UNITED STATES COURT OF FEDERAL CLAIMS

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

MASON CAPITAL L.P., *et al.*, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-529C (Chief Judge Sweeney)

JOINT STATUS REPORT

Pursuant to the Court's order dated February 20, 2020 (ECF No. 61), the plaintiffs (the "Jones Day Plaintiffs") in *Owl Creek Asia I, L.P. v. United States*, No. 18-281 ("*Owl Creek*"); *Appaloosa Investment Limited Partnership I v. United States*, No. 18-370 ("*Appaloosa*"); *Akanthos Opportunity Master Fund, L.P. v. United States*, No. 18-369 ("*Akanthos*"); *CSS, LLC v. United States*, No. 18-371 ("*CSS*"); and *Mason Capital L.P. v. United States*, No. 18-529 (collectively, the "Jones Day Actions") and the government (and together with the Jones Day Plaintiffs, 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 the Jones Day Plaintiffs' claims.

The Jones Day Plaintiffs request that this Court hold a status conference no later than March 6, 2020 so that the Parties' issues may be addressed together. The government opposes this request.

Plaintiffs' Position

Since this Court on February 20, 2020, issued its order on the Jones Day Plaintiffs' motion to lift the stay, the Plaintiffs have diligently pursued the possibility of entering into a stipulation with the government as suggested by this Court, including exploring what the content

and composition of such a stipulation might look like. The Jones Day Plaintiffs accordingly reached out to the government and proposed that, today, in response to the Court's request for a joint status report, the Parties simply report that they were willing to discuss a stipulation. The government, however, made clear at 3:00 p.m. (Eastern) this afternoon that it was not interested in discussing anything resembling what the Court suggested; it also then presented us with a draft of its portion of a joint status report.

It appears from the government's position that the Court's suggestion will not bear fruit. So the issues that the Jones Day Plaintiffs raised in their motion to lift the stay remain as acute as before. As the Court itself recognized in its Order of February 20, 2020 (*e.g., Owl Creek* ECF 46), the concern we have raised "is not an unfair" one, "given the significant overlap" between our complaints and that in *Fairholme*. And as the Jones Day Plaintiffs detailed in their motion, continuing the stay in this action is wholly unwarranted, even a potential abuse of discretion, given the—at a minimum—"fair possibility" that an appeal in *Fairholme* will prejudice Plaintiffs. This is so particularly because the Jones Day Plaintiffs' claims, although similar in certain respects to those raised in *Fairholme*, were pled differently with different facts and allegations. And, although time does not permit a full response to the government's joint status report, the three *Winstar* cases that had reached the liability stage were consolidated for appeal. Similarly here, all of the GSE cases are at the same stage—indeed, coordinated for the briefing and argument of the motion to dismiss that is the sole matter for appeal now. They accordingly should be permitted to go up on appeal together. Moreover, the circumstances here do not present the manageability concerns present in *Winstar* and, given the differences in the related actions, *Fairholme* is not a test case. *Winstar* also cannot overcome *Landis* and *Cherokee Nation*, which the government makes no effort to address.

The Jones Day Plaintiffs accordingly renew their motion and request that this Court hold a status conference no later than March 6, 2020, to further pursue a resolution.

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 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

[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; and the five Jones Day Actions.

[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.

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.

Respectfully submitted,

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