IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., *et al*.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 13-465C
	)	(Chief Judge Sweeney)
THE UNITED STATES,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' MOTION TO CERTIFY INTERLOCUTORY APPEAL

INTRODUCTION

Plaintiffs' Fairholme Funds, Inc., et al. ("Plaintiffs" or "Fairholme") respectfully move, pursuant to 28 U.S.C. § 1292(d)(2), for entry of an order certifying for immediate appeal the Court's decision dismissing certain of Plaintiffs' claims. In particular, Plaintiffs request that the Court "amend its order" of December 6, 2019,[1] FED. R. APP. P. 5(a)(3), to include a statement finding that the Court's decision dismissing Plaintiffs' direct claims involves controlling questions of law with respect to which there are substantial grounds for difference of opinion, and finding that an immediate appeal from that order may materially advance the ultimate termination of this litigation.

Those controlling questions of law include whether (1) this Court lacks subject-matter jurisdiction over Plaintiffs' direct claims for breach of fiduciary duty and breach of implied-in-fact contracts; (2) whether Plaintiffs who purchased stock in Fannie Mae and Freddie Mac (together, the "Enterprises" or the "GSEs") after the third amendment to the Preferred Stock Purchase

[1] This Court's Opinion and Order granting in part and denying in part the Government's motion to dismiss was originally issued under seal on December 6, 2019, and was subsequently reissued for publication on December 13, 2019. *Fairholme Funds, Inc. v. United States*, 146 Fed. Cl. 17 (2019) (referred to herein as the "*MTD Order*").

Agreements (the "PSPAs") lack standing to pursue their direct takings claims; and (3) whether Plaintiffs lack standing to pursue the claims that have been pled as direct claims because those claims are in substance derivative in nature. As discussed below, these questions themselves implicate important subsidiary questions of law that would need to be addressed on appeal.

Plaintiffs fully appreciate the great care taken by the Court in addressing the numerous and often complex issues raised by Plaintiffs' claims in this important case and by the Government's motion to dismiss those claims. Plaintiffs also understand, and endorse, the important policies underlying the final judgment rule, and fully share the significant concerns about the potential for delay, expense, and other inefficiencies that are often associated with piecemeal appeals in run of the mill cases that have not yet proceeded to final judgment. It is for good reason that interlocutory appeals "are only reserved for 'exceptional cases.'" *American Airlines, Inc. v. United States*, 71 Fed. Cl. 744, 745 (2006) (citing *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996)). But as this Court understands perhaps better than anyone, this case, whether viewed through the prism of the underlying Government conduct at its heart, its stakes, or the number and complexity of the issues presented by the Government's motion to dismiss, is about as far from "run of the mill" as litigation in this Court can get. For these reasons and others, the certification of an immediate interlocutory appeal from the MTD Order, far from undermining judicial economy and the efficient resolution of this case, would directly serve those considerations.[2]

Moreover, the case for an immediate appeal is buttressed by the fact that the Government

[2] The Court no doubt had such considerations in mind when it observed, during the November 19, 2019 hearing on the Government's motion to dismiss, that certification of its ruling on that motion probably made "good sense" and was likely the "logical next step[]" in the litigation. Transcript of Oral Argument Defendant's MTD at 250, *Fairholme Funds, et al. v. United States* (Nov. 19, 2019) ("Transcript").

is independently seeking certification of an appeal, as well as by the fact that an interlocutory appeal in this case "is likely to address (if not resolve) issues that are germane" to numerous other cases pending in the Court of Federal Claims challenging the Net Worth Sweep. *See, e.g.*, Order at 1, *Rafter v. United States*, No. 14-740 (Feb. 20, 2020). Though the Court must, in the final analysis, make its own independent judgment regarding whether certification of an interlocutory appeal is appropriate, the fact that the litigants in this case (as well as many of the litigants in the related litigation pending before the Court) apparently agree that the ultimate resolution of this important litigation would be materially advanced by an immediate appeal is significant.

ARGUMENT

Section 1292(d)(2) allows this Court to certify orders for immediate interlocutory review under certain circumstances. The statute provides that

> when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

28 U.S.C. § 1292(d)(2). Thus, under the statute, certification of an interlocutory appeal should be allowed if the Court finds that: (1) the decision to be appealed presents "a controlling question of law"; (2) that question is one "with respect to which there is substantial ground for difference of opinion"; and (3) "an immediate appeal . . . may materially advance the ultimate termination of the litigation." *See American Airlines*, 71 Fed. Cl. at 745. Taken together, these statutory criteria are "designed to weigh the relative benefits of an immediate appeal." *American Telephone and Telegraph Co. v. United States*, 33 Fed. Cl. 540, 541 (1995) ("*AT&T*"). The analysis

and weighing of these statutory criteria is committed to the sound discretion of this Court. *Nebraska Public Power Dist. v. United States*, 74 Fed. Cl. 762, 763 (2006). *See also Petro-Hunt, LLC v. United States*, 91 Fed. Cl. 447, 452 (2010); *Starr Int'l Co. v. United States*, 112 Fed. Cl. 601, 603 (2013).

As this Court has stressed, these standards are "to be applied strictly to preserve the important policies that underlie the final judgment rule, *i.e.*, avoiding piecemeal litigation, avoiding harassment due to separate appeals from the same litigation, and promoting efficient judicial administration." *American Airlines*, 71 Fed. Cl. at 745 (citations omitted) (internal quotation marks omitted). For these reasons, "[i]t is well-accepted that interlocutory appeals under [Section 1292(d)(2)] are reserved for 'exceptional' or 'rare' cases and should be authorized only with great care." *Nebraska Public Power*, 74 Fed. Cl. at 763 (citations omitted). Plaintiffs respectfully submit that this is one of those "exceptional" cases in which interlocutory review is appropriate.

I. THE MTD ORDER PRESENTS CONTROLLING QUESTIONS OF LAW.

For purposes of Section 1292(d)(2), decisions present a "controlling question of law" when their resolution would "materially affect issues remaining to be decided in the trial court." *Nebraska Public Power*, 74 Fed. Cl. at 763 (citations omitted). *See also Coast Fed. Bank, FSB v. United States*, 49 Fed. Cl. 11, 13 (2001) (same); *American Mgmt. Sys., Inc. v. United States*, 57 Fed. Cl. 275, 276–77 (2003) (same); *Marriott Int'l Resorts, L.P. v. United States*, 63 Fed. Cl. 144, 145 (2004) (same). By contrast, a question is not "controlling" when it involves the analysis of "narrow, nondispositive legal issues." *American Mgmt. Sys.*, 57 Fed. Cl. at 277. Here, there can be little doubt that the Court's analysis and resolution, through the *MTD Order*, of Plaintiffs' direct claims easily clear this hurdle.

Put simply, the Court's dismissal of Plaintiffs' direct claims alleging a taking without just

compensation (Count I), illegal exaction (Count IV), breach of fiduciary duty (Count VII), and breach of an implied-in-fact contract (Count X) cannot help but materially affect litigation of the issues remaining to be decided by the Court. For example, the scope of the litigation will be affected by the ruling dismissing direct claims. The types and measures of any damages or other monetary relief to be recovered in this case are almost certainly dependent upon not only the legal theory upon which the Government's liability is premised, but also upon whether the claims upon which such damages are based are direct or derivative, or both. Thus, the nature and scope of any expert analyses and discovery relating to those questions are materially affected by the Court's decision. *See, e.g., Coast*, 49 Fed. Cl. at 13 (finding issue of contract interpretation controlling where "proceedings on damages will . . . be 'controlled' by the resolution of [that] question, because plaintiff will be expected to prepare a damages projection consistent with the court's holding on this issue of contract interpretation").

For the same reasons, many of the Court's subsidiary rulings in support of its dismissal of Plaintiffs' direct claims present controlling questions of law. Those questions include: (1) whether Plaintiffs' direct claims for breach of fiduciary duty sound in tort, and are thus outside this Court's Tucker Act jurisdiction, *MTD Order*, 146 Fed. Cl. at 53–56; (2) whether, for purposes of the Court's jurisdiction, Plaintiffs are third-party beneficiaries of an implied-in-fact contract between the Government and the GSEs, *id.* at 57–58; (3) whether Plaintiffs who purchased GSE stock after the Third Amendment have standing to litigate their direct takings claims, *id.* at 59–60; and (4) whether Plaintiffs lack standing to litigate their "nominally" direct claims because those claims are substantively derivative in nature, *id.* at 61–63.

Because the Court's analysis of each of the above questions unquestionably led to its ultimate disposition of Plaintiffs' direct claims, the resolution of each of these subsidiary questions

materially affects the consideration of the issues remaining before the Court. Stated differently, there can be little question that were the Court of Appeals to disagree with the Court's analysis of any of these questions, it would likely reverse the Court's dismissal of Plaintiffs' direct claims, which would in turn materially affect the nature and scope of proceedings before this Court. And none of these questions can legitimately be characterized as "involving narrow, non-dispositive legal issues." *American Management Systems*, 57 Fed. Cl. at 277. Each question is itself therefore "controlling" for purposes of the certification inquiry.

II. THERE EXISTS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION WITH RESPECT TO THE CONTROLLING QUESTIONS OF LAW DECIDED BY THE COURT.

The second criterion under the statute focuses on whether "there is a substantial ground for difference of opinion" with respect to the controlling questions of law identified under the first criterion. 28 U.S.C. § 1292(d)(2). While there are few if any bright line rules governing this inquiry, numerous decisions of this Court identify common examples of scenarios in which such a substantial ground has been found:

> The Federal Circuit has held that one basis for this "substantial ground" may be two different, but plausible, interpretations of a line of cases. *See Vereda, Ltda. v. United States*, 271 F.3d 1367, 1374 (Fed. Cir. 2001) . . . More often, however, this criterion manifests itself as splits among the circuit courts, an intracircuit conflict or a conflict between an earlier circuit precedent and a later Supreme Court case, or, at very least, a substantial difference of opinion among the judges of this court.

Klamath Irrigation Dist. v. United States, 69 Fed. Cl. 160, 163 (2005). *See also American Airlines*, 71 Fed. Cl. at 746; *Petro-Hunt*, 91 Fed. Cl. at 452–53. In addition, although the fact that a question is one of first impression does not necessarily establish the existence of a substantial ground for difference of opinion, *Kislev Partners, LP ex rel. Bahar v. United States*, 84 Fed. Cl. 378, 385 (2008), neither does that fact defeat the conclusion that such a substantial ground exists. Indeed, both this Court and the Federal Circuit have found questions of first impression suitable

for interlocutory appeal. *See American Mgmt. Sys.*, 57 Fed. Cl. 275, 277 (collecting cases). *See also Wolfchild v. United States*, 78 Fed. Cl. 472, 483 (2007) (finding this criterion satisfied in "a case of first impression"). Ultimately, this inquiry calls upon the Court to exercise its judgment to determine whether a question of law is so difficult and so close as to justify appellate consideration of that question before a case has proceeded to final judgment.[3]

Plaintiffs submit, with respect, that this criterion is easily satisfied here. The parties devoted significant briefing, and hours of oral argument, to this Court's jurisdiction over, and Plaintiffs' standing to assert, their direct claims, and to the subsidiary issues examined by the Court in its analysis of those issues. As the Court aptly observed at the conclusion of the marathon oral argument on the Government's motion to dismiss, this case "presents an intellectual feast" with a large number of "thorny legal issues." Transcript at 391. While not dispositive, the Court's observation strongly supports the conclusion that the questions that would be the subject of any interlocutory appeal are ones about which substantial grounds for differences in opinion exist. *See Coast*, 49 Fed. Cl. at 14 (noting, in granting certification, that the parties had devoted "more than 200 pages of briefs and numerous hours of argument" to the issue for which certification was sought).

Turning to some of the specific questions relating to Plaintiffs' direct claims that were addressed by the Court in its decision, the parties' briefing and argument underscore the existence of legal authorities and principles that provide substantial grounds for conclusions that may differ from those reached by the Court. Thus, even assuming the general soundness of the Court's

[3] *See Wolfchild*, 78 Fed. Cl. at 484 (noting, where Court's resolution of legal question of whether trust was created was based on painstaking analysis of numerous statutes and implementing steps, that in such circumstances, losing litigant's view that it made sense to "present its arguments to the court of appeals at this [interlocutory] juncture" was entitled to "some weight").

analytical approach to these legal issues, there can be little question that a substantial ground exists for different conclusions with respect to each of them. Examples of such questions include, but are not limited to, the following:

(1) ***Whether Plaintiffs' direct claims for breach of fiduciary duty sound in tort, and are thus outside this Court's Tucker Act jurisdiction***. The Court based its ruling that Plaintiffs' direct claims for breach of fiduciary duty sounded in tort primarily upon its conclusion that HERA did not establish a fiduciary relationship between FHFA or Treasury, on the one hand, and the GSEs' private shareholders, on the other. *See MTD Order*, 146 Fed. Cl. at 54–56. As the briefing and argument established, however, HERA includes numerous provisions supporting the conclusion that when FHFA as conservator assumed control over the GSEs' assets, rights, powers, and privileges, and when Treasury exercised its HERA authority to invest in Fannie and Freddie while they were in conservatorship, those agencies undertook fiduciary responsibilities to the Enterprises' private shareholders. *See* Pls.' Omnibus Resp. to Def.'s Mot. to Dismiss, Doc. 428, at 70–74, *Fairholme Funds, Inc. v. United States*, No. 13-465C (Nov. 2, 2018) ("MTD Opp."). Moreover, the Court's conclusion is in considerable tension, if not outright conflict, with both decisions from other courts interpreting analogous provisions of FIRREA as imposing fiduciary obligations upon receivers, *see* MTD Opp. at 72–73 (citing cases), and with the Supreme Court's decision in *United States v. Mitchell*, 463 U.S. 206 (1983), interpreting a federal statute similar in certain significant respects to HERA as encompassing the elements of a common-law trust under which the Government assumed fiduciary responsibilities. *See* MTD Opp. at 70–71. *Cf. Nebraska Public Power*, 74 Fed. Cl. at 764 (certifying question where there was a "healthy tension" between relevant precedents, even though court was "hesitant to characterize those tensions as giving rise to full blown intracircuit or intercircuit conflicts").

(2) ***Whether, for purposes of the Court's jurisdiction, Plaintiffs are third-party beneficiaries of implied-in-fact contracts between the Government and the GSE's.*** Plaintiffs have argued, among other things, that under Federal Circuit precedent, the facts as alleged in their complaint demonstrated the existence of implied-in-fact contracts between FHFA and the GSEs, and that the contracting parties demonstrated an intention to directly benefit private shareholders, thus establishing Plaintiffs' status as third party-beneficiaries of those contracts. *See* Corrected Combined Opp'n to Def.'s Omnibus Mot. to Dismiss, Doc. 31 at 32–35, *Owl Creek Asia I, L.P. v. United States*, No. 18-281C (Feb. 22, 2019).[4] While the Court rejected those arguments based on its own reading of many of the same precedents, *MTD Order,* 146 Fed. Cl. at 58, the question is close enough, and important enough, to warrant certification. *Cf. Nebraska Public Power*, 74 Fed. Cl. at 764 (certifying interlocutory appeal even though Court believed its ruling "flow[ed] from the controlling precedents of the Federal Circuit").

(3) ***Whether Plaintiffs who purchased GSE stock after the Third Amendment have standing to litigate their direct takings claims.*** In at least two respects, substantial grounds for a difference of opinion exist with respect to the Court disposition of this issue. First, as the Court itself observed, multiple decisions, including decisions by the Supreme Court, caution against courts reaching out to decide thorny standing issues when it is clear that at least one plaintiff possesses standing. *See MTD Order,* 146 Fed. Cl. at 59. *See also* MTD Opp. at 35. Second, and more importantly, on the merits, the Court's invocation of what appears to be a blanket rule that only owners of stock at the time of an alleged taking possess standing to seek compensation for that taking, *MTD Order,* 146 Fed. Cl. at 60, is in considerable tension not only with Supreme

[4] Plaintiffs adopted the implied-in-fact contract arguments in the *Owl Creek* brief in their own opposition to the motion to dismiss. *See* Pls.' Suppl. Br. in Resp. to Mot. to Dismiss, Doc. 429, *Fairholme Funds, Inc. v. United States*, No. 13-465C (Oct. 2, 2018).

Court precedent holding that such blanket exemptions from takings liability are disfavored, *see* MTD Opp. at 35 (citing *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012) and *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017)), but also with decisions explicitly rejecting the notion that post-taking purchasers of property can never bring a regulatory takings challenge. *See* MTD Opp. at 35–38 (discussing, *inter alia*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) and *Bailey v. United States*, 78 Fed. Cl. 239 (2007)).[5]

(4) ***Whether Plaintiffs lack standing to litigate their "nominally" direct claims because those claims are substantively derivative in nature.*** Whether the claims that Plaintiffs pled as direct were actually derivative in substance consumed a significant portion of the parties' briefing and oral argument. *See, e.g.*, MTD Opp. at 21–25; Transcript at 160–73, 179–92, 210–12. The authorities cited in the parties' brief speak to the complexity of this issue.

For these reasons, it is clear that substantial grounds for differences of opinion exist with respect to the controlling questions of law that the Court decided in rejecting Plaintiffs' direct claims.[6]

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[5] Notably, the Court did not expressly distinguish *Bailey* in its discussion of standing. Rather, the Court noted that our "reliance on *Bailey*, a decision issued by another judge on this court, is ill-considered," *MTD Order*, 146 Fed. Cl. at 60, thus further demonstrating, at a minimum, the existence of a "substantial difference of opinion among the judges of this court" with respect to this question. *Klamath*, 69 Fed. Cl. at 163.

[6] In addition to ruling adversely to Plaintiffs on questions of law in connection with its dismissal of the direct claims, the Court also made adverse rulings on other questions of law that did not lead directly to the dismissal of those claims. With respect to some of those rulings, which may become relevant to any request by the Government to certify other aspects of the *MTD Order* for interlocutory appeal, there exist substantial grounds for difference of opinion. To take one example, in addressing whether Plaintiffs' claims were against the United States, the Court ruled that FHFA acted within its statutory authority under HERA when it implemented the Net Worth Sweep. *MTD Order*, 146 Fed. Cl. at 42–43. Notably, the Court recognized that while its ruling on this issue was supported by the decisions of several other courts, that ruling was in conflict with the Fifth Circuit's decision on this statutory authority issue. *Id.* (including "but see" cite to *Collins v. Mnuchin*, 938 F.3d 553, 582 (5th Cir. 2019) (en banc)).

III. AN IMMEDIATE INTERLOCUTORY APPEAL WILL MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION.

The third criterion under the statute is whether an immediate appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(d)(2). This factor requires the Court to exercise its judgment in weighing the relative costs and benefits of an interlocutory appeal against the costs and benefits of proceeding to final judgment. *See Coast*, 49 Fed. Cl. at 14 ("Whether interlocutory review of this question would materially advance the resolution of this case depends in large part on considerations of 'judicial economy' and the need to avoid 'unnecessary delay and expense' and 'piecemeal litigation.'") (citations omitted). *See also Nebraska Public Power*, 74 Fed. Cl. at 764 (same); *Klamath*, 69 Fed. Cl. at 163; *AT&T*, 33 Fed. Cl. at 541 (statutory test "designed to weigh the relative benefits of an immediate appeal").

These considerations tip the balance in favor of interlocutory review. While certification under Section 1292(d)(2) may delay proceedings in this Court and raises the possibility of piecemeal appeals, those potential costs are outweighed by the considerable benefits of allowing the Federal Circuit to address the multiple critically important controlling questions of law decided by the Court. In the absence of an immediate appeal, the parties will presumably proceed to expert discovery, motions practice, and ultimately trial on the issues pertaining to Plaintiffs' derivative claims that remain before the Court. Those proceedings are likely to be time-consuming for the litigants and for the Court, and they will consume considerable resources. If Plaintiffs were forced to await the conclusion of those proceedings before appealing from the dismissal of their direct claims, there is a significant chance, given the controlling nature of the questions decided by the Court pertaining to those claims and the substantial grounds for differing opinions on those questions, that additional time-consuming proceedings on remand would be necessary. That danger is especially pronounced considering, as discussed above, that the damages on any

direct claims that may be reinstated on appeal would likely be analyzed and measured differently than the damages on the derivative claims that remain in the case. *See Coast*, 49 Fed. Cl. at 14-15 (finding that judicial economy favored interlocutory appeal where resolution of the issue to be appealed "substantially affects plaintiff's damages model," such that a reversal by the Federal Circuit following entry of final judgment "would necessitate retrying those damages issues"); *Wolfchild*, 78 Fed. Cl. at 484 (finding that judicial economy favored interlocutory appeal where the issue to be appealed was "at the heart of this litigation" and an appellate ruling on that issue "would advance the resolution of the disputed matters").

In short, this case presents one of the rare occasions in which the benefits of immediate appeal outweigh the costs, and where "much can be gained by having the court of appeals address the controlling questions in the case on an interlocutory basis rather than at the conclusion of what could otherwise prove to be a much protracted lawsuit." *AT&T*, 33 Fed. Cl. at 541.

That conclusion is further buttressed by the fact that appellate resolution of the questions decided by the Court in this case would affect the numerous other cases pending in the Court of Federal Claims in which the Net Worth Sweep is being challenged. *See, e.g.*, *Statesman Sav. Holding Corp. v. United States*, 26 Cl. Ct. 904, 923–24 (1992) (certifying interlocutory appeal from liability rulings in three "*Winstar*" cases where those rulings "affect eighteen very large and complex cases" raising similar claims). *See also Nebraska Public Power*, 74 Fed. Cl. at 764 (finding that resolution of issue on interlocutory appeal "potentially impact[ed] all of the dozens of spent nuclear fuel cases pending before this court"); *AT&T*, 33 Fed. Cl. at 540 (finding that the benefits of an interlocutory appeal "extend beyond the boundaries of the instant case" where the court's ruling "puts in doubt the legality of a large number" of Government contracts).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order, pursuant to 28 U.S.C. § 1292(d)(2), certifying for immediate appeal the Court's order dismissing Plaintiffs' direct claims, including the subsidiary issues included in that ruling discussed in this motion, and that the Court reissue its December 6, 2019 Opinion and Order to include a statement finding that the Court's decision dismissing those direct claims involves controlling questions of law with respect to which there are substantial grounds for difference of opinion, and further finding that an immediate appeal from that order may materially advance the ultimate termination of this litigation.

February 21, 2020

Respectfully submitted,

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