IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSEPH CACCIAPALLE, et al.,	)	
	)	
Plaintiffs,	)	No. 13-466C
	)	(Judge Sweeney)
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

CLASS PLAINTIFFS' SUPPLEMENTAL OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

The large majority of the arguments raised in Defendant's motion to dismiss are addressed in the Omnibus Opposition Brief prepared and submitted by the Class Plaintiffs together with Plaintiffs in a number of the related cases. Plaintiffs Joseph Cacciapalle and American European Insurance Company and the class members they seek to represent (collectively, "Class Plaintiffs") adopt and incorporate the arguments and the statement of facts from the Omnibus Opposition.

This supplemental brief is limited to addressing three claims not addressed in the Omnibus Opposition: the uncompensated taking of Class Plaintiffs' right to bring a derivative cause of action, Compl. ¶¶ 132-38 (Count II); Defendant's breach of the contract in the Fannie Mae and Freddie Mac Preferred Stock Certificates by entering into the Net Worth Sweep that eliminates Class Plaintiffs' dividend and liquidation rights, *id*. ¶¶ 149-56 (Count IV); and Defendant's breach of the implied covenant of good faith and fair dealing by entering into the Net Worth Sweep, *id*. ¶¶ 157-64 (Count V).[1]

Class Plaintiffs' complaint includes sufficient facts for each of these claims to proceed to discovery. For the cause-of-action taking, the Supreme Court and Federal Circuit have long recognized that causes of action are cognizable property for which just compensation must be paid. Accordingly, the Government's success in persuading the D.C. Circuit that HERA forecloses derivative claims means that HERA effected a taking of these claims.

[1] The Government argues that certain of the plaintiffs do not have standing to pursue their claims because they purchased their shares of Fannie Mae and/or Freddie Mac after August 17, 2012, the date of the Third Amendment. MTD at 46-47. That argument is incorrect for the reasons set forth in the Omnibus Brief. Regardless, the standing of the Class representative plaintiffs is not in question. Cacciapalle purchased his respective Fannie Mae and Freddie Mac preferred stock in January and February of 2008 and has been a holder continuously since that time. Compl. ¶ 15. Similarly, American European Insurance Company purchased its Fannie Mae and Freddie Mac preferred stock in May 2008 and January 2001, respectively, and has been a holder continuously since that time. *Id.* ¶ 16.

For the contract-related claims, the Government does not argue that no breach has occurred or that Class Plaintiffs have not been harmed. Instead, it argues that there is a lack of ***privity***. That is false because the Government stepped into the shoes of Fannie and Freddie when it forced them to agree to conservatorship and then breached their agreements with Class Plaintiffs through the nullification of all dividend and liquidation rights held by private shareholders. *See First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999).

For the reasons discussed herein and in the Omnibus Brief, this Court should deny the Government's motion in its entirety and permit this case to proceed to discovery.

I. Class Plaintiffs' Right To Bring Derivative Causes Of Action And Seek Injunctive And Declaratory Relief Is A Cognizable Property Interest.

As explained in the Complaint, the Supreme Court and Federal Circuit have long recognized that a cause of action constitutes a property right protected by the Takings Clause. Compl. ¶ 90. The Supreme Court has recognized that a cause of action is a species of property protected by the Due Process Clause, *Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 804 (1996) (collecting cases acknowledging that a "chose in action" is a "protected property interest in its own right"), and that a cause of action is property for purposes of the Takings Clause, *Dames & Moore v. Regan*, 453 U.S. 654, 691 (1981) (Powell, J., concurring) ("The Court holds that parties whose valid claims are not adjudicated or not fully paid may bring a 'taking' claim against the United States."). The Federal Circuit has held unequivocally that a cause of action constitutes a property right protected by the Takings Clause. *Adams v. United States*, 391 F.3d 1212, 1225-1226 (Fed. Cir. 2004) ("a cause of action may fall within the definition of property recognized under the Takings Clause" where "the cause of action protects a legally-recognized property interest"); *Abrahim-Youri v. United States*, 139 F.3d 1462, 1465-66 (Fed. Cir. 1997) ("We agree with plaintiffs that their property rights-their choses in action against Iran-were extinguished when the

Government espoused and settled their claims"); *All. of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) ("Because a legal cause of action is property within the meaning of the Fifth Amendment, claimants have properly alleged possession of a compensable property interest.") (citations omitted).

The Government does not directly contest this point or the authorities cited by Class Plaintiffs. Instead, the Government cites a single 1948 case from another circuit, *Beneficial Indus. Loan Corp v. Smith*, 170 F.2d 44 (3d Cir. 1948), for the proposition that "'[t]he right to bring a stockholder's derivative suit is not a property right.'" MTD at 54 (quoting *Beneficial*, 170 F.2d at 58). However, *Beneficial* was not a takings case and has never been cited for this proposition.

Moreover, *Beneficial*'s statement is not an accurate statement of state law. State law typically defines the existence of property rights.[2] Here, the Delaware Court of Chancery has recently confirmed that "Delaware courts continue to recognize that the right to bring a claim for breach of fiduciary duty, *including derivatively*, is a property right associated with a share of stock and freely assignable." *Quadrant Structured Products Co., Ltd. v. Vertin*, 102 A.3d 155, 179 (Del. Ch. 2014) (emphasis added).

The holding in *Beneficial* was that New Jersey law did not deprive the plaintiff there from bringing her cause of action. *Beneficial*, 170 F.2d at 58 ("The plaintiff is not deprived of her cause of action by the New Jersey statute and she may assert her remedy subject to a reasonable condition."). Here, so long as the D.C. Circuit decision stands, Class Plaintiffs *are* being deprived of their derivative cause of action. Accordingly, the unremarkable proposition for which

[2] *See, e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992) (explaining the Supreme Court's "traditional resort to existing rules or understandings that stem from an independent source such as state law to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments") (citations omitted).

Beneficial stands, that the "Fourteenth Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real, and the condition imposed has reasonable relation to a legitimate object," *id*., has no application to this case.

The Government tries to transform *Beneficial*'s procedural focus by arguing that "Because any shareholder derivative suit seeks to vindicate a claim belonging to a corporation, any limit on that claim affects the corporation's rights, not the shareholder's." MTD at 54. This is a *non sequitur*. Even if the right to recovery being protected belongs to the corporation, the *right* to bring the derivative claim protecting that underlying corporate right belongs to the stockholders—and hence was *taken from* the stockholders. *See Quadrant Structured*, 102 A.3d at 179 (explaining that the right to bring a derivative suit is transferrable). That right to bring a derivative action seeking damages or injunctive and declaratory relief, which arises from long established common law, is a protectable property right for takings purposes. *See id*.; *Alliance*, 37 F.3d at 1481; *Horne v. Dept. of Agriculture*, 135 S. Ct 2419, 2427-28 (2015) (reaffirming "the established rule of treating direct appropriations of real and personal property alike"). This follows from the fact that cognizable property interests under the Fifth Amendment have been interpreted broadly based on "'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, [that] define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992)). And the right of a shareholder to bring a derivative suit to protect the company's (and its own) interests has been part of the fabric of the rules, understandings, and principles in this country for hundreds of years. *See Schoon v. Smith*, 953 A.2d 196, 201 et seq. (Del. 2008)

(detailing history of derivative actions in Delaware). As such, the right to bring such actions is a cognizable property interest under the Fifth Amendment.

The Government also argues that Class Plaintiffs' cause-of-action claim is not a compensable property right until Class Plaintiffs "obtain a final, unreviewable judgment in their favor." MTD at 54-55. This Court has rejected this very argument, holding that the proposition that "only final judgments are considered property under the Fifth Amendment…is directly contrary to the Federal Circuit precedent." *Aureus Asset Managers, Ltd. v. United States*, 121 Fed. Cl. 206, 213 (2015); *id*. at 210-13 (discussing *Abrahim-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997); *All. of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478 (Fed. Cir. 1994); and *Shanghai Power v. United States*, 4 Cl. Ct. 237 (1983)); *Alimanestianu v. United States*, 124 Fed. Cl. 126, 131-32 (2015); *Aviation & General Ins. Co., Ltd. v. United States*, 121 Fed. Cl. 357, 362-66 (2015). Moreover, in affirming the decision on which Defendant principally relies, *Two Shields v. United States*, 119 Fed. Cl. 762, 788 (2014), did so "not for the reasons relied on by the [Court of Federal Claims]." *Two Shields v. United States*, 820 F.3d 1324, 1333 (Fed. Cir. 2016) (assuming for its analysis that plaintiff had a cognizable property interest). Binding Federal Circuit authority precludes the Government's argument and makes clear that takings of causes of action are compensable takings even when the cause of action has not yet been converted into a final, unreviewable judgment.[3]

[3] This is certainly the case when, like here, the cause of action "protects a legally-recognized property interest" that arises from state or common recognized rights like those Plaintiffs seek to protect here. *Aureus*, 121 Fed. Cl. at 212-13. Even the *Two Shields* opinion relied upon by the Government concedes as much. *Two Shields*, 119 Fed. Cl. at 787 ("a claim can only be a property right under the Fifth Amendment if it 'protects a legally-recognized property interest'") (quoting *Adams*, 391 F.3d at 1225-26). Unlike here, none of the cases cited by the Government involved a cause of action to remedy an actual underlying taking of property or protect a legally-recognized property interest. *See Campbell v. United States*, 137 Fed. Cl. 54, 62-63 (2018) (personal injury claims extinguished in bankruptcy proceedings); *Two Shields*, 119 Fed.

II. This Court Has Jurisdiction Over Class Plaintiffs' Properly Alleged Contract Claims.

The Government spends nearly all of its argument on the contract claims arguing that no implied-in-fact contract exists and that Class Plaintiffs are not third-party beneficiaries. MTD at 41-43, 75-78. With respect to these arguments, Class Plaintiffs adopt the contract-related arguments ably made in the Combined Opposition to Defendant's Omnibus Motion to Dismiss of Plaintiffs Owl Creek Asia I *et al*., No. 18-529 *et al*.

The only argument the Government makes specifically against the Class Plaintiffs' complaint is that the breach of contract and breach of implied covenant of good faith and fair dealing claims lack a contract to which the Government is a party. MTD at 41, 75. *See also* Compl. ¶¶ 149-56 (Count IV, Breach of Contract); *id*. ¶¶ 157-64 (Count V, Breach of Implied Covenant). Accordingly, the Government concedes that the contracts "provide for certain rights to dividends, liquidation, and voting rights" and created an obligation to "deal fairly with Plaintiffs" and "not to deprive Plaintiffs of the fruits of their bargain," *id*. ¶¶ 155, 159, and that the Third Amendment breached these obligations and caused harm to Class Plaintiffs, *id*. ¶¶ 156-57, 163-64. The sole issue for the Court to address is whether Class Plaintiffs have alleged a valid contract between the Government and Class Plaintiffs. *See* MTD at 75.

In support of its argument, the Government relies on the allegation that "'The Certificates for the Fannie Mae and Freddie Mac Preferred Stock constitute contracts between Plaintiffs, on the one hand, and Fannie Mae and Freddie Mac, on the other.'" MTD at 41 (quoting Compl. ¶ 150). It ignores, with no explanation, the two allegations immediately following the paragraph

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Cl. at 788 ("plaintiffs are not seeking compensation for an actual taking of their mineral rights, but are alleging that the BIA breached a fiduciary duty by leasing plaintiffs' mineral rights on terms below market value"); *Bowers v. Whitman*, 671 F.3d 905, 909 (9th Cir. 2012) (involving temporary administrative waivers from land use restrictions and a plaintiff's contingent right to seek compensation under an Oregon statute that was subsequently amended to alter those remedies).

it quotes: (a) that "FHFA assumed the responsibility to act consistently with the Companies' contractual obligations when it became the Companies' conservator," Compl. ¶¶ 153, 161; *see also* 12 U.S.C. § 4617(b); and (b) that Net Worth Sweep constituted a breach that "was developed and implemented by two federal agencies—the FHFA and the U.S. Treasury—to advance the economic and political interests of the U.S. Government," Compl. ¶¶ 162, 154. These allegations establish that, while the initial contracts did not involve the Government, the Government—through FHFA—became a party to the contracts by assuming the Companies' obligations, which it then breached when it choose to implement the Net Worth Sweep to further the Government's interests.

These allegations are sufficient to state the contract claims at issue because this Court has jurisdiction over such claims where "the party standing outside of privity by contractual obligation *stands in the shoes* of a party within privity." *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999) (emphasis added). Typically, situations falling within this framework involve a third-party private person stepping into the shoes of private party that is in privity with the Government. *See id*. (collecting cases illustrating this point). There is no reason, however, to treat a third-party Government entity stepping into the shoes of a private party by contract and statute differently than a third-party private entity stepping into those same shoes.

This Court's exercise of jurisdiction is particularly appropriate in situations where, like here, the Government agency's breach of its acquired obligations was intended to further a governmental interest. In this case, FHFA breached the contracts specifically "to advance the economic and political interests of the U.S. Government." Compl. ¶¶ 154, 162. Indeed, the Net Worth Sweep is nothing like "the standard receivership situation in which the receiver is enforcing the rights or defending claims and paying the bills of the seized" entity. *Slattery v. United States*,

583 F.3d 800, 827-28 (Fed. Cir. 2009). It was instead designed to "ensure that 'every dollar of earnings that Fannie Mae and Freddie Mac generate will benefit taxpayers.'" Compl. ¶ 57; *see also* ¶¶ 67-68. FHFA's actions while in the shoes of Fannie and Freddie were not those of a private entity but of a governmental entity acting in its own interests. *See Slattery*, 583 F.3d at 827 (recognizing "that whether the FDIC is 'the government' depends on the context of the claim").

Thus, when FHFA assumed the contractual obligations held by Fannie and Freddie and then used its new-found position to further governmental interests, there was privity between the Government and Class Plaintiffs sufficient to give this Court jurisdiction and state a claim.

CONCLUSION

For these reasons, and those in the Omnibus Opposition Brief, this Court should deny Defendant's motion to dismiss.

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Respectfully Submitted,

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