

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL E. KELLY, *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

No. 21-1949C
(Judge Davis)

JOINT MOTION FOR A STAY OF PROCEEDINGS

The parties respectfully request that the Court stay all proceedings in this case pending the final disposition of the United States Court of Appeals for the Federal Circuit in *Washington Federal, et al. v. United States*, No. 20-2190, a related case in which oral argument was recently held on August 4, 2021. As described below, critical threshold issues in this case – including whether this Court possesses jurisdiction to entertain shareholder challenges to the conservatorships imposed, on September 6, 2008, upon the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the enterprises) by the Federal Housing Finance Agency (FHFA), and, if so, whether such claims are direct or derivative – were thoroughly briefed and argued by the parties in *Washington Federal*. Accordingly, staying all proceedings in this case pending the Federal Circuit’s final disposition of *Washington Federal* will promote judicial economy and aid in the orderly development of precedent.

BACKGROUND

In their complaint in this case, plaintiffs broadly allege that the FHFA’s imposition of the conservatorships were unlawful actions that “ultimately deprived [them] of their individual rights as shareholders, including dividends and voting rights, and destroyed the economic value

of [their] shares in the enterprises.” Compl. ¶ 1, Oct. 1, 2021, ECF No. 1. Notably, plaintiffs declare that this action “seeks relief solely for the Government’s actions as regulator in imposing the conservatorships, and not for its actions as conservator after placing the GSEs into conservatorship on September 6, 2008.” Compl. ¶ 4. They seek money damages for an alleged unlawful Fifth Amendment taking and/or illegal exaction and for alleged breach of an implied regulatory contract. Compl. ¶¶ 106-135.

Other Fannie Mae and Freddie Mac shareholders have brought numerous suits challenging the conservatorships and the Third Amendment, in both the Court of Federal Claims and in district courts around the country. The *Washington Federal* appeal is one of ten related shareholder appeals currently before the Federal Circuit. The companion cases are *Fairholme Funds, Inc. v. United States*, Nos. 20-1912 & 20-1914; *Owl Creek Asia I, L.P. v. United States*, No. 20- 1934; *Mason Capital L.P. v. United States*, No. 20-1936; *Akanthos Opportunity Fund L.P. v. United States*, No. 20-1938; *Appaloosa Investment Limited Partnership Inc. v. United States*, No. 20-1954; *CSS, LLC v. United States*, No. 20-1955; *Arrowood Indemnity Co. v. United States*, No. 20-2020; and *Cacciapalle v. United States*, No. 20-2037. The following related cases are pending in this Court: *Fisher v. United States*, No. 13-608C, petition to appeal denied, No. 20-138 (Fed. Cir.); *Reid v. United States*, No. 14-152C, petition to appeal denied, No. 20-139 (Fed. Cir.); *Rafter v. United States*, No. 14-740C; *683 Capital Partners, LP v. United States*, No. 18-711C; *Patt v. United States*, No. 18-712C; *Wazee Street Opportunity Fund IV LP*, No. 18-1124C; *Highfields Capital I LP v. United States*, No. 18-1150C; *CRS Master Fund, L.P. v. United States*, No. 18- 1155C; *Perry Capital LLC v. United States*, No. 18-1226C; *Quinn Opportunities Master LP v. United States*, No. 18-1240; *Angel v. United States*, No. 20-737.

In *Washington Federal*, plaintiffs filed a one-count complaint that alleges that the FHFA's imposition of the conservatorships were actions not authorized by the Housing and Economic Recovery Act of 2008 (HERA) at the time they were imposed, and, thus, constituted takings and/or illegal exactions.¹ This Court dismissed the *Washington Federal* complaint on the ground that the plaintiffs asserted direct claims that were substantially derivative in nature and the plaintiffs lacked standing to pursue derivative claims on their own behalf rather than on behalf of the enterprises. *Washington Federal*, 149 Fed. Cl. 281, 295-296 (2020). The plaintiffs appealed the dismissal to the Federal Circuit. The appeal has been fully briefed, and was argued on August 4, 2021, but the Federal Circuit has not yet issued its opinion.

THE COURT SHOULD ENTER A STAY OF PROCEEDINGS IN THIS CASE

The Court's "power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). The "court's discretion to stay its proceedings is broad and well established." *Farmer v. United States*, 132 Fed. Cl. 343, 345 (2017) (citing *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1426 (Fed. Cir. 1997) ("The power of a federal trial court to stay its proceedings, even for an indefinite period of time, is beyond question.")). In deciding whether to stay proceedings, "a court must exercise its judgment by considering the most orderly course of justice and the interests of the parties, weighing any competing interests." *UnionBanCal Corp. & Subsidiaries v. United States*, 93 Fed. Cl. 166, 167 (2010) (citing *Landis*, 299 U.S. at 255). "The orderly course of justice and judicial economy is served when granting a stay simplifies the 'issues,

¹ The *Washington Federal* plaintiffs also allege that FHFA as conservator exceeded its authority.

proof and questions of law which could be expected to result from a stay.” *Id.* (citing *CMAX, Inc. v. Hall*, 300 F.3d 265, 268 (9th Cir. 1962)).

As in *Washington Federal*, plaintiffs allege a direct claim that the FHFA’s imposition of the conservatorships was not authorized by the HERA, and, thus, constituted takings and/or illegal exactions. Compl. ¶¶ 4-11; 51-67; 106-120. In addition, plaintiffs raise two claims not brought by the *Washington Federal* plaintiffs, a derivative claim for an unlawful taking and/or an illegal exaction, Compl. ¶¶ 121-127, and a breach of implied regulatory contract, Compl. ¶¶ 128-135. The derivative claim is pled as an alternative to the direct claim and is based upon the same factual allegations. Plaintiffs’ breach of an implied regulatory contract, however, is a new claim. It alleges the Government provided incentives to invest in the enterprises and that the imposition of the conservatorships breached an implied regulatory contract. Specifically, plaintiffs allege that investment in the enterprises came with an implied guarantee that the Government would ensure that investment was secure and it would not let the enterprises fail. Plaintiffs allege that the Government breached its implied contract when FHFA placed the enterprises in conservatorships. Admittedly, while this third claim is not before the Federal Circuit in *Washington Federal*, the issue of whether the imposition of the conservatorships may be challenged is. Thus, there is a substantial overlap that warrants a stay here despite the differences in the two complaints. Accordingly, to conserve judicial and party resources, the Court should stay this case pending the Federal Circuit’s resolution of *Washington Federal*. The Federal Circuit’s rulings in *Washington Federal* may provide binding guidance in this case given the overlapping issues and claims. Moreover, the extent of the stay likely would be modest given that the *Washington Federal* appeal is fully briefed and was argued on August 4, 2021. A

stay also reduces the risk that rulings by this Court may require revisions in light of the Federal Circuit's decision.

If the Court grants the stay, the parties respectfully propose that, within 30 days of the date the Federal Circuit decision in *Washington Federal* becomes final and not subject to further appellate review, the parties submit a joint status report proposing a schedule for further proceedings in this case.

CONCLUSION

For the foregoing reasons, the Court should grant the parties' joint motion for a stay of proceedings pending the final disposition of the *Washington Federal* appeal.

Respectfully submitted,

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