7, 2017, the Court entered a scheduling order reflecting the Court's decision to adjudicate the question of liability on Washington Federal's contract claims (Counts I and II) first, and to defer consideration of plaintiffs' class allegations and Fifth Amendment takings claim (Count III). ECF No. 14.

SUMMARY OF THE ARGUMENT

Plaintiffs have not established the Court's jurisdiction over this case. As an initial matter, the ABA does not have standing to assert the claims in the complaint and must be dismissed. Moreover, because the parties to the alleged contract acted solely pursuant to clearly defined statutory and regulatory mandates, there are no facts alleged capable of demonstrating the existence of a valid contract. As a consequence, even taking plaintiffs' allegations as true, the Court cannot exercise jurisdiction over plaintiffs' contract claims.

Alternatively, the Court should dismiss plaintiffs' contract claims or grant the Government summary judgment because there is no contract between the United States and Washington Federal for the payment of six-percent dividends on Reserve Bank stock. The hallmarks of contract formation are entirely absent where parties act in accordance with statutory and regulatory mandates, and there is zero evidence suggesting the existence of a promissory undertaking. Indeed, plaintiffs did not allege that the FRB representative who signed the purported acceptance was authorized to bind the FRB by contract, let alone the United States. Thus, plaintiffs have not and cannot establish any of the elements necessary to demonstrate the formation of a contract binding the Government.

Dismissal or judgment on plaintiffs' contract claims similarly requires dismissal or judgment on the related good faith and fair dealing claims, which arise only when there is a valid contract.

Finally, neither a contractual nor statutory entitlement to six-percent dividends can constitute a property right subject to a compensable taking under the Fifth Amendment. Given this starting point, the Court should dismiss plaintiffs' takings claims. Even if the Court finds that there is a cognizable property interest sufficiently alleged, however, the Government's actions as alleged in the complaint did not effect a taking of that right. Indeed, the value of Washington Federal's Reserve Bank stock remains unchanged, and its receipt of dividends in 2016, albeit at a rate under six percent, demonstrates that the bank did not suffer a loss that is compensable under the Fifth Amendment.

ARGUMENT

I. Standards Of Review

A. Standard For A Motion To Dismiss For Lack Of Subject Matter Jurisdiction

The Court of Federal Claims is a court of specific jurisdiction. *See Rick's Mushroom Serv. v. United States*, 521 F.3d 1338, 1343 (Fed. Cir. 2008). Although this Court possesses authority to grant relief against the United States, that authority is capped by the extent to which the United States has waived its sovereign immunity. *See United States v. Testan*, 424 U.S. 392, 399 (1967).

In addressing RCFC 12(b)(1) motions, a "[d]etermination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997) (citations omitted). If this Court's subject matter jurisdiction is challenged, the non-moving party must establish that this Court has jurisdiction over the dispute. *See Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998). In such circumstances, this Court may consider evidentiary matters outside the pleadings. *Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985). Where the moving party "can show that the pleader's allegations are insufficient on their face, as for instance when they fail to properly allege the existence of a contract or privity of contract," a RCFC 12(b)(1) motion "should be granted . . . ." *Total Medical Management, Inc. v. United States*, 29 Fed. Cl. 296, 299 (1993).

B. Standard For A Motion To Dismiss For Failure To State A Claim

A court should grant a motion to dismiss for failure to state a claim upon which relief may be granted when the claimant's asserted facts do not, under the law, entitle him to a remedy.

See Perez v. United States, 156 F.3d 1366, 1370 (Fed. Cir. 1998). For purposes of the motion, the Court assumes that all well-pled factual allegations are true and makes reasonable inferences in favor of the non-movant. *See id.* Although a claimant need not recite detailed factual allegations in his complaint, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions[.]" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). The complaint must allege "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" to support the claims. *See id.* at 556.

C. Standard For A Motion For Summary Judgment

The Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to summary judgment as a matter of law." RCFC 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

II. The ABA Lacks Standing

Standing is a threshold jurisdictional issue. *Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1369-70 (Fed. Cir. 2002) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998)). "[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "This inquiry focuses not on the merits of the issue raised, but on the 'qualifications and status of the party seeking to bring [its] complaint before a federal court.'" *Emerald Int'l Corp. v. United States*, 54 Fed. Cl. 674, 677 (2002) (quoting *McKinney v. United States*, 799 F.2d 1544, 1549 (Fed. Cir. 1986)).

Although an Article I court, this Court applies the same constitutional standing requirements enforced by Article III courts. *Glass v. United States*, 258 F.3d 1349, 1355-56

(Fed. Cir. 2001). To satisfy standing requirements, each plaintiff must establish that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "This triad of injury in fact, causation, and redressability . . . comprises the core of Article III's case-or-controversy requirements, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Emerald Int'l*, 54 Fed. Cl. at 677 (quoting *Steel Co.*, 523 U.S. at 102).

Plaintiffs assert that the "ABA has standing to bring this action on behalf of members that received lower dividend payments after enactment of the FAST Act." Compl. ¶ 11. This misses the mark entirely because plaintiffs do not allege that the ABA is in privity of contract with the United States. "To have standing to sue the sovereign on a contract claim, a plaintiff must be in privity of contract with the United States." *Anderson v. United States*, 344 F.3d 1343, 1351 (Fed. Cir. 2003); *S. Cal. Fed. Sav. & Loan Ass'n v. United States*, 422 F.3d 1319, 1328 (Fed. Cir. 2005). The requirement of privity "takes on even greater significance in contract cases because 'the government consents to be sued only by those with whom it has privity of contract.'" *S. Cal. Fed. Sav. & Loan Ass'n*, 422 F.3d at 1328 (quoting *Erickson Air Crane Co. of Wash. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984)).

Without privity between the ABA and the Government, there can be no contract claim (Count I), nor any claim for the subordinate breach of the implied duty of good faith and fair dealing (Count II), which of course presumes a contract. Similarly, the ABA lacks standing to

assert a Fifth Amendment takings claim (Count III) because the complaint does not allege that the ABA had any property interest in a contractual or statutory entitlement to six-percent dividends on Reserve Bank stock, or any reasonable investment-backed expectations in receiving such dividends. *See* Compl. ¶¶ 86-87.

Perhaps recognizing that it does not, and cannot possibly, demonstrate direct standing for any of its claims, the ABA relies on the concept of associational standing, which has permitted associations in other courts to seek injunctive relief on behalf of their members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *United Food And Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553 (1996) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). Yet, the Supreme Court has recognized that the participation of individual members is "required in an action for damages to an association's members, thus suggesting that an association's action for damages running solely to its members would be barred for want of the association's standing to sue." *United Food*, 517 U.S. at 546. Indeed, courts routinely reject associational standing when the claims asserted or relief sought require individualized proof from the association's members. *See, e.g., Cmty. Fin. Servs. Ass'n of America, Ltd. v. FDIC*, No. 14-953, 2016 WL 7376847, *3 (D.D.C. Dec. 19, 2016); *Friends for Am. Free Enterprise Ass'n v. Wal-Mart Stores, Inc.*, 284 F.3d 575, 577 (5th Cir. 2002). This Court has already rejected an association's reliance upon associational standing because "the damages claims of [the association's members] require individualized proof." *Public Housing Auth. Directors Ass'n v. United States*, 130 Fed. Cl. 522, 530 (2017).

Associational standing is likewise inappropriate in this case, where the member banks' contract claims require individualized, fact-based inquiries into (i) the existence of a contract with the United States to pay six-percent dividends, (ii) the purported breach of any such contract, and (iii) the banks' damages. Likewise, regulatory takings claims require individualized proof of the factors described in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-124 (1978). *See Rent Stabilization Ass'n of City of New York v. Dinkins*, 5 F.3d 591, 596 (2d Cir. 1993) (rejecting associational standing to assert a takings claim).

Moreover, although the ABA purports to bring suit "on behalf of [its] members," the complaint also alleges that Washington Federal, as the representative of a putative class, "brings this action on behalf" of the same banks. Compl. ¶¶ 11, 60. Because Washington Federal brought suit under RCFC 23 on behalf of the ABA's member banks, and alleges that it "will fairly and adequately protect the interests of" those banks, there is no provision in RCFC 23, and no need, for the ABA to also seek to represent those banks in this case. Compl. ¶ 65. Indeed, permitting the ABA to represent its member banks in this case while Washington Federal seeks certification of a class encompassing the same banks would subvert the very purpose of RCFC 23. In particular, permitting the ABA to represent non-party banks in this case would eviscerate RCFC 23's opt-in provision. Thus, the rules of this Court simply do not permit plaintiffs two bites at the apple when it comes to representing the interests of non-parties in suits for damages. To the extent there is to be a representative plaintiff, RCFC 23 controls, and the ABA must be dismissed.

III. The Court Should Dismiss Plaintiffs' Contract Claims For Lack Of Jurisdiction Or Failure To State A Claim, Or Grant Summary Judgment To The Government

The Court should dismiss plaintiffs' contract claims because plaintiffs have not pled – and if pled, cannot prove – that they have a contractual guarantee to receive six-percent dividends forever.

A. The United States Has No Contractual Obligation To Pay Six-Percent Dividends On Reserve Bank Stock

There is no contract between the United States and Washington Federal for the payment of a six-percent dividend on Reserve Bank stock. The Act establishes a statutory program, not a contractual undertaking. Banks do not "agree" with the Reserve Banks to purchase stock in exchange for a promise to pay six-percent dividends on that stock. Rather, the Act *requires* national banks to join the Federal Reserve System and, in connection therewith, to subscribe to Reserve Bank stock; with that stock, member banks only acquire the rights provided by law. There is, consequently, no contract. It makes sense then, that none of the traditional hallmarks of a contract exists here.[7]

1. There Is No Express Contract Between Washington Federal And The United States

To establish a valid express contract with the Government, a plaintiff must allege and prove (1) mutuality of intent to contract, (2) lack of ambiguity in offer and acceptance, (3) consideration, and (4) authority on the part of the Government agent entering the contract. *Seuss v. United States*, 535 F.3d 1348, 1359 (Fed. Cir. 2008). Because plaintiffs cannot establish any of these elements, there is no express contract between the United States, acting through the

[7] Dismissal under either RCFC 12(b)(1) or 12(b)(6) is appropriate because plaintiffs have not alleged facts sufficient to establish the existence of a valid contract.

FRB, on the one hand, and Washington Federal on the other; thus, the Court should dismiss Count I or grant the Government partial summary judgment.

i. Nothing In The Act, Its Implementing Regulations, Or The Documents Attached To The Complaint Indicates An Intent By The Government To Contract

There is no intent to contract regarding a six-percent term among any of the alleged parties. It is axiomatic that "there must . . . be a clear indication of intent to contract" to conclude that "a contract was formed." *D & N Bank v. United States*, 331 F.3d 1374, 1378 (Fed. Cir. 2003). Plaintiffs allege that an express contract was formed when Washington Federal submitted an FR 2030a application for capital stock and the FRB processed the application. Compl. ¶ 33. But these allegations do not describe the intent required for a contract.

There is no indication in the Act or the Board's regulations that the United States intended to bind itself by contract to Federal Reserve member banks for the payment of Reserve Bank stock dividends. The Supreme Court has, "for many decades[,] . . . maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Nat'l R.R. Passenger Corp. v. Atchison, Topeka, And Santa Fe Railway Co.*, 470 U.S. 451, 465-66 (1985) (quoting *Dodge v. Bd. of Educ.*, 302 U.S. 74, 79 (1937)). This "well-established presumption is grounded in the elementary proposition that the principal function of the legislature is not to make contracts, but to make laws that establish the policy of the state." *Id.* at 466. Thus, "the party asserting the creation of a contract must overcome this well-founded presumption[,]" and "absent 'an adequate expression of actual intent' of the State to bind itself . . . this Court simply will not

lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party." *Id.* at 466-67 (citation omitted).

Nothing in the Act "create[s] or speak[s] of a contract" between the United States, acting through the Reserve Banks, and member banks. *Nat'l R.R. Passenger Corp.*, 470 U.S. at 467 (courts first look to the language of the relevant statutes and regulations to determine whether they indicate the Government's intent to contract); *compare* 12 U.S.C. § 289(a) (". . . stockholders of the bank shall be entitled to receive an annual dividend . . .") *with* Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10222(a)(1) ("In the performance of his functions under this chapter, the Secretary is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste . . . .").

Instead, the applicable provisions of the Act contain mandatory statutory provisions, which courts have held do not indicate intent to contract. First, 12 U.S.C. § 222 *requires* national banks to join the Federal Reserve System, section 282 *requires* national banks to subscribe to Reserve Bank capital stock, and 12 C.F.R. § 209.2(a) *requires* national banks to file applications for issuance of Reserve Bank stock. Reserve Banks, in turn, are *required* to issue stock to national banks (12 C.F.R. § 209.2(b)), and the Act and its implementing regulations *require*, in mandatory, non-promissory terms, Reserve Banks to pay dividends to their stockholders based on the Act's dividend rate. 12 U.S.C. § 289(a); 12 C.F.R. § 209.4(e). Such statutory and regulatory mandates do not indicate an intent to contract, rather just the opposite. *See ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 28 (2011) (dismissing plaintiffs' implied-in-fact contract claim because the statute failed to indicate an unambiguous offer or intent to contract, even though the government may have had a statutory obligation to make an award to the plaintiffs) (citing *Hanlin v. United States*, 316 F.3d 1325, 1331 (Fed. Cir. 2003)).

Thus, unlike statutes or regulations that clearly and adequately express the Government's intent to contract, the Act and its implementing regulations contain only mandatory stock, dividend, and membership provisions.

The absence of language authorizing Reserve Banks to enter into contracts with member banks concerning Federal Reserve membership, stock, and dividends is even more apparent when contrasted with Board regulations that expressly authorize Reserve Banks to enter into enforcement or regulatory agreements under delegated authority in specific circumstances – none of which apply here. Section 265.11(a)(15)(i), for example, authorizes Reserve Bank supervisory staff to "enter into a written agreement with a bank holding company or any nonbanking subsidiary thereof . . . concerning the prevention or correction of an unsafe or unsound practice in conducting the business of the" entity, "[w]ith the prior approval of both the Board's Director of the Division of Banking Supervision and Regulation and the Board's General Counsel[.]"[8] *See also* 12 C.F.R. § 265.11(d)(5).

Consequently, there is nothing in the Act or its implementing regulations to indicate the Government's intent to bind itself by contract regarding bank membership or stock dividends. Certainly the Act does not suggest an intent to contract to pay six-percent dividends on Reserve Bank stock in perpetuity, regardless of statutory changes. And, although Congress authorized Reserve Banks to make contracts, nothing in the Act indicates Congress believed the Reserve Banks would enter into contracts simply by processing applications for Reserve Bank stock. Indeed, the presumption against legislative contracts is particularly appropriate here, where the

[8] *See, e.g.*, Written Agreement by and between Liberty Bank and Federal Reserve Bank of San Francisco, Docket No. 16-019-WA/RB-SM, *available at* <https://www.federalreserve.gov/newsevents/pressreleases/files/enf20160811a2.pdf> (last visited April 6, 2017).

plaintiffs allege that the Government contracted through a Federal instrumentality, which is not an agency of the United States. Thus, the Court should reject plaintiffs' contract claims, heeding the Supreme Court's admonition to "not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party." *Nat'l R.R. Passenger Corp.*, 470 U.S. at 467. Doing otherwise here would only encourage participants in legislative programs, such as the Federal Reserve System, to sue for breach of contract as a means of ossifying statutory provisions.

Nevertheless, plaintiffs allege that the FRB's approval of Washington Federal's application for Reserve Bank stock demonstrates the Government's intent to contract. Compl. ¶ 31. But, plaintiffs cannot establish the existence of a contract and the Government's intent merely by labeling regulatory application documents as "offer" and "acceptance." This is evident from *Pennsylvania Department of Public Welfare v. United States*, 48 Fed. Cl. 785 (2001). There, a state agency applied for Federal financial participation in a juvenile-justice program by submitting a "State Plan," as required by the Social Security Act. *Id.* at 786. An employee at the Department of Health and Human Services (HHS) approved and signed the application, and sent notification of HHS's approval to the state agency. *Id.* After HHS later terminated the availability of the Federal funding and denied payment of the state agency's invoices, the state agency sued, alleging a breach of contract. *Id.* at 786-87. Notwithstanding the existence of an alleged offer and acceptance – the state agency's application and HHS's approval notification – the Court dismissed the contract claim on defendant's RCFC 12(b)(6) motion because the Social Security Act and HHS's regulations did not express an intent on behalf of the Government to be bound by contract. *Id.* at 791; *see also Nelson v. United States*, 16 Cl. Ct. 510, 514-15 (1989) (rejecting the existence of a contract based on an application to and acceptance by

the Government where the governing statute did not contemplate the creation of a contractual obligation). The same is true here.

Moreover, the purported "acceptance" – the FRB's July 2013 letter and "Advice of Holdings" to Washington Federal (Compl. Ex. B and C) – merely reflect the FRB's "performance of its regulatory or sovereign functions." As the Federal Circuit made clear in *D & N Bank*, such actions "do[] not create contractual obligations." *D & N Bank*, 331 F.3d at 1378-79 (citing *New Era Constr. v. United States*, 890 F.2d 1152, 1155 (Fed. Cir. 1989)); *see Anderson v. United States*, 344 F.3d 1343, 1357 (Fed. Cir. 2003) (holding that "regulatory proclamations are insufficient to create contractual obligations").

Washington Federal's contract claim is in fact foreclosed by *D & N Bank*. There, the plaintiff alleged that the Federal Home Loan Bank Board's merger approval represented the Government's contractual promise to permit the use of certain accounting treatment for supervisory goodwill. *D & N Bank*, 331 F.3d at 1378-79. The Federal Circuit rejected the proposition that, standing alone, the actions of an agency performing a regulatory or sovereign function "amounts to an intent to contract." *Id.* Instead, the Federal Circuit held that "performing regulatory duties or setting up a regulatory program is consistent with the regulatory function of an agency and says nothing about the role of the agency as an independent contracting body without further evidence." *Id.* at 1380.

Likewise, no contract was formed here because the FRB was, even according to plaintiffs' allegations, only performing its regulatory or sovereign functions when it approved Washington Federal's stock application and paid dividends on Washington Federal's capital stock – *i.e.*, the purported "acceptance." Compl. ¶ 31. Much like the Bank Board's merger approval in *D & N Bank*, the FRB was required by law to approve Washington Federal's stock

application and pay annual dividends. Nothing in the Act or regulations governing membership in the Federal Reserve System contemplated the Reserve Banks would enter into contracts when approving applications for Reserve Bank stock subscriptions, or provided them any negotiating room that would permit them to make separate deals with individual member banks. Rather, the terms of Federal Reserve membership, and the incidents of ownership of Reserve Bank stock, are determined by the Act. Thus, actions on applications for Reserve Bank stock do not reflect a promissory undertaking. As a result, like the plaintiff in *D & N Bank*, plaintiffs are left alleging that Washington Federal "simply submitted an application for approval of [stock issuance], and the [FRB] accepted it." *D & N Bank*, 331 F.3d at 1379. Under Federal Circuit precedent, this is not enough to establish the Government's intent to contract.

Plaintiffs will likely rely on the *Winstar* line of cases to argue that the Government's intent to contract is sufficiently alleged. As the Federal Circuit made clear in *D & N Bank*, however, the court looked for "something more" than documentation of the Government's regulatory action – approval of the bank/thrift mergers – to demonstrate the Government's intent to contract. That "something more" was commonly found where the parties engaged in arm's length negotiation or bargaining concerning the accounting treatment of supervisory goodwill – the critical term in dispute in the *Winstar* cases.

For example, *D & N Bank* distinguished *California Federal Bank, FSB v. United States*, on the ground that "each of the three transactions between the California Federal Bank and the government [had] a 'bargained-for exchange.'" *Id.* at 1381 (quoting *California Federal Bank, FSB v. United States*, 245 F.3d 1342, 1347 (Fed. Cir. 2001)). In particular, the Federal Circuit highlighted that "the government bargained with Cal Fed to assume the net liabilities of the acquired thrifts in exchange for favorable regulatory consideration allowing goodwill to be

counted as an asset for regulatory capital purposes and to be amortized over 35 to 40 years." *Cal. Fed. Bank*, 245 F.3d at 1347; *see also Winstar Corp. v. United States*, 21 Cl. Ct. 112, 115 (1990) (relying on documents illustrating the "negotiated and critical" term of the contract, without which, "no purchaser would have engaged in this transaction.").

Aside from a bargained-for exchange, the Federal Circuit also looked for "affirmative statement[s] of the government's intention to be bound either in documents or [] witness testimony about the words and actions of the relevant government officials" when determining whether the Government intended to be bound by contract. *D & N Bank*, 331 F.3d at 1382. In *LaSalle Talman Bank v. United States*, 317 F.3d 1363 (Fed. Cir. 2003), for example, the Federal Circuit highlighted not only the merger agreement's express consideration of "the purchase accounting method of determining liabilities and the accounting treatment of these liabilities as goodwill assets subject to amortization over forty years," but also testimony from the Director of the Federal Savings and Loan Insurance Corporation that the accounting terms of the agreement "were necessary in order for the mergers of failing thrifts to 'work as it was planned.'" *LaSalle*, 317 F.3d 1363, 1369-70 (Fed. Cir. 2003).

Nothing of this nature is alleged in the complaint. Plaintiffs do not allege any arm's length negotiation or bargained-for exchange between the parties. In fact, there could have been no such negotiation because the terms of the statute are not flexible. Thus, unlike in *Winstar* and *California Bank*, plaintiffs cannot establish the existence of a bargained-for exchange concerning the payment of six-percent dividends. Washington Federal's purported offer here does not even mention the dividend rate. Compl. Ex. A. And, unlike in *LaSalle*, plaintiffs do not identify or rely on "affirmative statements" or testimony from Board or Reserve Bank officials to demonstrate the Government's intent to contractually guarantee six-percent dividends.

Washington Federal's claim is also foreclosed because, rather than allege a bargained-for exchange, it merely asserts a contractual right to a statutory entitlement, which all member banks receive. *See* Compl. ¶ 27 ("Washington Federal's application constituted an offer to acquire shares of stock in the [FRB] that would pay an annual dividend pursuant" to "Section 7 of the Federal Reserve Act[.]"). Accordingly, under the Supreme Court's decision in *Bowen v. Public Agencies Opposed To Social Security Entrapment*, 477 U.S. 41 (1986) (*POSSE*), Washington Federal's contract claim must fail.

In *POSSE*, the State of California entered into an agreement with HHS to cover certain state employees in the Social Security System. *POSSE*, 477 U.S. at 48-49. The agreement contained a provision, authorized by the statute in effect at the time the agreement was adopted, giving the state the right to terminate the agreement and withdraw its employees by providing notice to the Secretary of HHS. *Id.* Subsequently, Congress repealed the termination provision, and California sued, claiming that its contract rights had been "taken" by the amendment. *Id.* at 48-50.

The Supreme Court concluded that California had no vested contract rights because "the termination provision in the Agreement exactly tracked the language of the statute, conferring no right on the State beyond that contained in [the statute] itself." *POSSE*, 477 U.S. at 54. Thus, as this Court later noted in *Winstar Corp. v. United States*, the Supreme Court's *POSSE* decision was based in part on the fact that no "vested rights were created as the basic elements of contract formation were absent." *Winstar Corp.*, 25 Cl. Ct. 541, 545 (1992), *aff'd Winstar Corp v. United States*, 64 F.3d 1531 (Fed. Cir. 1995). The rights at issue "were solely government-created[,]" meaning that, without more, the Government had not indicated its intent to bind itself to those statutory terms by contract. *Winstar*, 25 Cl. Ct. at 546 (citing *POSSE*, 477 U.S. at 52, 54-55).

"[T]he only 'negotiations' or bargaining involved in the enactment of the original Social Security Act and its amendments took place in the halls of Congress[,]" not between "Congress and the plaintiffs who filed suit." *Id.* at 546.

The *POSSE* Court also relied heavily on the fact that Congress had expressly reserved its right to amend the Social Security Act, holding that in accepting the agreement "under an Act that contained the language of reservation," the State was "expressly notified . . . that Congress retained the power to amend the law under which the Agreement was executed and by amending that law to alter the Agreement itself." *POSSE*¸ 477 U.S. at 54.

The same is true here, where (i) Congress expressly reserved for itself its authority to amend the Act in section 31, (ii) the only rights at issue were created in the Act, its amendments, and its implementing regulations, and (iii) there was no negotiation or bargained-for exchange between Washington Federal and the Government to guarantee those rights by contract. Put another way, if the Government had chosen not to allegedly contract with member banks, but, chosen instead to retain the right to change the dividend rate, the Government's actions would have been indistinguishable from those alleged by the plaintiffs.

Thus, because the Act and the Board's regulations provide no indication whatsoever that the United States intended "to bind itself contractually[,]" and plaintiffs have not alleged and cannot prove that Washington Federal negotiated or bargained for a contractual guarantee of its statutory rights from the United States, plaintiffs cannot overcome the presumption that Congress did not intend to bind the United States by contract for the payment of dividends. *Nat'l R.R. Passenger Corp.*, 470 U.S. at 466.

ii. There Is Ambiguity In The Purported Offer And Acceptance

"The inquiry into whether there is a mutual intent to contract overlaps, in part, with the requirement that there be a lack of ambiguity in offer and acceptance, since a plaintiff must offer objective evidence of 'the existence of an offer and a reciprocal acceptance . . . [t]o satisfy its burden to prove . . . mutuality of intent.'" *Davis Wetlands Bank LLC v. United States*, 114 Fed. Cl. 113, 121 (2013) (quoting *Anderson*, 344 F.3d at 1353) (additional citations omitted). As with mutuality of intent to contract, "lack of ambiguity in offer and acceptance must be demonstrated to establish the existence of a contract." *Petrini v. United States*, 19 Cl. Ct. 41, 45 (1989). In practice, "[t]he Federal Circuit requires that the material terms of an agreement must be definite before a contract may be established." *Am. Capital Corp. v. United States*, 58 Fed. Cl. 398, 408 (2003) (citing *Modern Sys. Techs Corp. v. United States*, 979 F.2d 200, 202 (Fed. Cir. 1992) ("In the absence of . . . sufficiently definite terms, no contractual obligations arise.").

The purported offer and acceptance between the FRB and Washington Federal lack nearly every material term required to form a binding contract. In fact, the only terms in Washington Federal's offer were the number of shares it sought from the FRB and the price per share it would pay, both of which were dictated by statute.[9] Compl. Ex. A; 12 U.S.C. §§ 282, 287. Notably missing from the alleged offer is any reference to the stock's dividend rate, let alone any provision that would have set the dividend rate in stone forever. Other critical terms, including those sufficient to "provide a basis for determining the existence of a breach and for

[9] Moreover, we note that the few terms in the purported offer and acceptance in this case do not satisfy the "mirror image" rule of the common law of contracts, under which a "mismatch between offer and acceptance negates contractual liability." *First Commerce Corp. v. United States*, 335 F.3d 1373, 1381 (Fed. Cir. 2003) (citing *Iselin v. United States*, 271 U.S. 136 (1926)). Washington Federal's purported offer – its June 2013 form FR 2030a – seeks a subscription of 479,609 shares of FRB stock (Compl. Ex. A), whereas Mr. Cabral's July 2013 form letter shows a subscription of 479,610 shares of FRB stock. Compl. Ex. B.

giving an appropriate remedy," are also missing. *See* Restatement (Second) of Contracts § 33(2).

To avoid these defects in its offer, plaintiffs allege that the terms of its offer incorporated by reference "the provisions of the act of Congress approved December 23, 1913, as amended, and known as the Federal Reserve Act." Compl. ¶ 27. Washington Federal's reliance upon the Act to provide all of the material terms of the alleged contractual relationship reaffirms that the relationship was defined and controlled by statute and regulation, not by contract. Moreover, as a matter of law, "[f]or extrinsic material to be incorporated into a contract by reference, the contract 'must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract (rather than merely to acknowledge that the referenced material is relevant to the contract, *e.g.*, as background law or negotiating history)." *Earman v. United States*, 114 Fed. Cl. 81, 103-04 (2013) (quoting *Northrop Grumman Info. Tech. Inc. v. United States*, 535 F.3d 1339, 1345 (Fed. Cir. 2008) (emphasis in original)).

"This court has been reluctant to find that statutory or regulatory provisions are incorporated into a contract with the government unless the contract explicitly provides for their incorporation." *St. Christopher Assocs., L.P., v. United States*, 511 F.3d 1376, 1384 (Fed. Cir. 2008) (citing *Smithson v. United States*, 847 F.2d 791, 794-95 (Fed. Cir. 1988) (contract did not incorporate agency's regulations "despite the statement in the contract that it was "subject to the present regulations of the [agency] and to its future regulations not inconsistent with the express provisions hereof.")); *cf. S. Cal. Edison Co. v. United States*, 226 F.3d 1349, 1353 (Fed. Cir. 2000) (concluding that contracts incorporated the terms and conditions of certain regulations by

specifically referring to the regulations as being made part of the contracts "as fully and completely as though set forth herein in length.").

Here, Washington Federal's FR 2030a application contains no explicit or precise reference to any provision of the Act, or to the Board's regulations. The form cannot, therefore, incorporate the provisions of either the Act or regulations to substitute for the missing terms of the purported offer. *Smithson*, 847 F.2d at 794-95.

If the Court concludes otherwise, and finds that the form sufficiently incorporates the Act, however, it must also be true that the form incorporates section 31, in which Congress expressly reserved the right to "amend, alter, or repeal" the Act. In that event, plaintiffs cannot state a claim for breach of contract based upon Congress's exercise of its section 31 reservation of rights, which Washington Federal accepted when it entered into the purported contract.[10] *See POSSE*, 477 U.S. at 52-53 (noting the "often-repeated admonition that contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority"), 54 (holding that agreements adopted pursuant to statute included the reserved amendment right).

Finally, even if the Court accepts that the FRB's purported acceptance contains a promise to pay dividends at six percent, which it did not (Compl. Ex. B), it does not set forth the duration of that promise. This Court has been reluctant "to lock parties into a given set of rights and

[10] Plaintiffs cannot argue for incorporation by reference and then cherry-pick the provisions that they claim are incorporated. There is no reason from the language of the form FR2030a – the document plaintiffs identify as Washington Federal's "offer" – to assume that the Act's then-existing dividend provision should be incorporated but the provision permitting amendment of the Act should not be. The form states that "the Board of Directors of this bank, on behalf of the said national bank, desires to subscribe to the capital stock of the Federal Reserve Bank . . . in accordance with the provisions of the act of Congress approved December 23, 1913, as amended, and known as the Federal Reserve Act." Compl. Ex. A. Thus, the "in accordance" language upon which plaintiffs rely references the entirety of the Federal Reserve Act.

obligations for long or indefinite periods without some clear indication that this was actually intended by the parties." *Consumers Ice Co. v. United States*, 475 F.2d 1161, 1166-67 (Ct. Cl. 1973). And, far from identifying terms of the purported agreement, the FRB's July 2013 form letter in response states that it is highlighting only "some important requirements concerning [Washington Federal's] Federal Reserve capital stock holdings." Compl. Ex. B. Accordingly, the material terms of the purported agreement are not "sufficiently definite," and the Court should conclude that no contract was formed.

iii. There Is No Consideration For An Alleged Promise To Pay Six-Percent Dividends

Plaintiffs cannot establish consideration for the purported contract between Washington Federal and the FRB. "Consideration is generally a bargained for exchange consisting of an act, forbearance, or return promise." Restatement (Second) Contracts §§ 71, 72. As consideration for the purported contract, plaintiffs allege that "Washington Federal paid $24,048,444.75 and agreed to become subject to the restrictions and requirements imposed upon members of the Federal Reserve System[,]" and "the Government, through the San Francisco Federal Reserve Bank, issued 479,610 shares of stock to Washington Federal and agreed to pay a six percent dividend." Compl. ¶ 35.

As discussed above, however, the complaint does not allege that the actions or promises alleged to constitute consideration were the result of a bargained-for exchange, or that any arm's length negotiations occurred prior to the purported contract. Thus, the allegations in the complaint do not demonstrate consideration for a valid contract for the same reason that there were no vested contract rights found by the Supreme Court in *POSSE* – the rights supposedly running from the contract were created by the Government through statute, not agreed upon by the parties following arm's length negotiation. *POSSE*, 477 U.S. at 55 ("The termination clause

was not unique to this Agreement; nor was it a term over which the State had any bargaining power or for which the State provided independent consideration. Rather, the provision simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare."); *see also NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997) ("Consideration generally requires a bargained-for exchange." (citations omitted)).

Actions or promises reflecting a party's pre-existing duties are insufficient to establish consideration. *See Allen v. United States*, 100 F.3d 133, 134 (Fed. Cir. 1996) ("Performance of a pre-existing duty is not consideration."); *Lawndale Restoration Ltd. v. United States*, 95 Fed. Cl. 498, 507 (2010) (same); *Youngblood v. Vistronix, Inc.*, No. 05-21, 2006 WL 2092636, at *4 (D.D.C. July 27, 2006) ("First and most simply, the Court notes that [defendant] has a pre-existing duty to abide by federal government regulations, whether it says so in its employee handbook or not. It is a general maxim of contract law that a party cannot offer as consideration a duty that the party is already obliged to perform.") (citing Restatement (Second) of Contracts § 73 (1981); 3 Richard A. Lord, Williston on Contracts § 7:41 (4th ed. 2006); *United States v. Bridgeman*, 523 F.2d 1099, 1110 (D.C. Cir. 1975) (rioting prisoners who had a pre-existing duty not to harm guards could not offer as consideration an agreement to forego violence against a guard)); *GLS Dev., Inc. v. Wal-Mart Stores, Inc.*, 3 F. Supp. 2d 952, 967 (N.D. Ill. 1998) ("Black letter law teaches that a promise to do or to pay something that the promisor is already bound to do or to pay provides no consideration for the party's promise in exchange, so that the other party's promise is not legally enforceable.").

Here, the acts and promises that plaintiffs identify in the complaint as providing consideration for the contract are nothing more than the fulfillment of the parties' pre-existing

legal duties required for all national banks. *See* Compl. ¶ 35. Once Washington Federal voluntarily converted into a national bank, it was required by the Act to subscribe to stock of the appropriate Reserve Bank in an amount established by the Act, and to pay $100 per share (for a total of $24 million), also as established in the Act. 12 U.S.C. §§ 222, 282, 287; *see* 12 C.F.R. §§ 209.4(a) (setting forth the Reserve Bank stock subscription amount for member banks), 209.4(c)(1) (setting forth the timing and amount that member banks must pay to the Reserve Bank for stock). Thus, the actions alleged in the complaint do not constitute contractual consideration from Washington Federal, but rather arose from Washington Federal's pre-existing duties as a national bank.[11]

Likewise, the Government is not alleged to have taken any action or to have promised to act outside the scope of its statutory and regulatory mandates. The FRB was required by 12 C.F.R. § 209.2(b) to issue Reserve Bank stock and by 12 U.S.C. § 289(a) and 12 C.F.R. § 209.4 to pay annual stock dividends at the statutory rate. Nothing more is identified in the FRB's July 2013 letter to Washington Federal. Compl. Ex. B. Thus, because the consideration alleged in the complaint reflects the parties' pre-existing legal duties and did not result from any arm's length negotiation or bargained-for exchange, it cannot provide sufficient consideration for a contract.

Furthermore, the Court should find there is no consideration for the purported contract because any alleged promise by Washington Federal was illusory. "Whenever one of the parties to an agreement can terminate without consequence, an enforceable contract does not exist." *Woll v. United States*, 45 Fed. Cl. 475, 478 (1999). It is undisputed that Washington Federal is

[11] "[F]or a contract to be binding, consideration must flow simultaneously to the government." *Carter v. United States*, 102 Fed. Cl. 61, 66 (2011).

permitted by law to receive a full refund of its paid-up capital at any time by withdrawing from the Federal Reserve. 12 U.S.C. § 328. Thus, because Washington Federal can terminate the purported agreement without consequence, its promises were illusory and no valid contract exists.

At best, plaintiffs appear to allege that the statutory return of six percent on Reserve Bank stock constituted a material incentive for Washington Federal to enter into the alleged contract. Compl. ¶ 27. But such an incentive cannot transform a pre-existing legal duty into consideration for a contract. Indeed, Washington Federal was required to subscribe to Reserve Bank stock once it voluntarily became a national bank, rendering its alleged reasons for doing so irrelevant. Moreover, this allegation of consideration does not demonstrate any consideration on the part of the FRB, which was likewise statutorily bound to issue stock and pay dividends in accordance with the Act. And, finally, Washington Federal's alleged incentive to contract founders upon the fact that it did not even bother to mention the dividend rate in its purported offer, much less condition its purported offer on a six-percent return. *See* Compl. Ex. A.

The Court should, therefore, conclude that there is no consideration for the purported contract, and dismiss Count I.

iv. Plaintiffs Fail To Sufficiently Plead The Requisite Authority To Bind The United States

Plaintiffs' contract claims must also be dismissed because plaintiffs have not, and indeed cannot, establish that the FRB or its representative had the necessary authority to bind the United States.

a. The FRB Did Not Have Authority To Bind The United States By Contract For The Payment Of Six-Percent Dividends

To establish the existence of a valid contract with the United States, plaintiffs must allege and prove that the FRB, as a Federal instrumentality, was authorized by law to bind the United States for the payment of six-percent dividends, *even after* the statute changed and where the statute specifically contemplated revisions. Here, plaintiffs allege only that Reserve Banks have the general power to contract under 12 U.S.C. § 341. Compl. ¶ 36. This alone says nothing about whether Reserve Banks have authority to enter into contracts with member banks concerning dividend payments that are entirely governed by the Act.

In fact, plaintiffs do not and cannot identify any statute or regulation authorizing Reserve Banks to contract on behalf of the United States with member banks concerning dividends, or identify the contours of any such authorization.[12] And, rightfully so, because "Federal Reserve Banks, while possessing the power to contract in their own names, do not have power to contract in the name of the United States." *Lee Const. Co. v. Fed. Reserve Bank of Richmond*, 558 F. Supp. 165, 179 (D. Md. 1982). Thus, because the Reserve Banks do not have authority to contract on behalf of the United States with member banks for dividend payments, there can be no contract here.

Even if the Court were to find section 341's general, enumerated power to contract sufficient to establish the Reserve Banks' authority here, however, the Court must next consider

[12] The Reserve Banks' power to contract generally, provided in 12 U.S.C. § 341, does not provide the specific authorization required to establish a contract here, but, to the extent the Court reads the requisite authorization into section 341, the Government reserves the right to argue that the Reserve Banks do not act as Federal instrumentalities when they contract under section 341. Section 341 authorizes Reserve Banks "[t]o make contracts[,]" which they do on their own behalf as independent corporate entities.

whether there are any laws or regulations that restrict this authority. *Brunner v. United States*, 70 Fed. Cl. 623, 635 (2006). "This second step of looking for publicly-enacted restrictions on contracting authority often result[s] in a determination that the government agent in question had contravened a statute or regulation." *Id.* In this instance, the restriction upon the FRB's contracting authority is provided by the Act and its implementing regulations, which mandate how and when payments are to be made from the Reserve Banks' surplus funds. It is a "rule of constitutional law that a government agency cannot validly contract to pay funds in contravention of a federal statute because any 'payment of funds from the Treasury must be authorized by a statute.'" *Fluor Enterprises, Inc. v. United States*, 64 Fed. Cl. 461, 491-92 (2005) (quoting *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424 (1990) (citing U.S. Const. art. I, § 9 ct. 7)). "It is 'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.'" *Id.* (quoting *Urban Data Sys., Inc. v. United States*, 699 F.2d 1147, 1154 (Fed. Cir. 1983)).

Congress has determined that member banks are entitled to certain statutorily-set dividends. Congress set that rate at six percent for all member banks, and then changed it, for the largest banks, in 2015. Congress has not authorized the Board or Reserve Banks to deviate from that dividend rate. Likewise, Congress has directed Reserve Banks to transfer their surplus funds to the United States Treasury. These legal requirements restrict the Reserve Banks' general authorization to contract in two ways. First, the FRB is not authorized to pay or to promise to pay dividends that are not authorized by statute, as it would be required to do under the purported contract. Second, the Act, as amended, requires surplus Reserve Bank funds to be paid to the United States Treasury, not to Federal Reserve member banks as would be required by the purported contract. The Reserve Banks' enumerated power to contract is, therefore,

restricted by Congressional mandates concerning the Reserve Banks' surplus funds. Thus, the FRB did not have the requisite authority to bind the United States by contract to pay six-percent dividends forever.

Finally, should plaintiffs invite the Court to read into the Act and its implementing regulations some *additional* authority of Reserve Banks to contract, beyond the section 341 powers alleged in the complaint, the Court should decline to do so. There are two instances in the Board's regulations where the Board has delegated to Reserve Banks specific authority to enter into agreements on behalf of the Board. *See* 12 C.F.R. §§ 265.11(a)(15)(i), (d)(5). The canon of construction articulated by the Supreme Court in *Rusello v. United States* holds that where the Board includes specific contractual authorization in specific regulatory provisions, but omits it from others, "it is generally presumed that [the Board] acts intentionally and purposely in the disparate inclusion or exclusion."[13] *Rusello v. United States*, 464 U.S. 16, 23 (1983) (quotations omitted). The Court must not, therefore, interpret the Act's implementing regulations concerning Reserve Bank membership and capital stock dividends as including authorization for the Reserve Banks to contract as alleged.

b. Plaintiffs Have Not Alleged That The FRB Representative Had Authority To Contract

Plaintiffs' contract claims should be dismissed for the additional, independent reason that the complaint fails to allege that the Government representative who purportedly contracted on behalf of the United States had authority to do so. Because actual authority on the part of the Government representative who agreed to the purported contract is required under the law, the

[13] The Federal Circuit has applied the cannon described in *Rusello* to regulations. *Smith v. Brown*, 35 F.3d 1516, 1523 (Fed. Cir. 1994) superseded on unrelated grounds by 38 U.S.C. § 7111 as discussed in *Samish Indian Nation v. United States*, 419 F.3d 1355, 1367 (Fed. Cir. 2005).

complaint's non-specific allegation that *some* Government representative had authority to bind the United States by contract to pay six-percent dividends forever fails to state a claim upon which relief may be granted. Compl. ¶ 36. Even if the Court were to conclude that the complaint states a claim regarding authority, however, as shown in the following section, the undisputed evidence proves that the Government is nonetheless entitled to partial summary judgment pursuant to RCFC 56 regarding this same issue. Thus, this pleading defect cannot be remedied by amendment, because plaintiffs cannot allege, consistent with their RCFC 11 obligations, that the FRB's representative had authority to bind the United States in a contract.

Before plaintiffs can place the terms of any contract into issue before this Court, they must satisfy the fundamental requirement of showing that the agent purporting to enter into the alleged agreement was acting within the scope of his authority. Because the Federal Government is one of the parties to the alleged contract, plaintiffs must show that "the officer whose conduct is relied upon had actual authority to bind the government in contract." *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985). Actual authority may be either express or implied.

"A Government agent possesses express actual authority to bind the Government in contract only when the Constitution, a statute, or a regulation grants it to that agent in unambiguous terms." *SGS-92-X003 v. United States*, 74 Fed. Cl. 637, 651 (2006) (citing *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990) ("The issue is not whether some authority exists which prohibits [the agent] from binding the Government in contract; rather, the issue is whether [the agent] has been granted the authority to affirmatively obligate the Government.")).

Apparent authority is not enough. Whether plaintiffs – or even the Government representative – believed that the Government agent had actual authority to bind the United States is irrelevant. As the Supreme Court cautioned in *Federal Crop Insurance Corp. v. Merrill*, "[w]hatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) ("And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority."); *see also Essen Mall Properties v. United States*, 21 Cl. Ct. 430, 445 (1990) ("While Griffin's actions and words may have *led plaintiff to believe* that Griffin had authority bind the Postal Service by way of a contract, the clear evidence set forth in Postal Service regulations and in the depositions of relevant Postal Service officials, shows that Griffin had no contracting officer authority." (emphasis added)).

Plaintiffs' complaint fails to state a claim for breach of contract because the complaint merely alleges that "a" Government representative had authority to bind the United States. Compl. ¶ 36. Plaintiffs have identified form letters signed by Richard Cabral, the FRB Director of District Accounting, as the basis for their contract claims, but the complaint fails to allege that Mr. Cabral had authority to bind the United States. Indeed, the complaint instead alleges that "each Federal Reserve Bank" is authorized to "make contracts," and later asserts that Mr. Cabral "entered into the contract with Washington Federal." *Id*.

The complaint's fatal flaw regarding authority, therefore, is that plaintiffs mistakenly equate the Reserve Bank's authority to contract with Mr. Cabral's. Even if the Court concludes that the FRB had authority to bind the United States in contract, that fact sheds no light on the

question of whether Mr. Cabral, in his position as Director of District Accounting, had actual authority to contract on behalf of the FRB or the Government to pay six-percent dividends forever when form letters are sent out under his name. And some vague authority to contract would not be enough (if even that had been alleged). Plaintiffs must allege and ultimately prove that Mr. Cabral had the authority to bind the United States forever to a dividend term. This they did not and cannot do.

v. The Government Is Entitled To Summary Judgment On Count I Because No Government Representative With Authority Entered Into A Contract With Washington Federal

Even if the Court finds the complaint's allegations are sufficient to state a contract claim, the Government is nonetheless entitled to judgment on Count I because the individual alleged to have signed the contract on behalf of the Government had no authority to bind the Government in contract. To survive a motion for summary judgment, a claimant must set out specific evidence demonstrating actual authority to contract in the manner alleged. *See Tracy v. United States*, 55 Fed. Cl. 679, 684 (2003) (citing *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562–63 (Fed. Cir. 1987)). The burden is thus on plaintiffs to prove that an agent who purports to act for the Government had actual authority to enter into the alleged contract. *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1432 (Fed. Cir. 1998). But, the only Government representative that plaintiffs point to for their claim that the United States was contractually bound with Washington Federal in perpetuity had *no* authority to bind the Government in contract – in fact, he could not even bind the FRB in contract.

Plaintiffs allege that Mr. Cabral bound the United States in contract when he signed form letters addressed to Washington Federal in July 2013. Compl. ¶¶ 33, 36, Exhibits B and C. But Mr. Cabral had absolutely *no* contracting authority (express or implied) – either on behalf of the

FRB or the United States – when he signed the documents attached at Exhibits B and C of the complaint.

Mr. Philip Jasienczyk is currently the Vice President and Chief Financial Officer of the FRB, and has submitted a declaration (attached hereto at A001 ("A__" refers to the appendix filed with this motion) (Jasienczyk Decl.)) describing the facts concerning contracting authority and the organizational structure of the FRB. Mr. Jasienczyk oversees operations in the Department of Financial Management at the FRB, including the Financial Accounting function, which is responsible for accounting issues relating to the FRB's capital stock and acting on applications to increase or decrease stockholdings by banks that are members of the Federal Reserve System. Jasienczyk Decl. ¶ 2. From January 2005 until he retired on April 30, 2015, Mr. Cabral was the Director of District Accounting, oversaw the Financial Accounting function at the FRB, and reported to Mr. Jasienczyk. Jasienczyk Decl. ¶ 3; *see also* FRB Department of Financial Management organizational chart (Nov. 13, 2014), A007 (demonstrating Mr. Cabral's position in the department).

When a nonmember financial institution converts to a national bank charter, it becomes a Federal Reserve member bank and is required to acquire stock in its regional Federal Reserve Bank. Jasienczyk Decl. ¶ 4. The institution applies for stock by submitting an application (FR 2030a) to its regional Reserve Bank; on this form, the bank lists its paid-up capital and surplus to permit calculation of the Reserve Bank stock the bank must acquire. *Id*. Washington Federal converted to a national bank in July 2013, and submitted its Form FR 2030a to the FRB at that time. *Id*. Washington Federal's initial application for Reserve Bank stock is attached to Mr. Jasienczyk's declaration as Exhibit A. The Financial Accounting function was responsible for responding to non-member bank applications. *Id*.

In his capacity as the Director of District Accounting overseeing the Financial Accounting function, Mr. Cabral signed the form documents sent to Washington Federal in July 2013. Jasienczyk Decl. ¶ 5. Mr. Cabral had authority to sign those documents as Director of District Accounting. *Id.*

Contracting authority at the FRB, however, is vested in the Procurement function – a separate function from Financial Accounting where Mr. Cabral worked. Jasienczyk Decl. ¶ 7. At the time Mr. Cabral signed the form documents sent to Washington Federal, the Procurement function was housed in the Administrative Services department. *Id*; *see also* FRB Administrative Services organizational chart (February 2014), A008. Under the FRB's Procurement policy, set out in its District Procurement Manual, only certain specified staff members are permitted to sign or enter into contracts binding the FRB. Jasienczyk Decl. ¶ 8; *see also* excerpt of the FRB District Procurement Manual (February 2015), A009-012. All of the staff members who are authorized to sign or enter into contracts are in the Procurement Function, with the exception of certain senior officers at the FRB: the President, the First Vice President, and the General Counsel. *Id.* Management of the Cash Product Office (CPO) and the Currency Technology Office (CTO) are also authorized to sign or enter into contracts relating to those areas under specific delegations of authority in the CPO and CTO areas. *Id*. In 2013, Mr. Cabral did not work in the Procurement function, the CPO, or the CTO, and because he was not one of the enumerated senior officers at the FRB, Mr. Cabral could not have had authority to sign or enter into contracts for the FRB or any other entity within the Federal Reserve System. Jasienczyk Decl. ¶ 9.

Thus, the undisputed evidence shows that Mr. Cabral did not have express actual authority to bind the FRB, let alone the United States, as alleged in the complaint. Nor did Mr.

Cabral have implied actual authority to do so. A Government official with implied actual authority can bind the Government "when such authority is considered to be an integral part of the duties assigned to a government employee." *H. Landau & Co. v. United States,* 886 F.2d 322, 324 (Fed. Cir. 1989) (quoting *Cibinic & Nash, Formation of Government Contracts* 43 (1982)); *see also Leonardo v. United States,* 63 Fed. Cl. 552, 557 (2005); *SGS-92-X003,* 74 Fed. Cl. at 652 (stating that contracting authority must be "necessary or essential" to carrying out those assigned duties to be "integral") (citation omitted). Contracting authority is integral to an employee's duties when the employee cannot perform his assigned tasks without such authority and when the relevant agency's regulations do not grant the authority to other agency employees. *See Leonardo,* 63 Fed. Cl. at 557-58.

As Mr. Jasienczyk testified, not only was contracting authority not necessary or essential for Mr. Cabral to do his job, contracting authority was *no part* of Mr. Cabral's job, because contract execution was the exclusive purview of the Procurement function in the Department of Administrative Services, along with three senior FRB officials. Jasienczyk Decl. ¶ 7; District Procurement Manual, A011-012. Contracting authority was not integral to Mr. Cabral's duties because, as this Court described in *Leonardo*, Mr. Cabral could – and did, for ten years – perform his assigned duties without such authority, while the FRB's guidelines explicitly grant such authority to other employees. *See Leonardo,* 63 Fed. Cl. at 557-58. The Government is, therefore, entitled to summary judgment on Count I.

2. There Is No Implied Contract Between Washington Federal And The United States

Plaintiffs also allege, in the alternative, the existence of an implied-in-fact contract between Washington Federal and the United States. Compl. ¶ 34. The elements of an implied-in-fact contact are the same as the elements of an express contract. *Hanlin v. United States*, 316

F.3d 1325, 1328 (Fed. Cir. 2003). Thus, for the same reasons demonstrated above, the Court should either dismiss plaintiffs' implied contract claims or grant partial summary judgment to the Government.

In addition, plaintiffs have not alleged, and cannot establish, conduct by the parties indicating mutual assent to an implied agreement, as they must to prove the existence of an implied contract. *See City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998). Plaintiffs allege that Washington Federal's payment of $24 million for Reserve Bank stock, and the FRB's payment of dividends at six percent between 2013 and 2015, demonstrate mutual assent to the terms of an implied contract requiring the payment of six-percent dividends forever. Compl. ¶¶ 33, 36-37. As established above, however, these actions demonstrate only that the parties acted in conformance with their pre-existing obligations under the Act and the Board's regulations, and if anything, promised nothing more than what was already required by law.

Construing actions taken by the Government pursuant to statute or regulation as manifest assent to the terms of an implied-in-fact contract, as plaintiffs contend, would transform every legislative program into a contractual program. This is precisely the result the presumption in *Nat'l R.R. Passenger Corp.*, 470 U.S. at 465, is designed to prevent. *See Pasco Enterprises v. United States*, 13 Cl. Ct. 302, 306 (1987) (rejecting the existence of an implied-in-fact contract; the parties' "mere compliance" with the Bankruptcy Code was insufficient to plead mutual assent to the terms of an implied-in-fact contract). Thus, the Government's lack of intent to bind itself to Federal Reserve member banks undermines any allegation that the Government manifested assent to a contract implied by the actions alleged in the complaint.

3. Even Assuming That An Express Or Implied Contract Exists, It Contains Only A Promise To Pay The Statutory Dividend Rate, And Thus Plaintiffs Have Not Alleged A Breach

Even if plaintiffs could establish the existence of an express or implied contract, they cannot establish that the United States breached its contractual obligation because the Government's statements and conduct evidence only an intention to pay dividends at the statutory rate.

When interpreting an express contract, the court begins with the language of the agreement. *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003) (citing *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993)). When the agreement's terms are "clear and unambiguous, they must be given their plain and ordinary meaning." *Bell/Heery v. United States*, 739 F.3d 1324, 1331 (Fed. Cir. 2014) (quoting *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996)). The only "term" in the purported express contract concerning the dividend rate is Mr. Cabral's statement in the July 17, 2013 letter to Washington Federal that "[d]ividends are paid [on Reserve Bank stock] at the statutory rate of six percent per annum[.]" Compl. Ex. B. To the extent the document refers to dividends at all, therefore, it merely recites the dividend provision set forth in 12 U.S.C. § 289(a), *i.e.*, the "statutory rate," which was six percent in 2013 when the stock was issued, and variable for members of Washington Federal's size after January 1, 2016.[14]

The letter's plain language can support no other reading of Mr. Cabral's statement; certainly the letter offers no support for plaintiffs' contention that it represents a promise to pay six-percent dividends in perpetuity. Indeed, taking the letter as a promise to pay six-percent

[14] Washington Federal does not contest that it was above the $10 billion threshold for application of the amended dividend rate.

dividends, regardless of the dividend rate set forth in the Act, reads "statutory rate" out of the letter, and violates the requirement that agreements are to be "construed as a whole and 'in a manner that gives meaning to all of its provisions and makes sense.'" *Bell/Heery*, 739 F.3d at 1331 (quoting *McAbee Constr.*, 97 F.3d at 1435)). Moreover, reading the letter as a promise to pay the statutory rate is more consistent with the terms of the purported offer, which plaintiffs allege incorporated the Act "as amended." Compl. ¶ 27; Compl. Ex. A. It is more reasonable, therefore, to read the reference in Mr. Cabral's letter to six percent as a reflection of the statutory rate at that time, and not as a promise to pay six percent regardless of the statutory rate. And, because even plaintiffs concede that the FRB has paid Washington Federal dividends at the prevailing statutory rate without fail since 2013, Compl. ¶¶ 37, 52, 55, they have not and cannot demonstrate a breach of the purported contract.

Likewise, the Government's conduct does not establish a promise to pay six-percent dividends in perpetuity. The fact that the FRB paid six-percent dividends to Washington Federal from 2013 to 2015, Compl. ¶ 37, reflects only the fact that the statutory rate was six percent until January 2016. Indeed, plaintiffs' reliance upon the entirety of the Act "as amended" to supply the terms of the purported contract demonstrates that Washington Federal necessarily knew Congress could amend the statutory dividend rate when Washington Federal agreed to the purported contract. As the Supreme Court observed in *POSSE*, "[t]he State accepted the Agreement under an Act that contained the language of reservation. That language expressly notified the State that Congress retained the power to amend the law under which the Agreement was executed and by amending that law to alter the Agreement itself." *POSSE*, 477 U.S. at 54. Thus, to the extent the parties' conduct evidences mutual assent to any purported implied-in-fact agreement, it was for the FRB to pay dividends based on the applicable statutory rate.

Consequently, even if the Court concludes that Washington Federal has alleged a valid, express or implied-in-fact contact, Washington Federal cannot establish that the Government breached the promises contained therein.

B. Because No Contract Exists Between The United States And Washington Federal To Pay Six-Percent Dividends In Perpetuity, There Can Be No Breach Of The Implied Duty Of Good Faith And Fair Dealing

Count II alleges that the United States breached the implied duty of good faith and fair dealing that attaches to every contract with the Government. Compl. ¶¶ 78-83; *see Metcalf Constr. Co. v. United* States, 742 F.3d 984, 990 (Fed. Cir. 2014). Yet, because one cannot breach implied duties of a nonexistent contract, the Court should reject plaintiffs' claims of this type. *See HSH Nordbank AG v. United States*, 121 Fed. Cl. 332, 340 (2015) (when a plaintiff "fail[s] to establish either an express or implied contract with [the United States], its dependent claim for a breach of implied covenant of good faith and fair dealing also must be dismissed."); *see, e.g., Wetlands Water Dist. v. United States*, 109 Fed. Cl. 177, 205 (2013) ("[T]here is no contractual . . . duty to which the implied duty of good faith and fair dealing can attach."). The United States has no contractual obligations with respect to dividend payments to Washington Federal. Accordingly, Count II should be dismissed.

IV. The Complaint Fails To State A Claim For A Taking

The Court should dismiss plaintiffs' takings allegations for failure to state a claim upon which relief may be granted. Neither the statute nor the paperwork effecting the statute provides Washington Federal with a cognizable property right in a specific dividend rate. In addition, even if any member bank did possess a valid property interest, no taking occurred. First, no member bank could possess reasonable, investment-back expectations in receiving a specific dividend rate in perpetuity. Second, the Government's actions could not constitute a taking

because the banks did not experience an economic impact to their property sufficient to constitute a regulatory taking.

A. Plaintiffs Do Not Possess Cognizable Property Rights In A Specific Dividend Rate

The Fifth Amendment prohibits the Government from taking private property for public use without providing just compensation. Therefore, "plaintiffs must demonstrate a cognizable property right to properly plead a Fifth Amendment takings claim." *Stockton East Water Dist. v. United States*, 62 Fed. Cl. 379, 393 (2004) (citing *Chancellor Manor v. United States*, 331 F.3d 891, 901 (Fed. Cir. 2003)). Plaintiffs do not allege such a right here.

Plaintiffs contend that Washington Federal and other banks possessed "property interests in their contractual and statutory rights to receive a six percent dividend." Compl. ¶ 86. Neither the alleged contractual rights nor the statutory rights are property interests protected by the Fifth Amendment.

1. A Contract Term Does Not Constitute A Property Right Subject To A Compensable Taking

Plaintiffs' contract claim is inconsistent with its takings claim. If plaintiffs had a contract with the Government – which they did not – the breach of a provision of that contract would give rise to a breach remedy, not a takings remedy. A contract between private parties is property protected by the takings clause. If, however, the Government is a party to a contract, the only remedy for a failure by the Government to perform is through a breach of contract claim. *Hughes Commc'ns Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001) ("[T]he concept of a taking as a compensable claim theory has limited application to the relative rights of party litigants when those rights have been voluntarily created by contract. In such instances, interference with such contractual rights generally gives rise to a breach claim not a taking

claim." (quoting *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Cl. Ct. 1978))). Put another way, the right to a specific contract term includes the right to a breach claim.

Thus, the property interest is not subject to a taking when the Government breaches or causes a breach, because a party with a valid breach claim already possesses all the property rights afforded by a contract. The alternative would be that any allegation of the Government's failure to perform on a contract would be a Constitutional issue. Two hundred years of case law will not support this result. Thus, if plaintiffs succeed in alleging the existence of a contract with the Government, the takings claims must fail.

2. A Statutory Entitlement Does Not Constitute A Property Right Subject To A Compensable Taking

Plaintiffs also do not possess any property right in the statutory dividend rate staying the same (or at least never decreasing) in perpetuity. Once Congress enacted the FAST Act, Washington Federal no longer possessed a statutory entitlement to six-percent dividends, because the statutory provision had changed. Plaintiffs never possessed any statutory right in dividends that plaintiffs had not yet accrued or received, and the prior version of the dividend provision could not create a future right that prevented Congress from changing the statutory rate provided. *See Dorsey v. United States*, 567 U.S. 260, 132 S. Ct. 2321, 2331 (2012) ("[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified.").

Statutory schemes that provide affirmative grants or benefits to individuals do not create cognizable property interests such that the Government may not decrease those benefits in the future. Any expectation of future benefits from a statutory scheme "are subject to any lawful changes made to the [statute] from which the claim to entitlement arises," and thus do not

constitute a present property interest in future benefits. *Zucker v. United States*, 758 F.2d 637, 639 (Fed. Cir. 1985) (discussing the existence of property rights in the context of procedural due process, and denying a takings claim for the same alleged right). Plaintiffs' theory would require that all Government payments are subject to a ratchet effect in which, once Congress enacts a law to provide certain payments, it may never decrease them. Such a result is absurd and clearly outside the scope of the takings clause.

The lack of a property right to a future benefit is particularly clear in highly regulated fields in which property has been the subject of pervasive Government regulation. In highly regulated areas, property is understood to be subject to subsequent Government regulation that occurs even after the property is acquired by the owner. The owner's rights in his or her property, therefore, do not include the right to be free from future regulation. *Branch v. United States*, 69 F.3d 1571, 1578-83 (Fed. Cir. 1995); *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 217 (Fed. Cir. 1993); *see also POSSE*, 477 U.S. at 55.

Here, Washington Federal's Federal Reserve membership and related stock and dividends are highly regulated. For example, national banks are required to be members of a Reserve Bank, and must buy stock in the Reserve Bank. 12 U.S.C. §§ 222, 282. A Federal statute fixes the value of each share, rather than subjecting them to market rates. 12 U.S.C. § 287. Member banks may not transfer the stock. *Id.* Indeed, the Board has promulgated regulations to govern membership and the issuance and cancellation of Reserve Bank stock. *See, e.g.*, 12 C.F.R. §§ 209.1, 262.3(a), 262.6. Washington Federal and other member banks, therefore, do not possess compensable property rights stemming from any statutory right that exists within that statutory scheme.

B. The Government's Actions Did Not Effect A Taking

Even presuming that Washington Federal and other banks possessed valid property interests subject to a taking, the Government's actions did not effect a taking here. Plaintiffs allege only a regulatory taking based upon the FAST Act provisions and the Board's implementing regulations. *See* Compl. ¶¶ 87-91 (listing conclusory allegations of factors relevant to regulatory takings, such as "reasonable investment-backed expectations" and "adverse economic impacts"). Plaintiffs, however, cannot establish the factors required for a regulatory taking pursuant to *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-124 (1978). In *Penn Central*, the Supreme Court identified three factors that it considers to have particular significance for determining whether a regulatory taking has occurred: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct, investment-backed expectations; and (3) the character of the governmental action. *Id.* at 124; *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1986).

No member bank could possess a reasonable investment-backed expectation that their stock would receive a six-percent dividend in perpetuity. Nor has Washington Federal suffered a sufficiently adverse economic impact to its Reserve Bank stock to establish a taking. Finally, although plaintiffs appear to also allege a *per se* or categorical regulatory taking pursuant to the Supreme Court's dicta in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), Compl. ¶ 89, that claim fails both (i) because categorical regulatory takings apply only to real property and (ii) because a categorical taking would require plaintiffs to have lost *all* value of their property, which has not occurred here.

1. Plaintiffs Lack Any Reasonable-Investment Backed Expectation In A Six-Percent Dividend

Although plaintiffs claim they possessed "reasonable investment-backed expectations" in receiving a six-percent dividend in perpetuity, Compl. ¶ 87, any such investment-backed expectations could not, as a matter of law, be reasonable. Because the contours of the requirements and benefits of Reserve Bank membership are highly regulated, plaintiffs could not possess any reasonable expectation that the value of that membership or their stock would not be subject to future changes in regulation. Moreover, because acquiring the stock was a required incident of their membership in the Federal Reserve System, it was not an "investment" at all. *See Lee Construction*, 558 F. Supp. at 177 n.17 ("[B]ecause banks which are members of the Federal Reserve System are required to subscribe to the stock of the Federal Reserve Bank in whose district they are located, it appears that the stock of Federal Reserve Banks, unlike stock in private corporations, is not acquired for investment purposes.").

As explained above, those who own property already subject to substantial Government regulation do not possess a valid property interest in being free from future regulation. In cases in which a plaintiff does possess a valid property interest, a similar analysis applies to evaluating whether the owner possesses a reasonable expectation of that property's value not being affected by Government regulation. When an owner uses his property in a business or for a purpose that is subject to pervasive regulation or control, that owner has also subjected himself to future regulation within the same regulatory scheme.

"Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958); *Connolly*, 475 U.S. at 227; *Branch v. United States*, 69 F.3d 1571, 1579 (Fed. Cir. 1995). Banks, and in particular national banks such as Washington Federal, that

are required to be members of the Federal Reserve System, have "been heavily regulated for more than a century." *Branch*, 69 F.3d at 1581. Therefore, the conclusion "that reasonable investment-backed expectations are greatly reduced in a highly regulated field . . . applies with special force to" them. *Id.*

Plaintiffs allege that they "could not have reasonably foreseen" the particular contours of the FAST Act, Compl. ¶ 91, and note that the dividend provision had not changed for a century. Compl. ¶ 1. But, a plaintiff's inability to foresee the exact details of future regulation does not provide it with a "reasonable" investment-based expectation that a statutory provision will remain forever unchanged. Rather, a plaintiff's expectations in a highly regulated industry are reasonable only if the expectations recognize that there may be changes to the statutory and regulatory provisions that may affect the underlying investment. *American Cont'l Corp. v. United States*, 22 Cl. Ct. 692, 697 (1991) ("when an investment is made in such a highly regulated industry, to be reasonable, expectations must be based not only on then-existing federal regulations but also on the recognition that there may well be related changes in the regulations in the future"). Therefore, to the extent Washington Federal alleges that it made its investment in Reserve Bank stock based upon an expectation of six-percent dividends in perpetuity, that expectation was not reasonable as a matter of law.

2. Plaintiffs Have Not Suffered A Sufficiently Adverse Economic Impact To Support A Regulatory Takings Claim

A regulatory taking claim also requires evaluating the extent of the economic impact of the Government's regulation on the owner's property. *Penn Central*, 438 U.S. at 124. The economic impact to plaintiffs' property here cannot support a finding of a regulatory taking.

Plaintiffs' property interest, to the extent it exists, is in the value of Washington Federal's investment in Reserve Bank stock. The FAST Act and implementing regulations have not

sufficiently impaired the value of that property to effect a taking. Generally, even substantial impairment of the market value of property incident to legitimate Government action, in the absence of impairment of the owner's right to dispose of the property, ordinarily does not result in a taking. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 15 (1984). "Loss of future profits" – here, in the form of a portion of dividends on Reserve Bank stock – "provides a slender reed upon which to rest a takings claim." *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

In determining the economic impact of the regulatory imposition on a property, courts evaluate the change in fair market value as a result of the regulation. *Walcek v. United States*, 49 Fed. Cl. 248, 258 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002). The fair market value is defined as "the price at which the property would change hands between a willing buyer and a willing seller." *United States v. Cartwright*, 411 U.S. 546, 551 (1973) (citation omitted). In other words, the Court must "compare the value that has been taken from the property with the value that remains in the property." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). Of course, Reserve Bank stock is highly regulated, and its value is set by statute at $100 per share. 12 U.S.C. § 287. It cannot be sold between willing private buyers and sellers, *see id.*, but if a bank withdraws its Reserve Bank membership, the bank will receive the stock's full, initial value. 12 U.S.C. § 328. The regulatory change to expected dividends, therefore, does not create a significant economic impact to Washington Federal's property, and a loss to expected profits in the form of dividends cannot support a valid takings claim. *See Andrus*, 444 U.S. at 66.

Even if plaintiffs possessed a valid property interest in future dividends (which they do not), the economic impact of the reduction in the dividend percentage rate does not result in a regulatory taking. Plaintiffs allege a 65 percent reduction in Washington Federal's dividends

from 2015 to 2016. *See* Compl. ¶ 4 (reduction from $1,439,304 to $502,571.53 of Washington Federal's dividends). Courts have consistently held, however, that even greater diminutions in value, although significant, do not result in a regulatory taking. In *Rith Energy, Inc. v. United States*, 270 F.3d 1347 (Fed. Cir. 2001), for example, the Federal Circuit held that when a regulation decreased the amount of coal to be mined pursuant to certain leases by 91 percent, no regulatory taking existed. *Id.* at 1349, 1352. The Court explained: "Although the regulatory action in this case caused a substantial diminution in the value of Rith's coal leases, it did not deprive Rith of its opportunity to make a profit on the leases; it simply reduced the margin of profit that Rith had hoped to achieve." *Id.* at 1352.

Of course, the actual percentage impact on the stock's value is actually even lower, as plaintiffs receive non-financial benefits by holding the stock, including maintenance of national bank status and voting rights within the FRB. Indeed, the fact that Washington Federal has chosen to keep its Federal Reserve membership – rather than cashing in its stock – proves the remaining value of its shares. Moreover, although the dividend rate pursuant to the FAST Act will fluctuate over time, plaintiffs have not and cannot plausibly allege that Washington Federal will lose all or almost all of the value of its Reserve Bank stock necessary to sustain a regulatory taking claim.

The last *Penn Central* factor – the character of the governmental action – also weighs against plaintiffs' takings claim. The Supreme Court in *Penn Central* explained that a regulatory action is more likely to constitute a taking if it is like a physical invasion than if the action "merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. In this regard, courts also evaluate the nature of the encumbrance on a plaintiff's property, and

regulations that impinge upon the "most essential" property rights, like the right to exclude others or the right to sell, are more likely to create compensable takings. *Hodel v. Irving*, 481 U.S. 704, 716-18 (1987). Here, the FAST Act's amendment to the statutory dividend rate bears none of the characteristics of a physical invasion or an encumbrance on Washington Federal's most essential rights in its Reserve Bank stock and membership. Rather, the FAST Act merely adjusted the benefits that member banks receive from their stock.

3. Plaintiffs Cannot Establish A Categorical Taking

Plaintiffs allege, "in the alternative," that they have suffered a taking of their capital investments because of the "substantial reduction" in the interest paid. Compl. ¶ 89. This appears to be an attempt to allege a categorical regulatory taking, but such a claim fails.

Categorical takings are a narrow class of regulatory takings claims in which, if the owner has lost *all* of the value of its property through regulation, the takings claims need not be evaluated under the *Penn Central* factors. Categorical takings, however, apply only to land. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1993). Regulation that deprives an owner of all use of his or her land is an exceptional circumstance because, "while an owner of personal property 'ought to be aware of the possibility that new regulation might even render his property economically worthless,' such an 'implied limitation' was not reasonable in the case of land." *Horne v. Dept. of Agric.*, 135 S. Ct. 2419, 2427 (2015) (quoting *Lucas*, 505 U.S. at 1027-28). Thus, the categorical takings analysis does not apply here.

Although, in 2003, the Supreme Court suggested in dicta that money may also be subject to a categorical taking, *Brown*, 538 U.S. at 221-22 (finding no taking and evaluating the alleged taking more like a physical taking rather than a regulatory taking), the Court more recently in 2015 affirmed in dicta that *Lucas*'s distinction between real property and personal property still applies. *See Horne v. Dept. of Agric.*, 135 S. Ct. at 2427 (both real property and personal

property are equally protected against physical appropriation, as distinct from the categorical takings defined by *Lucas*). Therefore, regulatory takings cases not involving land still require an analysis of the *Penn Central* factors.

Moreover, even if personal property could be subject to a categorical taking, plaintiffs have failed to allege such a taking here because a categorical taking occurs only if regulatory action denies the owner of *all* economically beneficial or productive use of his or her property. *Lucas*, 505 U.S. at 1015; *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg. Planning Agency*, 535 U.S. 302, 332 (2002) (explaining that *Lucas* "was carved out for the 'extraordinary case'"). Even an almost complete diminution in value cannot be a categorical taking. *Rith Energy*, 270 F.3d at 1347 (91 percent decrease in property value did not constitute a categorical taking). The Supreme Court has consistently held that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (approximately 75 percent diminution), and *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (92.5 percent diminution)).

The value of Washington Federal's property here, properly measured as its Reserve Bank stock, has not been categorically wiped out. Washington Federal still possesses the same number of shares with the same dollar value, and is entitled to a full refund of its paid-up capital at any time by withdrawing from the Federal Reserve. 12 U.S.C. § 328. Moreover, Washington Federal still receives dividends, so to the extent it possesses a valid property interest in unearned dividends (which it does not), its property interest has been diminished rather than categorically taken.

Because plaintiffs' allegations cannot establish the factors required for a regulatory taking either as a categorical taking or under the *Penn Central* standard, this Court should dismiss plaintiffs' takings claims for failure to state a claim upon which relief may be granted.

CONCLUSION

For these reasons, we respectfully request that the Court grant this motion and dismiss the complaint, or enter summary judgment for the United States on Counts I and II.

Respectfully submitted,

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