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' RESPONSE TO DEFENDANT'S
MOTION TO CERTIFY INTERLOCUTORY APPEAL

Pursuant to this Court's Order dated February 10, 2020 (Doc. 455), Plaintiffs Fairholme Funds, Inc., et al. respectfully submit this brief response to Defendant's Motion to Certify the Court's December 6, 2019 Opinion for Interlocutory Appeal and to Stay Further Proceedings (Doc. 456) (filed Feb. 21, 2020) ("Def. Mot."). The Government requests that the Court certify its December 6, 2019 opinion[1] for interlocutory appeal pursuant to 28 U.S.C. § 1292(d)(2), and that it do so, in part, by amending its opinion to designate three questions pertaining to the Court's decision not to dismiss Plaintiffs' derivative claims as "controlling" questions of law with respect to which there is a substantial ground for difference of opinion. Def. Mot. at 16. The Government further requests that, in the event the Court certifies its order for interlocutory appeal, the Court should also stay further proceedings pending the Federal Circuit's resolution of any petition for such appeal, and, if allowed, the appeal itself. *Id.* Plaintiffs do not oppose the Government's motion to certify, and we do not oppose the motion to stay to the extent it would

[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*").

entail a stay of discovery. But we do wish to briefly make several points in response to the Government's submission.

1. We read the Government's motion as seeking interlocutory appeal of the Court's December 6 *decision* on the Government's motion to dismiss, rather than the three discrete *questions* that the Government argues are controlling. *See, e.g.,* Def. Mot. at 1, 2, 3, 16 (referring to request to certify the Court's "opinion" for appeal); *id.* at 3 (arguing that the Court's "resolution of [the Government's] motion to dismiss" satisfies the criteria for interlocutory appeal under section 1292(d)(2)). This is appropriate, as the statute by its plain terms authorizes certification of an appeal from an interlocutory "order" of the Court rather than from any specific legal "question" decided by the Court. 28 U.S.C. § 1292(d)(2). As the Supreme Court held in interpreting the substantively identical provision (28 U.S.C. § 1292(b)) authorizing the certification of interlocutory appeals from district court decisions,[2] "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by" the court below. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (emphasis in original).

This distinction is important for several reasons. Most significantly, while we agree that, in the exceptional circumstances of this case, certification of an interlocutory appeal from those aspects of the MTD Order denying the Government's motion to dismiss Plaintiffs' derivative claims would be appropriate,[3] we do not believe that the three discrete questions that the Government argues are "controlling" necessarily exhaust all of the subsidiary issues addressed by the

[2] Because the operative language in Sections 1292(b)(2) and 1292(d)(2) is identical, case law interpreting the former provision is relevant and persuasive authority for the interpretation of the latter. *See Laturner v. United States*, 135 Fed. Cl. 501, 503 n. 1 (2017).

[3] Of course, for the reasons discussed at length in our own motion to certify, Plaintiffs believe that certification of an interlocutory appeal from those aspects of the MTD Order dismissing Plaintiffs' direct claims would also be appropriate. *See* Plaintiffs' Motion to Certify Interlocutory Appeal (Doc. 457) (filed Feb. 21, 2020) ("Pl. Mot.").

Court in its analysis of the derivative claims that may need to be considered in connection with any interlocutory appeal from the Court's decision. However, because it is the "order" that is appealable under the statute, and not the precise "controlling" questions identified by the movant, any interlocutory appeal from the MTD Order will encompass "any issue fairly included within the certified order." *Yamaha*, 516 U.S. at 205.[4] For these reasons, the fact that the Government's discussion of "controlling" questions does not explicitly identify all of the subsidiary questions that are fairly included within the Court's order should not affect the Federal Circuit's power and authority to address those issues on appeal, should it accept certification.

Nevertheless, Plaintiffs do believe it worthwhile to identify examples of issues and questions that are unquestionably "fairly included" and "reasonably bound up" in the Court's order denying the Government's motion to dismiss Plaintiffs' derivative claims. Such questions include the following questions relating to the Court's analysis of whether Plaintiffs have alleged claims against the United States for purposes of the Court's Tucker Act jurisdiction: (1) whether FHFA's alleged conduct relating to the implementation of the Net Worth Sweep exceeded its statutory conservatorship powers (*see MTD Order*, 146 Fed. Cl. at 41–43; Pl. Mot. at 10 n.6); (2) whether Plaintiffs' allegations regarding the Treasury's involvement in the imposition and implementation of the Net Worth Sweep support the Court's jurisdiction (*see MTD Order*, 146 Fed. Cl. at 41); (3) whether Treasury's and/or FHFA's alleged conduct adequately supports the conclusion that the FHFA-as-conservator ("FHFA-C") was coerced into approving the Net

[4] *See also A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1150 (Fed. Cir. 2014) (appellate court "may consider any question reasonably bound up with the certified order, whether it is antecedent to, broader or narrower than, or different from the question specified") (citations and internal quote marks omitted); *Tanasi v. New Alliance Bank*, 786 F.3d 195, 197 and n.2 (2d Cir. 2015) (noting, in affirming district court order on alternative grounds, that appellate court was "not strictly confined to the question presented for interlocutory appeal by the district court").

Worth Sweep (*see id.* at 44–45); (4) whether the FHFA-C should be considered Treasury's agent for purposes of the Net Worth Sweep (*see id*. at 45); and (5) whether the FHFA-C retained its governmental character for purposes of the Net Worth Sweep even if it is considered to have stepped into the shoes of Fannie Mae and Freddie Mac (together, the "GSEs") when it was appointed conservator (*see id*. at 46–49).

Each of the above questions, if answered in Plaintiffs' favor, would present an alternative ground for affirmance of the Court's decision that it has jurisdiction over Plaintiffs' derivative claims. They are thus fairly included in the Court's decision with respect to those claims, and are directly related to at least one of the questions identified by the Government as controlling. *See* Def. Mot. at 4–5.[5] Given their direct connection to this Court's analysis of the derivative claims, these subsidiary questions can themselves be fairly characterized as "controlling" within the meaning of Section 1292(d), and as the parties' arguments on the motion to dismiss and this Court's analysis demonstrate, there exists substantial ground for difference of opinion with respect to each. While it is not necessary under the statute for it to do so, the Court should consider making clear in any order it issues certifying an interlocutory appeal that the controlling questions include those subsidiary issues that are fairly included within its decision disposing of the motion to dismiss.[6]

[5] The Government does identify as controlling the question of whether the actions of FHFA-C are attributable to the United States for purposes of the Court's subject-matter jurisdiction, Def. Mot. at 4, 16, but its discussion of the Court's analysis of that issue focuses solely (and understandably, from the Government's perspective) on the one issue—whether FHFA actually did step into the GSEs' shoes when it was appointed conservator—with respect to which the Court rejected the Government's position. *See id.* at 8–10.

[6] At the conclusion of this submission, we have attempted, drawing from both our own motion to certify and the Government's, to compile a list of the subsidiary legal issues that are fairly included within the Court's disposition of the Government's motion to dismiss Plaintiffs' direct and derivative claims.

2. The Government devotes the bulk of its filing to a discussion of why there exists a substantial ground for difference of opinion with respect to each of the three controlling questions it has identified. Def. Mot. at 5–13. Needless to say, Plaintiffs disagree with much of the Government's legal argument with respect to these questions, and we are confident that the Court's analysis of these issues was correct. For present purposes, however, it suffices to note that, especially when considered in conjunction with the controlling nature of the issues decided by the Court, as well as the very strong case that can be made for the proposition that an immediate appeal from the Court's decision would materially advance the termination of the litigation, there is enough room for disagreement regarding the legal issues presented in any interlocutory appeal to more than justify certification under Section 1292(d). *See Laturner*, 135 Fed. Cl. at 504 (observing that the three statutory criteria " 'should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal' ") (quoting 16 Charles Alan Wright et al., FED. PRAC. & PROC. JURIS. § 3930 (3d ed. April 2017 update) ("WRIGHT & MILLER")).[7]

3. The Government also requests that the Court stay further proceedings in this case pending resolution by the Federal Circuit of any petition for interlocutory appeal, and, if such a petition is granted, the resolution of that appeal. Def. Mot. at 15–16. Plaintiffs do not oppose a stay of discovery, on the understanding that either party would be free to seek relief from any such stay should circumstances so warrant. For example, should proceedings before the Federal Circuit on any petition to allow an interlocutory appeal take longer than anticipated, or should the scope of any appeal allowed by the Federal Circuit be narrower than anticipated, it may make

[7] *See also* 16 WRIGHT & MILLER § 3930 ("The level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case.").

sense for any stay of discovery in this Court to be lifted either in whole or in part. However, the Court should not issue a blanket stay of *all* proceedings in this Court to the extent that such a stay would foreclose motions for partial summary judgment. Depending on how the Supreme Court rules on the constitutionality of the Consumer Financial Protection Bureau's structure in *Seila Law v. CFPB*, No. 19-7 (U.S.), it may make sense for the parties to move for partial summary judgment on whether FHFA's unconstitutional structure renders the Net Worth Sweep an illegal exaction even while other legal issues this Court has already decided are pending before the Federal Circuit as part of an interlocutory appeal.

CONCLUSION

For the reasons discussed above and in our motion to certify, Plaintiffs respectfully request that the Court enter an order, pursuant to 28 U.S.C. § 1292(d)(2), certifying for immediate interlocutory appeal the Court's December 6, 2019 order granting in part and denying in part Defendant's motion to dismiss, and that the Court do so by amending that order to include a statement along the following lines:

> The Court finds that this order involved a number of controlling questions of law with respect to which there is a substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of this litigation.
>
> The controlling questions raised by this order include the following (as well as any other subsidiary questions that are fairly included within the Court's order):
>
> (1) Whether Plaintiffs have standing to assert derivative claims notwithstanding the succession clause contained in the Housing and Economic Recovery Act of 2008, 12 U.S.C. § 4617(b)(2)(A)(i).
>
> (2) Whether actions by the Federal Housing Finance Agency (FHFA) as conservator for Fannie Mae and Freddie Mac (FHFA-C) are attributable to the United States for purposes of this Court's subject-matter jurisdiction to entertain Plaintiffs' derivative takings and illegal exaction claims. Important questions that are fairly included within this question include:

(a) whether FHFA's alleged conduct relating to the implementation of the Net Worth Sweep exceeded its statutory conservatorship powers;

(b) whether Treasury's and/or FHFA's alleged conduct adequately supports the conclusion that the FHFA-C was coerced into approving the Net Worth Sweep;

(c) whether the FHFA-C should be considered Treasury's agent for purposes of the Net Worth Sweep; and

(d) whether the FHFA-C retained its governmental character for purposes of the Net Worth Sweep even if it is considered to have stepped into the shoes of Fannie Mae and Freddie Mac when it was appointed conservator.

(3) Whether Plaintiffs' allegations regarding the Department of the Treasury's involvement in the imposition and implementation of the Net Worth Sweep support the Court's subject-matter jurisdiction to entertain Plaintiffs' derivative claims.

(4) Whether Plaintiffs' allegations that FHFA entered into an implied-in-fact contract with Fannie Mae and Freddie Mac to operate the conservatorships for the benefit of shareholders fail as a matter of law.

(5) Whether this Court lacks subject-matter jurisdiction over Plaintiffs' direct claims for breach of fiduciary duty because those claims sound in tort.

(6) Whether this Court lacks subject-matter jurisdiction over Plaintiffs' direct claims for breach of implied-in-fact contracts because Plaintiffs have not adequately alleged that they are third-party beneficiaries of such contracts.

(7) Whether Plaintiffs who purchased stock in Fannie Mae and Freddie Mac after the date of the Net Worth Sweep lack standing to pursue their direct takings claims.

(8) Whether Plaintiffs lack standing to pursue the claims that have been pled as direct claims because those claims are in substance derivative in nature.

March 4, 2020

Respectfully submitted,

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