UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFFS' SUPPLEMENTAL BRIEF ON MOTION TO DISMISS

Since the Government filed its omnibus motion to dismiss—directed almost entirely at the various Third Amendment claims—and the filing of Plaintiffs' opposition (ECF No. 69) along with Plaintiffs' recent motion to lift the stay (ECF No. 84), it has become clear that only one argument for dismissal is in dispute here. It is distinct from all the other related cases: whether under Plaintiffs' factual allegations, focusing on the Government's imposition of the conservatorships in September 2008, Plaintiffs adequately plead direct takings (or illegal exaction) claims and, therefore, have standing. They do.[1]

I. PLAINTIFFS ASSERT DIRECT CLAIMS NOT AT ISSUE IN *FAIRHOLME*.

A. This action is grounded on wholly different facts than *Fairholme*.

Although this Court's *Fairholme* Opinion provides general guidance, "*stare decisis* applies to only legal issues and not issues of fact." *Avenues In Leather, Inc. v. U.S.*, 423 F.3d 1326, 1331 (Fed. Cir. 2005). The factual distinctions separating the other actions from this one are significant. As the Court observed at the *Fairholme* status conference on March 5, 2020, the allegations underlying each complaint are "nuanced" and the "facts will drive what the outcome of the law is." Tr. at 15. In contrast to its motion to dismiss, largely ignoring Plaintiffs' claims, the Government now acknowledges that Plaintiffs' action is "to some extent, a different creature than the others, simply because of the time period" at issue, *id.* at 51, and is the "one exception" among all the related actions. ECF No. 85 at 2 (joint status report).[2]

[1] Several issues require no discussion beyond Plaintiffs' Potential Order and opposition brief. ECF No. 69. As elaborated there, given this Court's *Fairholme* Opinion, the Government's two jurisdictional arguments have no merit and, likewise, Plaintiffs' claims are timely.

[2] The *Fairholme* plaintiffs "challenge the actions of the United States ***during*** the conservatorships" of Fannie Mae and Freddie Mac ("Companies"). *Fairholme* Opinion ("Op.") at 1 (emphasis added).

Plaintiffs' claims arise from the imposition of the conservatorships themselves, in violation of FHFA's carefully enumerated authority to act as conservator under the Housing and Economic Recovery Act ("HERA"). ECF No. 57 ¶¶6, 82-84 (First Amended Complaint). By contrast, the other related cases involve the Third Amendment to the terms of the stock purchase agreements several years ***after*** the Government seized the Companies. Plaintiffs allege the conservatorships were coerced and grounded on a false premise at their inception. ¶¶58-67, 84-101. Rather than rescuing the Companies, which were "solvent" and "adequately capitalized," the Government seized them "to prop up other parts of the economy." ¶¶2, 6, 54-57, 68.[3]

Further, factually unique to Plaintiffs' action are the additional allegations that far from freely consenting to this takeover, the Government blindsided and strong-armed the Boards of the Companies into consenting. It was made clear to the Boards that if they withheld their consent the Government would come down hard and impose the conservatorships regardless. ¶¶64-67. The Boards had no real choice in the decision. ¶¶84-101. Their only "option," in light of the Government's heavy-handed tactics, was to assent. ¶67. As the Court stated at the motion to dismiss hearing, during "the critical time period" in September 2008, the Boards faced a "Hobson's choice" to "either play ball with Treasury or you're out." ECF No. 445 at 123. Therefore, the purported consent of the Boards as justifying the conservatorships is meaningless.

[3] These allegations are fully consistent with a takings claim. This Court stated at the *Fairholme* status conference that "to win a takings claim," Plaintiffs "have to concede that the government action was, in fact, allowed or authorized." Tr. at 11. To be precise, a takings claim may be grounded on ***authorized*** but ***unlawful*** conduct—here, conservatorships imposed in excess of HERA—by government officials acting "within the general scope of their [official] duties." *Del-Rio Drilling Programs, Inc. v. U.S.*, 146 F.3d 1358, 1362 (Fed. Cir. 1998). Plaintiffs do not allege that government officials in September 2008 engaged in "*ultra vires* conduct" of the sort that "cannot create a claim against the Government" for a Fifth Amendment taking. *Id.*

B. The law driving *Fairholme*'s standing analysis does not control, while the most relevant legal authorities dictate that Plaintiffs' claims are direct.

Having vexed courts for decades, the direct/derivative distinction is case-specific. *See Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036-38 (Del. 2004). In *Fairholme*, it was alleged that "the government (1) targeted private shareholders and (2) discriminated against them by rearranging the Enterprises' capital structure to plaintiffs' detriment" through the PSPA Amendments. Op. at 33. By contrast, Plaintiffs allege that the Government fabricated a false narrative of financial insolvency at Fannie and Freddie and ambushed their Boards to nationalize both companies under HERA, for purposes that do not satisfy the HERA prerequisites for conservatorship. ¶¶58-67, 84-101.

As a result of the Government's actions, Plaintiffs were directly harmed. The Government's abrupt move was designed to help rescue the economy, not the Companies. ¶¶68, 94. The Government sought to stabilize the mortgage markets on the backs of the Companies' shareholders, at great cost to them. In the Court's words, stock in a publicly traded company is a "certificate of ownership"—property necessarily personal to the investor—not, as the Government called it, a "lottery ticket." ECF No. 445 at 123. In violation of the Fifth Amendment, the conservatorships eviscerated Plaintiffs' bundle of property rights in the Companies overnight. ¶¶30-33, 66, 73, 77-81, 185-89, 217-25; *see also* ECF No. 69 at 23-44. The financial harm to the Companies' shareholders was diffuse, especially those who purchased their shares ***before*** the conservatorships were imposed, as compared to hedge funds and other investors who purchased their shares speculatively ***after*** the Government imposed the conservatorships. Plaintiffs' proposed class representatives typify these types of mom-and-pop shareholders (an individual, a regional bank and a city retirement fund) who sustained billions of dollars in losses. ¶¶17-19, 206-08. And, because Plaintiffs held both common and preferred

stock at the start of the conservatorships, their time of purchase or acquisition, in further contrast to other related actions, presents no issue. *Cf.* Op. at 36-38 (just one plaintiff had standing).

For the direct/derivative distinction, Plaintiffs' allegations answer the central question of "[w]ho suffered the alleged harm." *Tooley*, 845 A.2d at 1035. Indeed, the *en banc* Fifth Circuit punctured the facade that direct claims related to the conservatorships cannot be brought. *Collins v. Mnuchin*, 938 F.3d 553, 574-75 (5th Cir. 2019). On the distinct facts alleged here, this Court should reach the same conclusion that Plaintiffs' claims are direct and, therefore, unlike in *Fairholme*, Plaintiffs have standing to bring their action.

Putting aside the dual-nature exception not invoked by Plaintiffs, Op. at 38-39, under the facts of this case, *Fairholme* provides little guidance on standing. The core allegation there was that "[t]he government, *via* the PSPA Amendments, compelled the Enterprises to overpay Treasury" by "compulsory payments of all profits." *Id.* at 40. Quoting Delaware case law holding that "claims of corporate overpayment are . . . regarded as derivative," this Court ruled that the *Fairholme* plaintiffs' claims were "substantively derivative in nature because they are premised on allegations of overpayment" to Treasury ***during*** the conservatorships. *Id.*

That is not close to this case. Whether the Government's unjustified imposition of the conservatorships under HERA harmed shareholders, in the first place, is entirely distinct from FHFA's actions as conservator related to the Third Amendment—conduct that was central to finding the claims derivative in *Fairholme*. Legal challenges to the Third Amendment on various theories have generated a body of decisions and, with certiorari in *Collins* still pending, the governing law continues to evolve. Yet Plaintiffs' factual allegations are, comparatively, unique because they focus exclusively on the initial, wrongful government actions, and the direct harm to investors holding shares at that time, from which all subsequent events flowed. ¶¶58-76.

Despite the many decisions related to the Fannie and Freddie conservatorships, the standing issue on this motion presents, in Plaintiffs' view, a question of first impression. There is no need "to challenge the legal conclusions reached in the *Fairholme* Opinion," as the Court admonished not to do, because those conclusions, on different facts, do not apply. ECF No. 90 at 2 n.2. Whether Plaintiffs' claims are direct is not controlled by any precedent to date.[4]

Plaintiffs' allegations also do not approach the typical goal animating a derivative suit—shareholders seeking to "protect the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers.'" *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991) (citation omitted). Plaintiffs' allegations do not impugn the Boards in any way that a derivative claim might challenge. Instead, as the Court put the matter at oral argument, the conservatorships were imposed through governmental "undue influence" on the Boards—"if not a death grip." ECF No. 445 at 119; *see* ¶¶58-67, 84-101.

II. ALTERNATIVELY, PLAINTIFFS PLEAD DERIVATIVE CLAIMS.

In their opposition brief, Plaintiffs argued that even if their claims are treated as derivative, "FHFA's role in imposing the conservatorships and its close work with the Treasury in effecting the Government's goals create a conflict of interest" preventing FHFA from pursuing Plaintiffs' claims. ECF No. 69 at 22 n.7. Applying *First Hartford Corp. Pension Plan & Trust v. U.S.*, 194 F.3d 1279 (Fed. Cir. 1999), this Court in *Fairholme*, in light of HERA's succession clause, recognized the conflict of interest exception. Op. at 43-45. If the Court deems Plaintiffs' claims derivative, this exception also applies to this action.

[4] For the reasons already given, the cases involving Government conduct ***during*** bank conservatorships do not apply here. ECF No. 69 at 18-19 & n.6. Indeed, no case involved taking over a perfectly solvent bank to use it for economic objectives having nothing to do with the bank's financial health.

Dated: April 2, 2020

Respectfully submitted,

HAGENS BERMAN SOBOL SHAPIRO LLP

By: */s / Steve W. Berman*
Steve W. Berman
Attorney of Record
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
E-mail: steve@hbsslaw.com

OF COUNSEL:

Karl P. Barth
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
E-mail: karlb@hbsslaw.com

Kevin K. Green
HAGENS BERMAN SOBOL SHAPIRO LLP
533 F Street, Suite 207
San Diego, CA 92101
Telephone: (619) 929-3340
E-mail: keving@hbsslaw.com

Robert M. Roseman
James McGovern
SPECTOR ROSEMAN & KODROFF P.C.
2001 Market Street, Suite 3420
Philadelphia, PA 19103
Telephone (215) 496-0300
Facsimile: (215) 496-6611
E-mail: rroseman@srkattorneys.com
E-mail: jmcgovern@srkattorneys.com

Attorneys for Washington Federal, Michael McCredy Baker, and City of Austin Police Retirement System in No. 13-385C

EXHIBIT

Potential Order Denying Motion to Dismiss

POTENTIAL ORDER DENYING MOTION TO DISMISS

I. As to Count I (Unconstitutional Takings and Illegal Exaction)*

a. The Government's motion under *CRFC 12(b)(1)* is **DENIED**:

1. The claims are against the United States. *Fairholme* Op. at 20 ("The FHFA is indisputably the United States …."); *id.* at 17-18 (coercion of nongovernment actors); *see* ECF No. 57 ¶¶58-67, 84-101 (First Amended Complaint ("FAC")); ECF No. 69 at 18-20 (opposition brief). As to Plaintiffs' action specifically, the Government makes no argument and therefore has waived the issue. ECF No. 64 at 20-21 (motion to dismiss).

2. The claims do not sound in tort. *Fairholme* Op. at 33 (Plaintiffs "were forced to give their property to the government"); *see* ¶¶30-33, 66, 73, 77-81, 185-89, 217-25; ECF No. 69 at 17. The only paragraph cited for dismissal does not sound in tort. *Compare* ECF No. 64 at 45 *with* ¶200.

b. The Government's motion under *CRFC 12(b)(6)* is **DENIED**:

1. Plaintiffs have standing. Plaintiffs assert direct claims. Their factual allegations, focusing on imposition of the conservatorships in 2008, differ materially from those in *Fairholme* focusing on the PSPA amendments in 2012. *Compare Fairholme* Op. at 6-8, 10-11 *with* FAC¶¶58-67, 84-101. The legal authority leading this Court to hold the *Fairholme* claims derivative does not apply to Plaintiffs' claims. Although the issue on the facts alleged is of first impression, under the most relevant law, Plaintiffs' claims are direct. Alternatively, Plaintiffs' claims may be treated as derivative, giving Plaintiffs standing under *First Hartford*. *Fairholme* Op. at 43-45; ECF No. 69 at 22 n.7.

2. The claims are timely. With timeliness not at issue, *Fairholme* provides no guidance. The 30-day HERA time limit cited for dismissal, ECF No. 64 at 79-80, does not apply because Plaintiffs are not the "regulated entity" and they do not seek "an order requiring the Agency to remove itself as conservator." 12 U.S.C. § 4617(a)(5); ECF No. 69 at 47-48; *cf.* FAC at 82-83 (prayer seeking only monetary relief). Plaintiffs' action is timely because it was filed "within six years" after Plaintiffs' claims accrued. 28 U.S.C. § 2501.

* Plaintiffs expressly reserve all appellate rights and do not waive any arguments concerning the propriety of the reasoning in the *Fairholme* Opinion. If dismissal is granted in part, for the reasons argued to date and with further briefing if necessary, the Court's ruling on the motion to dismiss this action should be certified for immediate appeal under 28 U.S.C. § 1292(b). If dismissal is granted in full, a separate judgment should be entered to reflect finality. *See RCFC 58(a), (d).*