UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA J. ANGEL,	)	
	)	
Plaintiff,	)	No. 23-CV-800
	)	(Senior Judge Margaret M. Sweeney)
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

PLAINTIFF'S MOTION FOR RECONSIDERATION OF CERTAIN RULINGS IN THE OPINION AND ORDER OF JUNE 25, 2024

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JOSHUA J. ANGEL PLLC

Plaintiff respectfully requests this Court reconsider the Opinion and Order dated June 25, 2024 (the "Opinion and Order") in three respects: (1) whether claims for illegal extraction of Enterprise assets occurring and asserted within the six years preceding can be asserted by Plaintiff despite their being derivative in nature, and dismissed based upon the authority of *Fairholme Funds, Inc. v. United States,* 26 F.4th 1274 (Fed. Cir. 2022), *cert. denied*, 143 S.Ct. 563, and *cert. denied sub nom. Barrett v. United States*, 143 S.Ct. 563, and *cert. denied sub nom. Owl Creek Asia LLP v. United States*, and *cert. denied sub nom. Cacciapalle v. United States,* 143 S.Ct. 563, as controlling, rather than *Washington Federal v. United States,* 26 F.4th 1253 (Fed. Cir. 2022) controlling; (2) whether the Opinion and Order improperly applied the plausibility standard to make a factual finding inappropriate at this stage of the litigation; and (3) whether the Court was misplaced in relying upon the District Court and Circuit Court decisions in Angel I in making certain timeliness and preclusion findings in the Opinion and Order in respect of *Angel IV* Counts I, II, III, and V. Submitted with this motion is the Declaration of Joshua J. Angel, executed July 12, 2024, further supporting this motion and incorporated herein.[1]

POINT I

This Court held in the Opinion and Order that the statute of limitations bars any claims accruing more than six years prior to the filing of the instant lawsuit, and further found that Plaintiff's argument that his claims were founded on a series of separate decisions regarding dividend declarations were insufficient to establish separate claims. Furthermore, this Court, following *Fairholme*, correctly found in the Opinion and Order that Plaintiff's illegal extraction claim was derivative in nature, incorrectly then finding under *Fairholme* that ". . . that the

[1] Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the Complaint or in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss.

Enterprises' shareholders could not bring takings claims against the United States, because any takings claim would belong to the Enterprises. *Fairholme*, 26 F.4th . . .", rather than *Washington Federal*. *See* Opinion and Order at 19. The Circuit's analysis in *Washington Federal*, as followed by the related case Kelly v. United States, 21-CV-1949, Dkt. No. 48, when properly applied, excuses the demand requirement upon which the Fairholme ruling was based.

As explained in *Kelly*,

> "The Federal Circuit explained that, under the "so-called shareholder standing rule," injured shareholders may not bring a direct action to enforce the rights of the corporation; only the corporation may bring such a claim. *Washington Federal,* 26 F.4th at 1267. The plaintiffs' allegation that the government violated their shareholder rights "depend[s] on an alleged injury to the Enterprises." *Id* at 1268; *see also id* at 1269; 149 Fed. Cl at 294-95. As third parties, the *Washington Federal* plaintiffs did not have standing under the "prudential standing" doctrine and could not bring a direct takings claim. *Id.* at 1267-70; *see* 149 Fed. Cl at 294-95. They had at most a derivative action. *Id.*
>
> The Federal Circuit further explained that shareholders, like the *Washington Federal* plaintiffs, may bring derivative actions, but only in the "extreme circumstances" that the enterprises' management "refuse[s]to pursue an action enforcing the Enterprises' rights for reasons other than good-faith business judgment," or that there is a conflict of interest between the managers and the shareholders. *Washington Federal,* 26 F.4th at 1267-68; *see* 149 Fed. Cl at 296-97. The *Washington Federal* plaintiffs demonstrated neither circumstance. *Washington Federal,* 26 f.4th at 1267- 68; *see* 149 Fed. Cl at 296-97. Thus, the plaintiffs also failed to establish standing to bring their derivative claim. *Washington Federal,* 26 F.4th at 1268."

(Dkt. 48, page 4.)

Plaintiff respectfully requests this Court reconsider its decision finding that *Fairholme* (and by extension *Washington Federal*) bars his claims to the extent they are derivative.

POINT II

Plaintiff alleges that multiple statements by responsible officials of the United States established that the United States implicitly guaranteed payment of certain obligations of the

Enterprises. *See* Complaint ¶¶ 21-27, including footnotes 8 and 9. The Opinion and Order held that the statements alleged were insufficient to state a plausible scenario that the United States government had guaranteed the Enterprises' dividend obligations, and on that basis held that the Complaint failed to state a cause of action. In granting the Government's motion to dismiss for failure to state a claim upon which relief can be granted, this Court, of course, correctly identified the controlling standard of plausibility as set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

However, in Plaintiff's view, the Court improperly made a factual determination in holding that Plaintiff's allegations failed to meet that standard. Courts must construe a complaint in the plaintiff's favor and may not make factual determination on a motion to dismiss. *See, e.g., McFarland-Lawson v. Ammon*, 847 Fed.Appx. 350, 355 (7th Cir. 2021). And the standard of pleading facts sufficient to support plausibility is, frankly, a very "low bar." *See, e.g., Sprott v. Ottawa Hills Local School District,* 2024 WL 3292577 at *9 (plaintiff need only allege facts sufficient to meet plausibility standard "by the thinnest of margins" at the pleading stage, even if the court believes the facts as ultimately determined may not support plaintiff); *Supino v. SUNY Downstate Medical Center*, 2021 WL 4205181 (S.D.N.Y. March 15, 2021) (plausibility standard is a "low bar" at pleading stage); K.G. Tile, LLC v. Summitville Tiles, Inc. 2020 WL 7319282 at *5 (". . . this Court must take KG Tile's alleged facts as true and must draw all inferences in its favor" in considering whether plaintiff "meets the relatively low bar to plausibly state a claim . . .").

The conclusion urged by Plaintiff – that there was an implied guarantee – is hardly an implausible one. The Complaint alleged copious factual support for the marketplace to draw

such a conclusion. *See* Complaint ¶¶ 21-27, including footnotes 8 and 9. In light of these statements, was the conclusion of an implied guarantee implausible? No. To the contrary, it was so plausible that the marketplace did draw such a conclusion. Indeed, the Federal Circuit noted that such a conclusion was exactly the case. *See Washington Federal v. United States*, 26 F.4th 1253, 1260 (Fed. Cir. 2022). The Court is also referred to *Owl Creek v. United States*, 18-CV-281, Dkt. No. 64, June 8, 2020, at pages 7, 8, and footnote 7, in respect of official governments sources showing plausibility, which is quoted as follows:

> On March 27, 2019, President Donald J. Trump issued a memorandum in which he directed the Treasury Secretary to develop, "as soon as practicable," a plan for "[e]ndmg the conservatorships of the [Enterprises] upon the completion of specified reforms . . .."[7]
>
> Memorandum on Federal Housing Finance Reform, 84 Fed. Reg. 12,479, 12,479 (Mar. 27, 2019). The President explained that the plan must include proposals for "[sJetting the conditions necessary for the termination of the conservatorships" and outlined some of those conditions. Id. at 12,480. Subsequently, Treasury issued a plan in which it advocated for "begin[ning] the process of ending the [Enterprises'] conservatorshipsY[8] U.S.-Dep't of the Treasury, Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, at 3 (2019), https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf [https://perma.cc/RGH8-N385]; accord id. at 26 ("It is, after 11 years, time to bring the conservatorships to an end."). As part of the plan to end the conservatorships, Treasury proposed that it and the FHPA consider revising the Net Worth Sweep to allow the Enterprises to retain more of their earnings. Id. at 26-27.
>
> The FHFA shares Treasury's goals with respect to the conservatorships. Mark Calabria, the current FHPA Director, testified during his confirmation hearing that he wanted to end the conservatorships.[9] 165 Cong. Rec. S2246 (daily ed. Apr. 4, 2019) (statement of Sen. Crapo) (summarizing testimony). See generally Nominations of Bimal Patel, Todd M. Harper, Rodney Hood, and Mark Anthony Calabria: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs, 116th Cong. 10-40, 74-75, 148-85 (2019) [hereinafter Calabria Testimony] (documenting Mr. Calabria's testimony, statement, and responses to written questions during and after his confirmation hearing). He also stated that, as FHFA Director, he would seek to increase the amount of capital that

each Enterprise retains. Calabria Testimony, supra, at 150; see also id. at 25 ("I support the idea of having significantly more capital at the [Enterprises].").

7 The court takes judicial notice of the presidential memorandum because it is a government record published in a reliable source,-the Federal Register. See Murakami v. United States, 46 Fed. CL 731, 739 (2000) (noting that the court may take Judicial nonce of government documents), aff'd, 398 F.3d 1342, 1354-55 (Fed. Cir. 2005); see also Democracy Forward Found. v. White House Office of Am. Innovation, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) ("[J]udicial notice may be taken of government documents available from reliable sources, such as this 2017 Presidential Memorandum."). See generally Fed. R. Ev1d. 201 (d1scussmg judicial notice). Although a motion to dismiss is normally limited to the allegations in a complaint, the court may consider facts derived from sources subject to judicial notice without converting the motion into one for summary judgment. Sebastian v. United States, 185 F.3d 1368, 1374 (Fed. Cir. 1999)

In light of the correct standard to be applied, Plaintiff respectfully requests that this Court reconsider the portion of the Opinion and Order dismissing the Complaint for failure to state a claim upon which relief may be granted and allow the question of whether there was an implied guarantee proceed to discovery.

POINT III

Plaintiff alleges that the Court was misplaced in reliance upon Angel I District and Circuit Court decisions in making its determinations in the Opinion and Order on timeliness and preclusion in respect of Counts I, II, III, and V.

Plaintiff respectfully asserts that the District and Circuit decisions in *Angel I* should not be considered in this case because the United States was not an *Angel I* party defendant and rulings in *Angel I* are inconsistent with later decisions of this Court. *See, e.g., Fairholme v. FHFA* (Case No. 13-CV-1288, October 3, 2022), holding in reversal of prior holding regarding implied covenant of good faith and fair dealing, direct claim running with the shares contract, actionable with remedy of compensable damages. The Court, in later decisions, determined damages to be approximately $600 million, inclusive of interest. Accordingly, use of *Angel I*

decisions, for Angel IV Complaint determination of timeliness, plausibility, or other determinations, is inappropriate.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court reconsider its rulings in the Opinion and Order as outlined herein.

Dated: July 12, 2024

Respectfully submitted,
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UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA J. ANGEL,	)	
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Plaintiff,	)	No. 23-CV-800
	)	(Senior Judge Margaret M. Sweeney)
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

DECLARATION OF JOSHUA J. ANGEL

I. United States Court of Federal Claims *Angel II*

1. After the April 2020 dismissal of *Angel v. Federal Home Loan Mortgage Corp.,* No. CV-18-1142 (D.D.C. May 24, 2019), Aff'd 815 F.App'x at 566 (hereinafter "*Angel I*")[1], Plaintiff filed a new action in the United States Court of Federal Claims ("CFC"). with the United States as defendant, instead of FHFA, the Companies, and their respective director boards ("BOD"), *Angel II* Complaint (CFC No. 20-737) June 12, 2020.

2. Plaintiff filed the *Angel II* Complaint, as a *pro se* putative class action, *expressly stating therein, that Plaintiff did not contest the legality of the Third* Amendment. The *Angel II* Complaint, alleges *inter alia* breach by the United States of (1) the contract rights created by the Junior Preferred share certificate of designation ("COD"), (2) the covenant of good faith and fair dealing implied in every contract, and (3), the federal

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government implicit guaranty ("Implicit Guaranty"), of timely payment of the shares' contract rights.[2]

a. <u>The 1992 Federal Housing Enterprises Financial Safety and Soundness Act, 12 USC §4501.</u>

The Federal Housing Enterprises Financial Safety and Soundness Act (the "1992 Act"), created a revised regulatory structure to monitor Fannie Mae and Freddie Mac for compliance with their statutory mission. The 1992 Act is ambiguous as to whether there is a federal guaranty of the payment obligations created by the Junior Preferred CODs.

This 1992 Act's ambiguity resulted in Secretary Paulson's September 7, 2008 „statement that "These Preferred Stock Purchase Agreements were made necessary by the ambiguities in the GSE Congressional charters, which have been perceived to indicates government support for agency debt and guaranteed MBS." (Complaint paragraph 22). Paulson's statement was followed by other government officials, government agencies and authoritative commercial and legal authorities' recognition of the existence of a full faith and credit federal government Implicit Guaranty for Fannie Mae and Freddie Mac debt and equity securities, legal obligations timely payment which are outlined in *Angel IV* Complaint, paragraphs 21 through 27, footnotes 8 and 9. Government post-1992 refutation of the Implicit Guaranty, is totally absent, other than Defendant's *Angel II, III,* and *IV* defense allegations. In light of *Owl Creek v. United States*, 18-C-281, Page 9, June 8, 2020, Sweeney J. language regarding "government document from authoritative sources", Plaintiff requests that the Court reconsider the "plausibility issue" in respect of Angel IV, Count 1.

4. Plaintiff *Angel II, III,* and *IV* Complaints neither challenge the legality of the Third Amendment, nor the legality of the Net Worth Sweep. Rather, Plaintiff beginning *Angel II* Complaint and ,expanded in *Angel III* and *Angel IV* Complaints , repeatedly allege any later wrongful government actions, i.e., the government's quarterly actions preventing the Fannie Mae and Freddie Mac's respective BODs from making dividend determinations direct wrongful government actions, and in *Angel III* and *IV*, in (1) "Illegal Exaction' of $22 billion dividend contract property interests

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[2] Styled as a putative class action, neither the *Angel I* or *II* Complaints were certified as a class action, and no lead plaintiff was applied for or approved by the Court. Early on, the United States took the position that because *Angel II* was commenced by a *pro se* plaintiff, it could not be maintained as a class action. Rather than decided, the issue was mooted by, (a) Plaintiff's engagement of Joshua J. Angel of Angel PLLC as plaintiff counsel, in place of Joshua J. Angel serving *pro se* as *Angel II* complaint counsel, and (b) as explained below, Plaintiff responsive pleadings to Defendant MTD the *Angel II* Complaint, and the *Angel II* Settlement Agreement.

belonging to the Plaintiff, and (2) "Illegal Extraction" initially $25 billion, by year end 2023 $36 billion Defendant Private Label MBS Actions litigation asset proceeds.[3]

5. In response to *Angel II* complaint filing, Defendant on August 18, 2020, filed a motion to dismiss ("MTD") the *Angel II* Complaint, alleging, *inter alia*, "3. Whether the complaint states a [direct] claim for breach of contract," is in issue.

6. On September 17, 2020, Plaintiff filed a motion for a continuance, to stay further briefing of the MTD, so as to permit Plaintiff to obtain S.O.L. jurisdictional discovery, to refute the United States' MTD arguments ("Motion for Continuance," or "MFC"). On September 30, 2020, the United States filed an unopposed motion for an enlargement of time in which to reply to the MFC, to which Plaintiff consented.

7. On October 27, 2020, Plaintiff filed a consensual motion, requesting the Court temporarily suspend briefing on the MFC, until after the Supreme Court issued a decision in *Collins*. The Court that day, granted the motion and directed the Parties to submit a joint status report ("JSR") for further proceedings 30 days after a decision in *Collins*, denied both the MTD and MFC motions as moot, and stayed all further proceedings pending JSR filing ("October 27 Stay Order").

8. The October 27 Stay Order gave the parties opportunity to construct an informal settlement protocol, Plaintiff, after discussion with Defendant, agreed to formulate settlement proposals for (a) Defendant counsel review, and if acceptable, (b) Defendant counsel submission to appropriate government agencies with the agencies to have the option of acceptance or rejection with neither explanation nor feedback required.

9. On June 10, 2021, Plaintiff delivered a preliminary draft settlement agreement proposal, dated June 10, 2021, to Defendant counsel for client review. On June 17, 2021, Defendant counsel acknowledged Settlement Agreement receipt, stating; "Thank you for your proposal. We will review internally with the agencies, and get back to you. Thanks."

10. After the *Collins* decision June 22, 2021 there were a series of communications, informing Plaintiff counsel that (a) the appropriate agencies had approved a July 22, 2021,

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[3] Illegal Exaction - government unauthorized under HERA or otherwise serial taking via Third Amendment Net Worth Sweep Fannie, Freddie directors misdirection January 1, 2013, through December 31, 2023, $22 billion approximate of Fannie Mae, Freddie Mac Junior Preferred share contractual dividend entitlements.

Illegal Extraction - government unauthorized under HERA or otherwise in random taking via Third Amendment Net Worth Sweep misdirection of initially $25 billion, $36 billion of proceeds from 2011 Justice Department initiated litigation in name of Fannie Mae and Freddie Mac, against financial institutions engaged in the underwriting and issuance of residential mortgage-backed securities payment guaranteed by the companies through December 31, 2023 (hereinafter "Private Label MBS Actions").

filing of the Settlement Agreement with the Court and (b) the only Justice Department action that was required was approval by the lead counsel's superior and (3) that approval was delayed by that person's injury but no JSR filing extension would be required.

11. On or about July 21, 2021, Defendant requested, and Plaintiff consented, to suspend the Settlement Agreement court filing, from "30 days after *Collins* decision," to "30 days after Federal Circuit decision in *Fairholme* final and non-appealable." Defendant rationale for the agreement filing Defendant led motion stated as follows:

> "The interlocutory appeal from the Court of Federal Claims to the Federal Circuit, *Fairholme Funds v. United States [Fairholme]*, has been fully briefed, and is scheduled for argument on August 4, 2021. Indeed, the parties to the *Fairholme Funds* interlocutory appeal are required to file supplemental briefs, prior to argument, addressing the effect of the *Collins* decision on the cases appealed from the Court of Federal Claims."

12. Plaintiff July 2021 agreement to use the *Fairholme* case as point of reference in determining when an *Angel II* JSR would be filed, with the Court was not an agreement as to the relevance of *Fairholme* case to any of the procedural or substantive *Angel II* issues. *Fairholme* Circuit appeal, initially confined to a group of cases collectively denoted as *Fairholme* Third Amendment case: the *Fairholme* plaintiffs in challenge to the Third Amendment, *per se, ab initio* illegal. *Fairholme,* June 2020 enlarged to accommodate joinder in consideration of an interlocutory appeal of this Court's June 8, 2020, grant of Defendant MTD in *Owl Creek v. United States* complaint (18-CV-281, Dkt. No. 64), Court described *Owl Creak* complaint claims as follows:

> "In their amended complaint, plaintiffs present four claims. Plaintiffs first assert that the Net Worth Sweep constitutes <u>a Fifth Amendment taking</u> (count I) of their economic interests in their stock. Plaintiffs next assert, in the alternative, that <u>the Net Worth Sweep constitutes an illegal exaction</u> (count II) of those same economic interests because the (1) FHFA was operating unconstitutionally and (2) <u>FHFA-C and Treasury exceeded their statutory authority when they approved the PSPA Amendments</u>. (Dkt. 64, Page 9) (emphasis supplied)

As described in paragraph 4 above, and in *Angel II*, *III,* and *Angel IV*, Plaintiff repeatedly acknowledged the validity of the Third Amendment. Once again, Plaintiff is solely challenging the validity of governmental actions well after Third Amendment adoption. Most respectfully, Plaintiff suggests that the Court's employment of CFC and Circuit decisions of *Fairholme* in adjudicating Plaintiff *Angel IV* claims, rather that *Washington Federal* and *Owl Creek* CFC and Circuit decisions, to be misplaced.

13. From July 23, 2021, extension to March 16, 2022, Plaintiffs believed that there was an agreed to and binding *Angel II* Settlement Agreement track for ministerial Court courtesy filing on March 24, 2022, as an attachment to the joint status report ("JSR"), 2022.

14. For example, on January 20, 2022, Defendant lead counsel advised of an internal rotation, and Defendant lead counsel change. Not wanting to lose settlement momentum, Plaintiff same day advised both departing and incoming Defendant counsel, as follows:

> "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. 31(a)(1)(A)(i); and
>
> (3) Wire instructions for Fannie/Freddie attorney fee payments to Joshua J. Angel PLLC attorney escrow account at [deleted] Bank."

15. There was no response to this email for almost two months, Two months! Then, on March 16, 2022, eight days short of the then-agreed-to *Angel II* date for Settlement Agreement filing, in JSR Court courtesy attachment, Defendant, without explanation, completely changed its position on the Settlement Agreement, advising Plaintiff per email as follows:

> "*…will not be accepting your settlement offer, nor entering any stipulations at this time. Moreover, we are not interested in further settlement discussion at this time… 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*."

16. The final communication from the Defendant regarding Plaintiff permissive inclusion of the *Angel II* Settlement Agreement in Plaintiff portion of the JSR scheduled March 24, 2022, filing, received March 23, 2022, as follows:

> *"Mr. Angel,*
>
> *"Thank you for sending the updated draft. We continue to believe that your section of the JSR gives the reader the mistaken impression that a settlement has been agreed to, when it has not.* ***That said, should you insist on filing as drafted, we agree to the filing, provided no further changes are made. Should you make any further changes prior to filing, please send me an updated draft prior to doing so."*** *(emphasis added)*

17. The present attorney for the Defendant has never expressly denied, in either pleadings filed with this Court or communications with the Plaintiff, that an attorney for the Defendant told the Plaintiff that the Settlement Agreement had been approved.

18. **03/04/2022 - Joint Status Report Parties' Individual Opposing Case Positions**

Plaintiff	Defendant
A. The "...eleven other cases pending in this and other courts per Defendant, that involve various legal challenges to validity of the Third Amendment, are no more dispositive in relation to this case today, than they were at the time of the Briefing Stay Suspension Order October 27, 2020, entry... 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. "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."	A. "...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)... 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."[4]

[4] The *Fairholme* decision has been heavily referenced as supporting Defendant's MTD complaint allegations, that Plaintiff's claims are derivative, indirectly belonging to the Companies. There is language in other cases with complaints alleging government contractual breach (direct) rather than statute enactment (indirect), specifically: Defendant MTD *Washington Federal* (13 CV-385, Dkt. No. 64), and *Kelly v United States* (21-CV-1949, Dkt. No. 31), as well as *Kelly* parties' joint motion for stay of proceedings (Dkt. No. 7), which support the Plaintiff's position and should be considered. Under *Washington Federal,* and *Kelly*, shareholders, in "extreme circumstances," such as boards of directors' refusal even to consider actions expressly derivative, for reasons other than good-faith business judgment, may independently assert such causes of action. At the very least, the Court needs to consider whether the allegations of the *Angel IV* complaint credibly alleged such an "extreme circumstance."

19. On March 24, 2022, the Court in response to the Parties filed J.S.R. same date, ordered: (Dkt. No. 32)

> "To resume litigation of this case before the *Fairholme* decision is final and non-appealable would needlessly consume the resources of the parties and the court. Accordingly, this case remained **STAYED** and the parties shall **FILE** a joint status report within thirty days after the *Fair-holme* decision becomes final and non-appealable."

20. On April 18, 2022, the Court in response to Plaintiff effort for stay lifting, tightened the October 27 Stay Order of all *Angel II* proceedings, via April 18, 2022 (Dkt. No. 34) order as follows:

> "Accordingly, plaintiff's motion and all of the request stated therein are **DENIED**. The clerk is directed to reject any filings in this case, other than a notice of voluntary dismissal, until the parties file their joint status report."

21. On August 4, 2022, Plaintiff filed a Notice of Voluntary Dismissal pursuant to RCFC 41(a)(1)(A)(i), dismissing the *Angel II* action without prejudice.

II. United States Court of Federal Claims *Angel III*

22. On August 8, 2022, Plaintiff filed its *Angel v. United States* complaint, No. 22-CV-867. The complaint contained the Angel II breach of contract claims and added Illegal Exaction and Illegal Extraction Claims grounded in *West Virginia v. EPA,* counsel energized wrongful actions.

23. On May 12, 2023, Angel III was dismissed without prejudice.

III. United States Court of Federal Claims *Angel IV*

24. On June 1, 2023, Plaintiff filed *Angel v. United States*, No. 23-CV-800.

25. On October 13, 2023, Defendant filed a Motion to Dismiss.

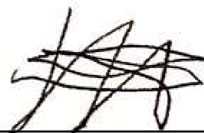
26. On June 25, the Court granted the Defendant's Motion to Dismiss.

27. On June 27, 2022, Plaintiff provided Defendant counsel with a detailed letter, referring to *Kelly v. United States* (21-CV-1949, Dkt. 48, May 8, 2024) and stating that Plaintiff viewed the June 24, 2024, Dismissal Decision Counts I, II, III, and V as

without prejudice as an invitation for Plaintiff to file a motion for reconsideration upon further fact taking.

28. On June 27, 2024, Defendant replied: "Mr. Angel, thank you for your letter. We do not see any grounds for a stay, so we do not consent to that relief."

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 12, 2024.



Joshua J. Angel