UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA J. ANGEL,	)	
	)	
Plaintiff,	)	No. 20-737C
	)	(Senior Judge Margaret M. Sweeney)
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

JOINT STATUS REPORT

Pursuant to the Court's September 18, 2020 Order, ECF No. 11 (the "MTD Briefing Stay Suspension Order"); the Court's October 24, 2020 Order, ECF No. 15; the Court's July 27, 2021 Order, ECF No. 26; the Court's March 24, 2022 Order, ECF No. 32; the Court's April 18, 2022 order, ECF No. 34; and the Court's April 19, 2022 order, ECF No. 36, (hereinafter collectively the "JSR Extension Orders") the parties ("Parties") respectfully submit this joint status report (JSR).

On August 18, 2020, Defendant filed a motion to dismiss the *Angel v. United States* complaint ("Complaint"). On September 17, 2020, Plaintiff filed for a continuance of briefing on Defendant's motion to dismiss and for leave to conduct discovery. On September 18, 2020, the Court suspended briefing on the motion to dismiss "until further order of the Court," but did not authorize discovery (ECF No. 11). Thereafter, the Court granted Defendant's unopposed motion for an enlargement of time until October 30, 2020, to file a response to Plaintiff's motion for a briefing continuance. (ECF No. 13). On October 27, 2020, Plaintiff filed an unopposed motion to suspend briefing on its motion for continuance, pending the decision of the United States Supreme Court in *Collins v. Mnuchin* (ECF No. 14). On the same day, the Court granted

Plaintiff's unopposed motion to stay briefing (ECF No. 15), and denied both the Defendant's MTD (ECF No. 7), and the Plaintiff's motion for a continuance and to permit discovery (ECF No. 10) as moot. The Court stayed the case until further order of the Court, directing the parties to "file a joint status report within thirty days of the *Collins* decision proposing further proceedings in this matter" (hereinafter "Briefing Stay Suspension Order," ECF No. 15). On July 23, 2021, the Parties filed a joint status report and motion to continue the stay of proceedings pending the final outcome of a related appeal in the United States Court of Appeals for the Federal Circuit, *Fairholme Funds, Inc. v. United States*, Nos. 20-1912, 20-1914 (Fed. Cir.) ("Fairholme"). On July 27, 2021, the Court granted the Parties' motion, extending the stay and ordering the parties to file a joint status report within thirty days of a decision in Fairholme.

On March 24, 2022, the Court, attendant to the *Fairholme* decision rendered on February 23, 2022, and parties filing of a joint status report of the same date, directed a further extension of the stay and ordered the parties to file a joint status report "within thirty days after the *Fairholme* decision becomes final and non-appealable," (ECF No. 32). On April 18 and 19, 2022, the Court directed the clerk to reject any filings in the case other than a properly filed notice of voluntary dismissal, until the filing of a joint status report proposing further proceedings in the matter (ECF No. 34 and 36).

Despite consultation and their best efforts, the Parties have been unable to agree on the appropriate next steps in this case. Accordingly, each party separately states below its position as to how this case should best proceed.

Defendant United States' Position:

As the parties have explained in previous filings, this case, like *Fairholme* and a host of other cases pending before this Court, is a shareholder suit arising out of the operation of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises or GSEs), in conservatorship. Plaintiffs in *Fairholme* challenge a 2012 amendment (Third Amendment) to stock purchase agreements between Treasury and the Federal Housing Finance Agency (FHFA), acting as the Enterprises' conservator, on various grounds. Mr. Angel's complaint in this case also contains allegations concerning the Third Amendment to the Treasury and FHFA agreements that are the subject of the *Fairholme* Federal Circuit appeal.

In its opinion in *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (Fed. Cir. 2022), a unanimous Federal Circuit panel issued guidance that is highly relevant to the issues in this case. Indeed, the Federal Circuit's decision in *Fairholme* effectively foreclosures Mr. Angel's claims. We anticipate that, when and if proceedings in this case resume, we will again seek dismissal of Mr. Angel's complaint based on the Federal Circuit's decision in *Fairholme*, among other reasons, including those previously explained in our earlier motion to dismiss in this case, ECF No. 7.

Since our last status report, the *Fairholme* appellants have requested, and the Supreme Court has granted, a sixty-day extension of their time to file a petition for a writ of *certiorari*. This extension changed the deadline for such a petition from May 23, 2022, to July 22, 2022. Therefore, the Federal Circuit's decision in *Fairholme* is not yet final and non-appealable. Nor will it be until no earlier than July 22, 2022, if no petition for *certiorari* is filed. The *Fairholme* appellants' motion, however, indicates their intent to file a petition for *certiorari*. In the event

that they do so, the Federal Circuit's *Fairholme* decision will not be final and non-appealable until after the Supreme Court resolves that petition and, in the event that it was to grant *certiorari*, any further proceedings.

Moreover, as we have previously reported, there are 11 other cases pending in this Court, including *Fairholme* itself, that are stayed until the decision in the *Fairholme* appeal becomes final and non-appealable. *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl.); *Fisher v. United States* No. 13-605C (Fed. Cl.) (lead case); *Shipmon v. United States*, No. 13-672C (Fed. Cl.) (consolidated under *Fisher*); *Reid v. United States*, No. 14-152C (Fed. Cl.); *Rafter v. United States*, No. 14-740C (Fed. Cl.); *638 Capital Partners, LP v. United States*, No. 18-711C (Fed. Cl.); *Patt v. United States*, No. 18-712C (Fed. Cl.); *Wazee St. Opportunities Fund IV LP v. United States*, No. 18-1124C (Fed. Cl.); *CRS Master Fund, L.P. v. United States*, No. 18-1155C (Fed. Cl.); *Perry Capital LLC v. United States*, No. 18-1226C (Fed. Cl.); *Quinn Opportunities Master LP v. United States*, No. 18-1240C (Fed. Cl.). The United States can discern no benefit to moving forward with this case while 11 other similar cases continue to be stayed, with no filings, including status reports, due until after the decision in these appeals become final and non-appealable. Instead, it serves the interests of the parties and the Court to continue to maintain these similar cases on a similar schedule. Accordingly, to conserve judicial and party resources, the Court should continue to stay this case until the Federal Circuit's decision in *Fairholme* becomes final and non-appealable.

Finally, in his section of his joint report, plaintiff Mr. Angel continues to suggest the existence of a stipulation and settlement agreement. No such agreement is in place, nor are the parties currently exploring settlement. To be clear, the United States has not agreed to any

stipulation with Mr. Angel. Moreover, the United States has not agreed to settle this case under the terms Mr. Angel describes below or under any other terms.

In the event that the Court continues to stay, the United States respectfully proposes that, within 30 days of the date the Federal Circuit's decision in *Fairholme* becomes final and non-appealable, the parties submit a joint status report proposing a schedule for further proceedings in this case.

Plaintiff Joshua J. Angel Position:

CASE BACKGROUND

A. The *Angel v. United States Complaint*

The *Angel v. United States* complaint ("Complaint") is anchored in consecutive Defendant action, each and every quarter beginning January 1, 2013, directing and otherwise preventing GSE boards of directors ("BOD") from declaring junior preferred share ("Junior Preferred") dividends. The Complaint alleges these quarterly actions as being in breach of a) certificates of designation ("COD") explicit payment covenants , (b) the federal government's implicit guaranty ("Implicit Guaranty") of the shares timely dividend payment, and (c) the contract law covenant of good faith and fair dealing The Complaint further alleges that these quarterly actions resulted in a $18 billion unwarranted and unjustified Government recovery and Junior Preferred share loss..

B. Defendant Motion to Dismiss Complaint

The main elements of the Defendant MTD were as follows:

1. Whether Mr. Angel, who represents himself, may represent a class of shareholders. [1]

2. Whether the complaint should be dismissed as barred by the statute of limitations for actions filed in this Court, 28 U.S.C. §2501.

3. Whether the complaint alleges a contract with the United States.

4. Whether the complaint states a claim for breach of contract.

[1] Plaintiff position is that Defendant MTD assertion of a *pro se* plaintiff inability under RCFC Rule 83.1(a)(3), to maintain a class action, was eliminated by Joshua J. Angel, Esq. of Joshua J. Angel PLLC ("Angel PLLC") substitution of himself as Plaintiff lead counsel in place of Joshua J. Angel *pro se* per Court Clerk docket entry, January 4, 2021.

C. Briefing Stay Suspension Order (ECF No. 15)

Recognizing the Supreme Court's resolving the statutory and constitutional challenges raised in Collins, would almost certainly decide one or more of the Complaint issues raised in Defendant MTD, the Parties were in agreement to request Court suspension of all proceedings in the case "until after the Supreme Court issues its decision in *Collins*."

On October 27, 2020, the Court without demurrer, extended the Briefing Stay Suspension Order staying all proceedings in the case, and directing the Parties file a joint status report within thirty days of a *Collins* decision, proposing further case proceedings.

D. The Settlement Agreement

In the nearly eight months to a day period, between the October 27, 2020, Briefing Stay Suspension Order issuance, and SCOTUS' June 22, 2021, *Collins* decision ("Interim Period"), Plaintiff pursuant to FRD 408 provided Defendant with extensive materials for review and settlement discussion in tempo with *Collins* briefing and argument, resulted in the fully agreed "Stipulation and Agreement of Settlement" (hereinafter "Settlement Agreement") which was courtesy filed with the Court as an attachment to Plaintiff's March 24, 2022, position statement. Plaintiff's position as set forth above is disputed in full by Defendant.

Focused on Interim Period productive settlement discussion opportunity to resolve significant case issues, Plaintiff year end 2020 expanded his settlement discussion task force to include Professor David G. Epstein (of the University of Richmond Law School), and Lewis Kruger (ret. Partner in the Financial Restructuring Group at Stroock & Stroock & Lavin LLC (the "Counsel Group").

In the Interim Period briefing stay suspension, Plaintiff FRD 408 provided materials and Parties substantive settlement discussion communications combined in time to give rise to an informal mechanical settlement protocol, whereby Plaintiff following counsel discussion was designated sole scribe to formulate counsel discussions into *Plaintiff Proposals* for, (a) Defendant counsel review, and if deemed Defendant counsel acceptable, (b) submission to agency client, for client exclusive, unconditional, and absolute option to either of accept or reject (no explanation required, no feedback) (the "Settlement Protocol").

The Settlement Protocol resulted in the Settlement Agreement draft dated June 10, 2021, delivered to Defendant counsel for review. On June 17, 2021, Defendant counsel acknowledged receipt of the June 10th draft agreement stating; "Thank you for your proposal. We will review internally with the agencies, and get back to you. Thanks."

In practical terms, the Settlement Agreement effects a restoration of the status quo ante for Fannie Mae and Freddie Mac junior preferred shares ("Junior Preferred") as if share dividends had been GSE BOD timely declared, and payment reserved for, as contractually required. Saying the same thing another way, the Settlement Agreement has the same financial and accounting effects as if Defendant had, instead of directing the Companies' boards not to declare Junior Preferred dividend, simply allowed GSE directors to discharge their duty to consider and declare Junior Preferred share dividends without interference of contra Defendant direction.

More important to the Defendant, the Settlement Agreement does not require any cash payment by the Defendant. The Settlement Agreement provides for Defendant to cause the GSE respective BOD to effect a simple redivision of $18 billions of Senior Preferred capital reserve dollars by GAAP accounting application of corrective sharing of Senior Preferred capital reserve amounts to Junior Preferred shares for eventual respective company conversion and issuance of

common shares, instead of cash payment, for in time to Fannie Mae, Freddie Mac recapitalization and conservatorship emergence.

Defendant's approval of the Settlement Agreement was communicated to Plaintiff Counsel in a June/July 2021 series of emails and telephone calls culminating in Defendant counsel July 20, 2021, advice to Plaintiff counsel informing of the June 10th draft Settlement Agreement's circulation to Defendant counsel agency client, and agency client preliminary grant of approval for Settlement Agreement finalization, while at the same time noting final step of counsel recommendation for client agency final approval, informed Plaintiff counsel of the mechanical challenge he was faced with by reason of a colleague's sudden physical incapacity, and dogged determined intent to get the job done and timely filed. Plaintiff counsel in jocular response offering to lend a hand inform of Professor Epstein, and Lewis Kruger, no response necessary, none provided.[2]

On Wednesday, July 21, 2021, Plaintiff counsel received the following email message from Defendant counsel:

> "Hi Josh. I hope your surgery was successful and that you're enjoying vacation.
>
> "Although we have traded a few emails regarding the joint status report, given that you are still on vacation and the status report is due on July 23, I thought it made sense to copy your co-counsel on this email. Perhaps they can respond in your absence.
>
> "Given that the interlocutory appeals in *Fairholme* are fully briefed and oral argument is scheduled for August 4 – just two weeks from today – we propose requesting that the Court continue the stay pending final resolution of the *Fairholme* interlocutory appeals. Within 21 days after final resolution, the parties would file another joint status report proposing further proceedings. We believe that continuing the stay makes sense because the ruling in *Fairholme* would likely streamline the issues for litigation, thus conserving the Court's and the parties' resources.
>
> "Please let me know if you agree with this approach and we will prepare a draft status report."

[2] Defendant's position is that Plaintiff assertion of a Defendant counsel having agreed to the Stipulation and Agreement of Settlement is false.

Plaintiff counsel immediately agreed to unhitching Settlement Agreement filing, from SCOTUS *Collins* decision, to within thirty days of *Fairholme* decision when rendered in trigger rather than substantive wait for Settlement Agreement public unveiling.

After listening to *Fairholme* counsel August 4th oral argument, Plaintiff counsel realized that a Settlement Agreement tied to a specific *Collins* release, needed to be adjusted by reason of its agreed-to public filing being tied to an indeterminate *Fairholme* decision date, so as to mechanically comport in intended release ("SA Mechanical Amendments").

On or about August 9, 2021, Plaintiff counsel prepared and forwarded the SA Mechanical Amendments (i.e., Settlement Protocol offered as *Plaintiff Proposals*) to Defendant counsel for Defendant counsel client once again exclusive unconditional absolute and sole option to either accept or reject without recourse:

> "A. Footnote 1
>
> "This Settlement Agreement does not require Court approval. However, because it purposefully confers certain substantial and valuable benefits to all present holders of Junior Preferred Shares in Federal National Mortgage Association ("Fannie Mae") and/or the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, the "GSEs"), and although the Settlement Agreement is made solely between Joshua J. Angel, on his own behalf, and Defendant on its behalf, the Parties to attach the Settlement Agreement as an Exhibit to the Joint Status Report rather than in a separate Court filing."
>
> -and-
>
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>
> 1. "Except as otherwise provided in numbered paragraph 2 of this Settlement Agreement, the effective date of Settlement Agreement ("Effective Date") shall be the date on which the Parties file this fully executed Settlement Agreement, as an attachment to the Joint Status Report.
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> 2. The terms and conditions of this Settlement Agreement are to remain confidential between the Parties and shall not be disclosed to anyone or any entity until filed in Court by the Parties as an Exhibit to the Joint Status Report."

On or about August 16, 2021, Plaintiff was advised by Defendant counsel to the agreed incarnation of the Settlement Agreement with August 9, 2021, SA Mechanical Amendments in place of the previously four corners agreed to June 10, 2021, agreement.

On January 20, 2022, in email exchange with Defendant counsel, Plaintiff counsel was informed of a Justice Department internal personnel shift in case lead counsel assignment, and responded in part:

> "Per our recent conversations, I prepared the attached documents with intent of submission to you in tandem with *Fairholme* decision entry, and pre-Joint Status Report filing:
>
> "(1) Plaintiff's proposed, revised 'Stipulation and Agreement of Settlement' ('SAS') for attachment to the Joint Status Report ("JSR") to be filed with the Court on or before 2022;
>
> "(2) Plaintiff's draft Stipulation and Notice of Voluntary Dismissal Pursuant To R.C.F.C. 41(a)(1)(A)(i); and
>
> "(3) Wire instructions for Fannie/Freddie attorney fee payments to Joshua J. Angel PLLC attorney escrow account at J.P. Morgan Chase Bank.
>
> "Please note that the proposed SAS revisions other than errata, are to paragraphs 6 and 7 of the July 2021 SAS version previously provided for JSR attachment following *Fairholme* decision entry. The revisions were made necessary by reason of either SAS document empty dates, or dates rendered mechanically inoperative by reason of *Fairholme's* having been decided in 2022 rather than 2021.
>
> "Attendant to your moving, thought it best not to wait for *Fairholme*, due any day now, and instead provide early for you, and [first name new lead counsel] to discuss without surprise. Any questions feel free to call. Otherwise, I will call [first name new lead counsel] for JSR filing, etc. discussion, when decision comes down. Again congratulations, and good luck."

Two months later, with virtually no communication with either outgoing Defendant lead counsel or incoming Defendant lead counsel other than with regard to JSR filing due date, Plaintiff counsel received the following email from incoming Defendant counsel (the "March 16 Rejection Email"):

> "Thank you for your message, and apologies for the delay in my response. I can now state, having received confirmation from the appropriate authorities, that we will not be accepting your settlement offer, nor entering into any stipulations at this time. Moreover, we are not interested in further settlement discussion at this time. *[Emphasis added]*
>
> . . .
>
> "We anticipate that we will likely seek dismissal of your complaint, along with the complaints in the other cases that are currently stayed, in reliance upon *Fairholme* and *Washington Federal*. We will also seek to resume the Court's consideration of the statute of limitations issue in your case. I hope you will join me in this joint status report proposing to extend the stay. If so, I will put together a draft for your review. If you intend to take a different position, however, we can file a joint status repot separately explaining our position and yours. In this event, if you would please send me what you would like me to reflect as your position, I will put together a draft joint status report including that information, along with our position, and send it for your review." *[Emphasis added]*

Proposal for Further Proceeding

It is appropriate for this case to proceed beyond *Collins*. There is no Supreme Court case nor even a pending petition for certiorari that affects this case.

There is *Fairholme* and eleven other cases pending in this and other courts per Defendant, that involve various legal challenges to validity of the Third Amendment, which are no more dispositive in relation to this case today, than they were at the time of the Briefing Stay Suspension Order October 22, 2020, entry. Moreover, no matter what their individual or collective outcome, that entire body of cases is without relevance beyond Defendant's not seeing any "… benefit to moving forward with this case, while similar cases continue to be stayed."

This case does not involve a single question of the validity of the Third Amendment, and none of the Plaintiff's filings with this Court or the Plaintiff's communications with the Defendant's attorneys have even raised a question of the validity of the Third Amendment. The only possible strained reading of this litigation is that the Plaintiff's is alleging that the

Defendant's quarterly actions violated the Third Amendment as well as the Plaintiff's contract rights

In all of the litigation involving the Third Amendment in the various courts, the Defendant has never taken the position that (1) the Third Amendment eliminated the contract rights of the Junior Preferred or (2) the Third Amendment barred the board of directors of Mae and Freddie Mac from declaring dividends Indeed, after the Third Amendment, the Government publicly stated the procedures that the boards must following to declare such dividends. This case is not about the validity of the Third Amendment.

This case is about Treasury contractual misconduct following Third Amendment August 17, 2012 enactment beginning January 1, 2013. This case is Tucker Act six-year statute of limitations governed, rather than Third Amendment July 2012 enaction in statute of limitation governance.

Plaintiff respectfully proposes that this case now proceed as follows. First, consistent with the obligation of attorneys to work for a consensual resolution during a period of a Court's easing of calendar control, Plaintiff respectfully proposes that the Court direct parties to meet forthwith in renewed settlement discussion, and failing same direct the parties to file a joint status report within two weeks, in attachment with:

1) Amended Stipulation and Agreement of Settlement; or

2) Defendant Plenary Pleading for Stipulation and Agreement of Settlement Rejection and/or Nullification with:

    a) Stipulation and Proposed Governing Schedule for Providing Plaintiff Discovery, and Parties Respective Filing of Motions for Summary Judgment and/or Dismissal

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