IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WASHINGTON FEDERAL, *et al.*,	)	
	)	
Plaintiffs,	)	No. 13-385 C
	)	(Chief Judge Sweeney)
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

JOINT STATUS REPORT

Pursuant to the Court's order dated February 20, 2020 (ECF No. 83), the parties respectfully provide this status report addressing the Court's inquiry regarding the parties' willingness to discuss joint stipulations as to the effects of the Court's motion-to-dismiss ruling in *Fairholme Funds, Inc., et al. v. United States*, No. 13-465, on plaintiffs' claims.

Defendant's Position

After undertaking preliminary discussions with counsel for plaintiffs in the 11 Stayed Actions at issue,[1] defendant has concluded that it will be unable to enter into the stipulations suggested in the Court's Order.

Counsel for plaintiffs in 10 of the 11 Stayed Actions have communicated to us that they will ask the Court to (1) lift the stays currently in place; and (2) ultimately seek certification of separate interlocutory appeals in each of the actions.[2] We cannot agree to such a process. The

[1] *Washington Federal v. United States*, No. 13-385C; *Cacciapalle v. United States*, No. 13-466C; *Fisher v. United States*, No. 13-608C; *Arrowood Indem. Co. v. United States*, No. 13-698C; *Reid v. United States*, No. 14-152C; *Rafter v. United States*, No. 14-740C; *Owl Creek Asia I, L.P. v. United States*, No. 18-281C; *Akanthos Opportunity Master Fund, L.P. v. United States*, No. 18-369C; *Appaloosa Inv. Ltd. P'ship I v. United States*, No. 18-370C; *CSS, LLC v. United States*, No. 18-371C; and *Mason Capital L.P. v. United States*, No. 18-529C.

[2] Counsel for plaintiffs in *Arrowood Indem. Co. v. United States*, No. 13-698C, have not yet decided whether they will seek to lift the stay and pursue an appeal.

parties in *Fairholme* have filed motions to certify an interlocutory appeal; should the Court grant the motion, petitions for interlocutory appeal will be filed with the United States Court of Appeals for the Federal Circuit in the near future. One interlocutory appeal is the most efficient means for advancing the Third Amendment litigation in this Court, given that the *Fairholme* appeal will resolve all common legal questions in the Stayed Actions. Indeed, any effort to certify 10 or 11 interlocutory appeals is sure to place an undue burden on the Court, the Government, and the Federal Circuit. Multiple petitions for interlocutory appeal may jeopardize the success of a petition for interlocutory appeal in *Fairholme*. We will not, however, oppose requests by plaintiffs in the 11 Stayed Actions to participate in the interlocutory appeal through the filing of amicus briefs. Further, we have communicated to plaintiffs that we would not oppose motions to lift the current stays for purposes of dismissal of their complaints, so they make take appeals as of right to the Federal Circuit. None of the plaintiffs, however, has agreed to move forward on such terms.

We note that there is precedent in the Court for staying a group of related cases while a decision in one case proceeds through the appeals process: the *Winstar* litigation. In *Winstar*, the Court stayed over 100 cases pending appeals in three test cases that proceeded to the Federal Circuit, and, ultimately, the Supreme Court. *See*, *e.g.*, *S. Cal. Fed. Sav. & Loan Ass'n v. United States*, 52 Fed. Cl. 531, 537 (2001). Thus, there is no reason to lift the stays in the 11 Stayed Actions at issue here while the *Fairholme* decision is considered on interlocutory appeal, given that, with only one exception, each action challenges the same 2012 amendments to preferred stock purchase agreements executed by the Federal Housing Finance Agency, on behalf of Fannie Mae and Freddie Mac, and the Department of the Treasury. Resolution of the issues raised by the Government and Fairholme in their respective motions for interlocutory appeal will

inform the path forward for the Stayed Actions, as the Court acknowledged in its February 20 Order ("An interlocutory appeal in Fairholme is likely to address (if not resolve) issues that are germane to the parties in the instant case because of the similarities between the two complaints.").

Finally, given that motions to lift the stays currently in place have now been filed by plaintiffs in 9 of the 11 Stayed Actions, we plan to seek an extension of the deadlines for our responses to those motions. Such an extension will allow sufficient time for the Government to formulate and coordinate its responses to the motions.

Plaintiffs' Position

The Government acknowledges that the anticipated interlocutory appeal in *Fairholme* will not address the "one exception" in the 11 related cases—this action. Plaintiffs' case, the first of the 12 filed in 2013, is indeed the exception. Unlike the other actions, including *Fairholme*, Plaintiffs' focus is not the Third Amendment. Rather, Plaintiffs are the only Fannie Mae and Freddie Mac shareholders contending that the United States' conservatorships were wrongfully imposed upon these companies ***from their inception*** in 2008. ECF No. 57 at 23-32¶¶58-81(operative *Washington Federal* complaint). Given that *Fairholme* cannot be dispositive, how is this "exception" to be addressed short of the Court's ruling on Plaintiffs' complaint? The Government seeks dismissal. It cites, however, no relevant authority for evading a ruling on its own motion simply because another case—by the Government's own description different from this action—may soon go on appeal.

Thus, in a case that has been pending for nearly seven years, and still at the pleading stage, the Government seeks to avoid a ruling on its motion to dismiss this action by now urging an indefinite stay. First, this would plainly run afoul of binding guidance set forth in *Landis v. N.*

Am. Co., 299 U.S. 248 (1936), and *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413 (Fed. Cir. 1997). *See* Plaintiffs' Motion to Lift Stay and for an Order Ruling on the Government's Motion to Dismiss this Action, ECF No. 84 at 3-4 ("Motion to Lift Stay").

Second, with Plaintiffs' rejection of the Court's suggestion to consider stipulations, and their filing of the Motion to Lift Stay, the Government's now proffers two theories for allowing Plaintiffs to be treated co-equally with *Fairholme*, both of which miss the mark. As an initial matter, it should surprise no one that Plaintiffs will not stipulate to dismissing this action without a ruling on the Government's motion since an amicus brief in a *Fairholme* appeal would not protect their distinct interests. ECF No. 84 at 5.

The Government first argues that multiple interlocutory appeals would unduly burden the Federal Circuit. But the appellate court is better positioned to make that call. The Federal Circuit should not be precluded the opportunity to rule collectively, in the interest of judicial economy, or as it otherwise sees fit, on all the complaints in the related actions if that is its preference.

The Government next argues that this Court should stay this action based on *Winstar*, a trial court decision staying "over 100 cases" while "three test cases" went on appeal. The circumstances here, however, do not present those manageability concerns and, given the differences in the related actions, *Fairholme* is not a test case. Moreover, *Winstar* cannot overcome *Landis* and *Cherokee Nation*, which the Government makes no effort to address.

Finally, to clarify the process for addressing the Government's motion to dismiss the 11 related actions, Plaintiffs respectfully ask the Court to set a status conference at its earliest convenience.

Respectfully submitted,

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