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IN THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

UNITED STATES OF AMERICA, Plaintiff, vs. GOVERNMENT OF GUAM; CHAMORRO LAND TRUST COMMISSION; and ADMINISTRATIVE DIRECTOR OF THE CHAMORRO LAND TRUST COMMISSION, Defendants.	CIVIL CASE NO. 17-00113 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION PURSUANT TO FED. R. CIV. P. 54(b) TO VACATE THE SECTION OF THE COURT'S DECEMBER 21, 2018 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND THE COURT'S APRIL 25, 2019 ORDER DENYING RECONSIDERATION**

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I. INTRODUCTION

The United States respectfully moves, pursuant to Federal Rule of Civil Procedure 54(b) and Paragraph 25 of the settlement agreement entered into by the parties in this case on June 4, 2020 ("Agreement") (attached hereto as Exhibit "A"), for this Court to vacate Section V.B of its interlocutory order dated December 21, 2018, which granted in part and denied in part defendants' motion for judgment on the pleadings, and the Court's interlocutory order dated April 25, 2019, which denied reconsideration of the Court's holding that the United States may not, as a matter of law, bring a claim against defendants for monetary damages for individual victims of housing discrimination under the Fair Housing Act ("FHA"), 42 U.S.C. § 3614(d)(1)(B). Order Denying Pl.'s Mot. for Partial J. on the Pleadings & Granting in Part and Denying in Part Defs.' Mot. for J. on the Pleadings and Joinder Therein at 50-61, Dec. 21, 2018, ECF No. 53;[1] Order Denying Pl.'s Mot. to Revise Order Granting in Part Defs.' Mot. for J. on the Pleadings, Apr. 25, 2019, ECF No. 72.[2] This Motion does not seek vacatur of any other part of the Court's December 21, 2018 Order. This Motion likewise does not seek to reinstate the United States' damages claims against defendants in the instant matter, those claims having been fully resolved by the Agreement and following the Court's dismissal of this matter with prejudice.[3] Under the terms of the Agreement, defendants do not oppose this Motion. Ex. A,

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[1] *See also United States v. Guam*, No. 17-00113, 2018 WL 6729629, at *18-22 (D. Guam Dec. 21, 2018).

[2] *See also United States v. Guam*, No. 17-00113, 2019 WL 1867426 (D. Guam Apr. 25, 2019).

[3] *See Int'l Union v. Karr*, 994 F.2d 1426, 1429 (9th Cir. 1993) ("After the parties entered into a settlement agreement, the district court dismissed the entire action with prejudice. The dismissal of the action with prejudice constitutes a final judgment on the merits, and prevents the Trusts from reasserting the same claim in a subsequent action against AUC."). However, the parties have requested that this Court retain jurisdiction for the limited purpose of deciding the

Agreement ¶ 25.[4]

The United States does not bring this Motion lightly. The United States understands and respects that this Court has carefully considered and issued two decisions on whether the FHA authorizes the United States to seek damages for individual discrimination victims in this case. It does not seek vacatur on grounds that it disagrees with this decision. Indeed, the United States is not seeking vacatur of the Court's denial of the United States' motion for judgment on the pleadings. *See* ECF No. 53 at 28-50. Conversely, the United States understands that granting this Motion would also result in this Court vacating other parts of its ruling that find in favor the United States. *See id*. at 50-55.

Instead, the United States brings this Motion because, based on our experience litigating fair housing cases across the country, we are reasonably concerned that the Court's rulings on damages, if cited in other cases and adopted by other courts, could undermine the United States' enforcement interests under the FHA and deprive housing discrimination victims of critical protections and remedies afforded by the FHA. That this Court may not have intended this effect does not mean that these concerns are unfounded. The United States therefore has a strong interest in appealing these rulings. Yet to settle this case—a result that the parties agree is in the public interest and, as this Court has noted, is far more desirable than going to trial—the United States must forego its right to appeal. Under these circumstances, vacatur is a fair, reasonable, and equitable alternative to forcing the United States to reject a mutually-beneficial settlement,

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instant Motion. Mot. to Dismiss, ECF No. 95.

[4] Although the Agreement refers only to seeking vacatur of the Court's denial of the United States' damages claims, in the interest of fairness and equity to all parties, the United States moves here to vacate the Court's entire decision on defendants' motion for judgment on the pleadings, including the Court's findings and language that found in favor of the United States. The United States conferred with defendants on this question, who do not object.

go to trial, and obtain a final judgment on the merits, solely to appeal a ruling on a legal question that, while of considerable importance to the United States' broader enforcement responsibilities, is at best incidental to settlement of the instant case. The United States therefore respectfully asks this Court to set aside its damages rulings and leave the resolution of this issue for another day.

II. BACKGROUND

A. Procedural History

The United States filed this action on September 29, 2017, alleging that defendants' awarding of residential leases to "native Chamorros" under the Chamorro Land Trust Act ("CLTA") violated the FHA's prohibition on race discrimination in housing. Compl. ¶ 43, ECF No. 1. On August 31, 2018, per this Court's Order (ECF No. 32), the parties filed cross-motions for judgment on the pleadings. ECF Nos. 34, 35. Defendants' motion argued that the United States' claims should be dismissed because defendants were not "persons" subject to liability under the Fair Housing Act and because defendants were entitled to sovereign immunity. Defs.' Mot. for J. on the Pleadings, ECF No. 35. The United States responded that states and territories may be sued under the FHA and that sovereign immunity did not apply to or bar the United States' claims. U.S. Resp. in Opp. to Defs.' Mot. for J. on the Pleadings, ECF No. 37.

On November 29, 2018, this Court heard oral argument on these motions. At the close of the hearing, the Court took these motions under advisement and encouraged the parties to settle. Hr'g Tr. 95-97, Nov. 29, 2018 (attached as Exhibit "B"). The Court noted that "the prospect of a trial for the alleged yet unidentified victims . . . of the alleged discrimination is kind of a horrifying thought," and that trial in this case would be "very expensive" and require the Court to issue "very extensive findings." *Id.* at 96. The Court then observed that the United States might want to reject settlement and insist on going to trial to obtain an adverse final judgment "[t]hat

can make its way through the appellate process." *Id*. Notwithstanding this concern, the Court "urge[d]" the parties to consider settlement. *Id.* at 97.

On December 21, 2018, the Court denied the United States' motion in full, and granted in part and denied in part defendants' motion. ECF No. 53 at 1-2. With respect to defendants' motion, the Court agreed with the United States that defendants could be sued under the FHA and did not enjoy sovereign immunity against the United States' claims. *Id.* at 50-55. Nevertheless, the Court dismissed the United States' FHA damages claims, on grounds that "Congress intended that a court prevent duplicative litigation by awarding in a suit brought by the United States the same relief awardable had the aggrieved persons brought a Fair Housing Act claim themselves." *Id.* at 57. Accordingly, the Court concluded that because the aggrieved persons' damages claim would have been barred by sovereign immunity, the FHA likewise prohibited the United States from seeking this relief for these individuals. *Id.* at 57-58.

On February 8, 2019, the United States moved for reconsideration of this ruling, noting that it had not had the opportunity to brief this issue because defendants had not raised this argument in their motion or reply brief. *See* Mot. to Revise Order Granting in Part Defs.' Mot. J. on the Pleadings 1, ECF No. 62. On April 25, 2019, the Court denied this motion, and amended the December 21, 2018 Order only to clarify that Guam, as a territory and not a State, was entitled to sovereign immunity and not Eleventh Amendment immunity. ECF No. 72, at 5-6, 16.

B. Settlement Negotiations and Agreement

Immediately after the Court encouraged the parties to settle during the November 29, 2018 hearing, counsel for both sides approached each other and agreed to inquire as to whether their clients were interested in participating in a settlement conference. Declaration of Max Lapertosa ¶ 2, ECF No. 98. On December 19, 2018, before the Court ruled on the parties' dispositive motions, counsel for the United States sent an email to defendants' counsel to

schedule a time to discuss settlement. Defendants' counsel responded affirmatively and suggested various dates when they were available in January, after the holidays.[5] *Id*. ¶¶ 2-3.[6]

Between February 8, 2019 and November 14, 2019, the parties engaged in extensive settlement negotiations, while concurrently exchanging written discovery, taking depositions, and preparing expert reports. On February 12, 2019, at the parties' request, Magistrate Judge Barry M. Kurren scheduled a settlement conference in Guam for June 18, 2019. Scheduling Order 2-3, ECF No. 66. This conference lasted two full days, and while it did not result in a final settlement, the parties agreed to keep negotiating. During a telephonic status conference on September 5, 2019, the parties requested a second settlement conference with Judge Kurren, which he scheduled in Guam for November 13, 2019. Am. Scheduling Order 3, ECF No. 80.

Late in the day on November 14, 2019, the parties reached an agreement in principle. The final Settlement Agreement (Ex. A) provides important benefits to both sides beyond avoiding an expensive and complex trial. As the Chamorro Land Trust Commission ("CLTC"), a defendant in this case, has recognized, the Agreement "preserves the [Chamorro Land Trust] program intact and would not materially affect existing leaseholders." CLTC Resolution No. 2019-08 at 2, Dec. 26, 2019 (attached as Exhibit "C"). It does so by requiring amendments to

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[5] Settlement discussions were delayed by the Government shutdown, which prevented counsel for the United States from working on all but emergency matters. *See* U.S. Mot. to Stay Proceedings ¶ 3, ECF No. 55 (citing 31 U.S.C. § 1342).

[6] To avoid disclosing confidential settlement communications on the record, the United States has not attached this email exchange and instead submits a declaration by undersigned counsel verifying that this exchange took place. The United States does so for the limited purpose of showing that both sides diligently pursued the Court's suggestion to settle before the Court ruled on the pending dispositive motions, and not for the purpose of disclosing settlement offers or terms. Should the Court wish to view these emails, the United States is willing to produce them for *in camera* review or file them under seal.

the Chamorro Land Trust Act and regulations that would remove "native Chamorro" as the eligibility criterion for awarding leases, which the United States had challenged as racially discriminatory, and instead awards leases based on whether individuals can demonstrate that the United States government acquired their or their descendants' land during a specified time period. Agreement ¶ 19. These amendments would resolve the United States' facial challenge to the CLTA. Just as significantly, the amicable resolution of this case represents a departure from the long—and sometimes acrimonious—history of contested land litigation between the Government of Guam and the United States.[7] In short, the Agreement is a "win-win" for both sides.

C. The United States' Concerns with Respect to Settlement and Allowing the Court's Rulings on the United States' Damages Claims to Stand

For the United States, one significant barrier to settlement was that it would require the United States to waive its right to appeal the Court's interlocutory orders interpreting the FHA as prohibiting the United States from seeking damages for housing discrimination victims from the defendants in this case. As described below, the United States has well-founded concerns about the potential impact and implications of this decision to the United States' ability to seek justice for victims of housing discrimination. These concerns are unrelated to the instant case, whose claims—including the United States' damages claims—are fully resolved by the Agreement.

To our knowledge, the Court's ruling is the first time any court has held that the United States' FHA claims are subject to an affirmative defense applicable to private claims. If adopted by other courts, this decision would prohibit the United States from seeking damages for discrimination victims from any defendant that demonstrates that it could have successfully

[7] *See*, *e.g.*, *Guam v. United States*, 179 F.3d 630 (9th Cir. 1999); *Guam v. United States*, 744 F.2d 699 (9th Cir. 1984).

asserted a claim of Eleventh Amendment or sovereign immunity had the FHA case been brought by the victims themselves. This includes not just States themselves, but also state housing authorities and housing finance agencies. *See*, *e.g.*, *Bylsma v. Haw. Pub. Hous. Auth.*, 951 F. Supp. 2d 1116, 1120 (D. Haw. 2013) (in private case brought under Americans with Disabilities Act and state negligence law, court dismissed state claim because "[t]he HPHA is a state agency, and, as such, the HPHA and its employees fall within the protection of the Eleventh Amendment."). Indeed, one of the Supreme Court's leading FHA cases involved a defendant state housing agency, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Proj.*, __ U.S. __, 135 S. Ct. 2507 (2015), thus demonstrating that state agencies may often be the subject of FHA claims by the United States.

Beyond state agencies, the United States is also concerned that this ruling could impact cases against local and quasi-local agencies, such as public housing authorities, that frequently invoke Eleventh Amendment or sovereign immunity by claiming to be an "arm of the State" or an "alter ego" of the State.[8] To be sure, these arguments do not always succeed. Nevertheless, for the first time, the United States would often be required to litigate and seek discovery on whether a defendant's immunity claim had merit, which turns on what the Ninth Circuit has called a "multi-factored balancing test." *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 250-51 (9th Cir. 1992) (factors include "(1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central governmental functions, (3) whether the

[8] *See Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988) (holding that local community college district was "a state entity that possesses eleventh amendment immunity"); *Holmes v. Marion Cnty. Office of Family and Children*, 349 F.3d 914, 919 (7th Cir. 2003) ("[C]ounty offices of family and children in Indiana now must be classified as part of the state for purposes of the eleventh amendment.").

entity may sue or be sued, (4) whether the entity has the power to take property in its own name or only the name of the state, and (5) the corporate status of the entity.") (internal quotations and citations omitted).[9] This is because, were the Court's ruling adopted, a sovereign immunity claim would no longer be automatically dismissed as inapplicable or irrelevant to the United States' FHA claims. To the contrary, the validity of a sovereign immunity defense would be *determinative* of whether the United States could seek damages for individual discrimination victims under the FHA.

Finally, the United States is concerned about the ruling's potential impact beyond sovereign immunity defenses. The United States commonly seeks relief, including damages and injunctive relief, on behalf of individual discrimination victims who may be legally barred from bringing their own claims. Landlords and municipalities may cite the Court's analysis and reasoning, particularly its language with respect to avoiding "duplicative litigation," *see* ECF No. 53 at 57, to argue that the United States should not recover *any relief* for *any* discrimination victim unless the victim could seek such relief on his or her own. For example, a landlord who sexually harassed a tenant, and then brought an eviction proceeding against her in state court, might argue that the United States may not seek damages for this tenant because her own FHA

[9] *See also Peters v. Del. River Port Auth.*, 16 F.3d 1346, 1350 (3d Cir. 1994) (setting forth "criteria to be considered in determining whether an entity is an alter ego of a State for Eleventh Amendment purposes," including the entity's funding source, status under state law, and the entity's degree of autonomy from the State); *Gray v. Laws*, 51 F.3d 426, 431 (4th Cir. 1995) ("It is often difficult to determine whether a government entity with both state and local characteristics constitutes an 'arm of the state' for Eleventh Amendment purposes."); *Slavish v. City of Wilkes-Barre*, No. 3:17-CV-1468, 2018 WL 5289500, at *9-12 (M.D. Pa. June 14, 2018) (recommending that court defer judgment and order additional factual development as to whether the Wilkes Barre Housing Authority was an arm of the State), *adopted*, 2018 WL 5283437 (M.D. Pa. Oct. 24, 2018).

claims are barred by res judicata due to her failure to raise them during her eviction case.[10] Similarly, a municipality might argue that the United States may not seek relief for persons with disabilities who were being removed from their group home under an adverse zoning decision because the residents failed to appeal this decision per state law. Currently, such arguments would be automatically rejected on grounds that the United States was not a party to these earlier proceedings.[11] Yet defendants in other FHA cases may argue that this is no longer the case under this Court's analysis and interpretation of the FHA, which ties the viability of the United States' damages claims to those of individual discrimination victims. The United States does not concede here that these arguments have merit or should succeed, but remains concerned that the Court's ruling will give rise to numerous new legal challenges and arguments that were previously considered inapposite and irrelevant.

The United States recognizes that this Court, in denying reconsideration, distinguished sovereign immunity from other affirmative defenses—specifically statutes of limitations—on grounds that, unlike claims that are time-barred, "individuals acting on their own behalf could never have recovered damages against Guam." ECF No. 72, at 16. However, the Court declined

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[10] *See*, *e.g.*, *Turner v. Crawford Square Apartments III*, 449 F.3d 542, 548-49 (3d Cir. 2006) (state court eviction judgment barred plaintiff from bringing FHA claims against landlord); *West v. DJ Mortg.*, 164 F. Supp. 3d 1393, 1401-02 (N.D. Ga. 2016) (whether res judicata barred plaintiff's FHA unlawful interference claim turned on whether, under Georgia law, she could have raised these claims in an eviction action in magistrate's court); *Jamison v. Hart Realty*, No. 2:04-CV-535, 2005 WL 2290309, at *4 (S.D. Ohio Sept. 20, 2005) (eviction judgment by municipal court barred FHA claims that eviction was discriminatory, as well as other federal claims that "should have been raised during the eviction action."); *Flynn v. 3900 Watson Place, Inc.*, 63 F. Supp. 2d 18, 22-23 (D.D.C. 1999) (eviction judgment in D.C. Superior Court barred tenant's FHA claims arising out of the eviction); *Fayyumi v. City of Hickory Hills*, 18 F. Supp. 2d 909, 917-19 (N.D. Ill. 1998) (analyzing, under state law, whether FHA claims are barred by res judicata by virtue of not having been raised in state court eviction action).

[11] *See United States v. City of Beaumont*, No. 1:15-CV-201, 2016 WL 159228, at *1 (E.D. Tex. Jan. 14, 2016).

to revise its initial holding that "Congress intended that a court prevent duplicative litigation by awarding in a suit brought by the United States the same relief awardable had the aggrieved persons brought a Fair Housing Act claim themselves," ECF No. 53 at 57, which is not limited to sovereign immunity. And even if it had, defendants in other FHA cases might argue that, once this general principle is accepted, there is no logical reason to limit it to sovereign immunity defenses. Indeed, defendants in other FHA cases might argue that discrimination victims who failed to preserve their own claims are *less deserving* of relief than those whose claims were barred through no action or fault of their own. Again, while the United States does not admit or concede the validity of these arguments and would vigorously contest them, it remains concerned that the Court's ruling may give rise to such challenges and, at the very least, delay the achievement of justice for housing discrimination victims.

For these reasons, the Agreement's provision that defendants do not oppose vacatur of the Court's damages ruling was a critical settlement term that allowed the United States to enter into the Agreement and resolve this case.

III. LEGAL ARGUMENT

A. Legal Standard Governing Vacatur

In *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the Supreme Court held that when a case becomes moot on appeal due to "happenstance," thereby preventing appellate review, the "established practice of the Court . . . is to reverse or vacate the judgment below and remand with direction to dismiss." *Id.* at 39. This practice is initiated by a motion to vacate the judgment, which is "commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 41; *see also Planned Parenthood of Wis. v. Azar*, 942 F.3d 512, 519 (D.C. Cir. 2019).

In *U.S. Bancorp Mortgage Co. v. Bonner Mail Partnership,* 513 U.S. 18 (1994), the

Supreme Court clarified that when mootness results not from "happenstance" but from voluntary action by the parties, including settlement, vacatur of a lower court decision is not automatic and may be granted only under a showing of "exceptional circumstances," which "do not include the mere fact that the settlement provides for vacatur." *Id.* at 29. This is because "[j]udicial precedents are presumptively correct and valid to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that a public interest would be served by vacatur." *Id.* at 26-27 (quoting *Izumi Seimitsu Kogyo Kabushiki v. U.S. Phillips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)).

However, the Ninth Circuit has held that *U.S. Bancorp*'s "exceptional circumstances" test does not apply to the district court, which "may vacate its own decision in the absence of extraordinary circumstances." *Am. Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1168 (9th Cir. 1998). Instead, a district court should "decide whether to vacate its judgment in light of the consequences and attendant hardships of dismissal or refusal to dismiss and the competing values of finality of judgment and right to relitigation of unreviewed disputes." *Id.* (citations and internal quotations omitted). The district court should also examine "the motives of the party whose voluntary action mooted the case[.]" *Id*. If the party seeking vacatur "did not intend to avoid appellate review and to have the district court's order vacated," this "may weigh equitably in favor of vacating the order." *Id.*; *see also Ayotte v. Am. Econ. Ins. Co.*, 578 F. App'x 657, 659 (9th Cir. 2014) (reversing and remanding district court's denial of vacatur where court followed *U.S. Bancorp* and not the balancing test in *American Games*).

District courts may vacate an interlocutory order under Federal Rule of Civil Procedure 54(b) where the potential for appellate review is mooted by settlement "when it is 'consonant with equity' to do so." *Luciano Farms, LLC v. United States*, No. 2:13-cv-02116-KJM-AC, 2016 WL 4884855, at *1 (E.D. Cal. Sept. 14, 2016) (quoting *De La O v. Arnold-Williams*, Nos.

04-0192 & 05-0280, 2008 WL 4192033, at *1 (E.D. Wash. Aug. 27, 2008) (citation omitted)). In making this determination, courts consider "whether all the parties involved in the ruling(s) request and agree to vacatur as a condition of a proposed settlement of the action … whether a former party to the action would be adversely affected by a vacatur; and whether the costs of continuing the action with uncertain results are outweighed by the benefits of the proposed settlement of the action." *Cuviello v. Cal. Expo*, No. 2:11-CV-2456 KJM EFB, 2014 WL 1379873, at *3 (E.D. Cal. Apr. 8, 2014) (quoting *De La O*, 2008 WL 4192033, at *1).

B. The Balancing of the Equities in this Case Favors Vacatur

1. The United States' Concerns Over the Impact of the Court's Damages Rulings in Future Cases Justify Vacatur

The First and Second Circuits, applying *U.S. Bancorp*'s more stringent "exceptional circumstances" test, have held that vacatur of a district court decision is appropriate where one of the settling parties is "a repeat player before the courts" and is "*primarily* concerned with the precedential effect of the decision below." *Motta v. Dist. Dir. of Immigration & Naturalization Servs.*, 61 F.3d 117, 118 (1st Cir. 1995) (emphasis in original); *see also Major League Baseball Props. v. Pac. Trading Cards, Inc.*, 150 F.3d 149, 152 (2d Cir. 1998). In *Motta*, the former Immigration and Naturalization Service ("INS") settled with the plaintiff while the case was pending on appeal. 61 F.3d at 118. The INS then asked the First Circuit to vacate the district court's decision staying the plaintiff's deportation, which the INS viewed "as a dangerous and erroneous precedent[.]" *Id*. In granting vacatur, the First Circuit relied on the fact that "the INS has at all times sought to pursue its appeal; it has agreed to consider settlement only at the suggestion of this Court, the proposed settlement being an inexpensive, simple, and speedy way to accommodate the interests of both parties." *Id.* Under these circumstances, "the equities plainly favor vacatur." *Id.* And although the First Circuit recognized that "depriving the public

and the judicial system of the precedential value of the district court's system works a kind of harm," it held that this harm "is not entitled to take priority over the parties' best interests." *Id.*

In *Major League Baseball*, the Second Circuit, following settlement, vacated a district court opinion that denied a preliminary injunction on grounds that the plaintiff was not likely to succeed on the merits of its trademark infringement claims. 150 F.3d at 150 (citing *Major League Baseball Props. v. Pac. Trading Cards, Inc.*, No. 98 Civ. 2739, 1998 WL 241904, at *1 (S.D.N.Y. May 14, 1998)). As in *Motta*, the Second Circuit found "exceptional circumstances" justifying vacatur of this decision because the plaintiff "had to be concerned about the effect of the district court's decision in future litigation with alleged infringers." *Id.* at 152. Additionally, "the victor in the district court wanted a settlement as much as, or more than, the loser did." *Id.* Under these circumstances, the Second Circuit found that "[t]he only damage to the public interest from such a vacatur would be that the validity of MLB's marks would be left to future litigation." *Id.*

Finally, in *Hartford Cas. Ins. Co. v. Crum & Forster Specialty Ins. Co.*, 828 F.3d 1331 (11th Cir. 2016), the Eleventh Circuit followed *Motta* and *Major League Baseball* in reversing the district court's refusal to vacate its orders granting summary judgment to defendants after the case settled while on appeal. *Id.* at 1332, 1335-36. The Eleventh Circuit found "exceptional circumstances" because (1) the court of appeals, and not the parties, had referred the case to mediation, and (2) "both parties to the settlement desire vacatur because settlement would otherwise be impossible." *Id.* at 1336.[12] Accordingly, "[t]he slight value of preserving that

[12] Unlike the Ninth Circuit in *American Games*, the Eleventh Circuit in *Hartford Casualty* held that *U.S. Bancorp*'s "exceptional circumstances" test was the correct legal standard for the district court to follow when determining whether to vacate a final judgment, but also held that the district court abused its discretion in how it applied that standard. *Id.* at 1332, 1334.

precedent to the public interest generally … is outweighed by the direct and substantial benefit of settling this case to [the parties] and to the judicial system (and thus to the public as well)." *Id.* The court concluded:

> When proper consideration is given to the interests of the parties, the judicial system, and the public taken together, vacatur may still prove an appropriate remedy even if the public's interest in the preservation of precedent is not affirmatively advanced when considered in isolation.

Id. at 1337.

The same factors that led the First, Second, and Eleventh Circuits to order vacatur of substantive district court opinions following settlement under the more-demanding "exceptional circumstances" standard are also present in this case, where a less-stringent standard applies. First, this Court encouraged the parties to settle. Second, while the Court's damages rulings were not immediately appealable,[13] the United States acted to preserve its appeal rights by filing

[13] A district court decision is generally not appealable unless it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Caitlin v. United States*, 324 U.S. 229, 233 (1945)). The district court may certify an interlocutory order, *i.e.*, one "that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties," Fed. R. Civ. P. 54(b), for immediate appeal under 28 U.S.C. § 1292(b), but only if, *inter alia*, the order involves a "controlling question of law" for which "an immediate appeal … may materially advance the ultimate termination of the litigation[.]" Even when the district court so certifies, the Court of Appeals may nevertheless reject the appeal. *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982) ("If we conclude that the requirements [under Section 1292(b)] have been met, we may, but need not, exercise jurisdiction."). Certifications under Section 1292(b) are appropriate "only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *Id*. Courts have therefore declined to certify for immediate appeal orders dismissing claims for damages or other forms of relief, particularly when liability has not yet been established. *See*, *e.g.*, *Banneck v. Fed. Nat'l Mortg. Ass'n*, No. 17-cv-04657, 2018 WL 5603632, at *2 (N.D. Cal. Oct. 29, 2018) ("[W]here an outcome 'would not result in the wrong party prevailing, but rather the calculation of any potential final judgment,' it does not rise to the level of a controlling question of law materially affecting the outcome of the litigation.") (quoting *Zulewski v. Hershey Co.*, No. 11-cv-05117, 2013 WL 1334159, at *1 (N.D. Cal. Mar. 29, 2013)); *accord Fujitsu Ltd. v. Tellabs, Inc.*, 539 F. App'x 1005, 1007 (Fed. Cir. 2013) (denying permission to appeal district court order holding that plaintiff could not seek lost profits as damages because the issue of liability remained undecided;

its motion for reconsideration, which raised arguments that the United States was not able to raise during the initial round of briefing on defendants' motion for judgment on the pleadings. *See Motta*, 61 F.3d at 118.

Third, both sides have indicated their desire to settle, and settlement clearly benefits all parties and the public interest. This Court described the prospect of going to trial as "kind of a horrifying thought," and while the Court unquestionably dedicated significant resources to deciding defendants' motion for judgment on the pleadings, it also recognized that trial would be "very expensive" and require a "very extensive bench trial" and "very extensive findings" by the Court. Ex. B at 96. Thus, the judicial resources expended in drafting the Court's damages ruling would almost certainly be dwarfed by those required to take the case to trial and final judgment. Moreover, through settlement, defendants are able to preserve key features of the Chamorro Land Trust, while the United States was able to obtain changes to those aspects of the program that it challenged as discriminatory.

Finally, with respect to enforcing the FHA, the United States, like the INS and Major League Baseball, is a "repeat player" in the courts. *See Motta*, 61 F.3d at 118. Along with the Department of Housing and Urban Development, Congress has entrusted the Attorney General with responsibility for enforcing the FHA, including by filing lawsuits to remedy patterns or practices of discrimination. *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208-09 (1972). Given this responsibility, the United States is "*primarily* concerned with the precedential effect" of this Court's decision on its ability to enforce the FHA in a manner that it believes is consistent with Congress's intent, including by obtaining relief for individuals who have suffered

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therefore, granting appeal on damages availability "would not resolve any controlling question of law.").

discrimination. *See Motta*, 61 F.3d at 118 (emphasis in original); *see also Wal-Mart Stores v. Rodriguez*, 322 F.3d 747, 750 (1st Cir. 2003) ("The government has an institutional interest in vacating adverse rulings of potential precedential value. … It would be inequitable here to require the [Puerto Rico] Secretary [of Justice] to choose between the strong public interest in settling the case amicably and her interest as chief enforcement officer in removing adverse precedent."); *De La O*, 2008 WL 4192033, at *3 (vacating order declaring Washington state statute unconstitutional because this issue "is of considerable importance to the State because of its impact on state judicial officers, prosecuting authorities, and law enforcement officers. The State's inability to challenge to challenge the Court's … ruling is an unintended result of the settlement …").

The United States recognizes the public interest in preserving court rulings as valid law.[14] *See U.S. Bancorp*, 513 U.S. at 26-27. However, under the unique facts of this case, the countervailing equities—namely, a settlement that preserves Guam's interest in a land trust program that is consistent with the FHA, along with the United States' strong interest in not leaving the Court's damages ruling unreviewed—outweigh this interest in a manner that is arguably even more compelling than the facts in *Motta*, *Major League Baseball* and *Hartford Casualty*. Unlike *Motta*, settlement in this case will benefit not just one person, *see* 61 F.3d at 118, but potentially thousands of people. And unlike *Major League Baseball*, vacatur is sought here not to preserve the validity of a trademark for baseball cards, *see* 150 F.3d at 150, but, rather, the federal government's ability to seek relief for victims of housing discrimination.

[14] As some courts have noted, the weight given to this interest is "tempered by the fact that vacatur will not cause the orders to vanish; they will remain in electronic research databases, albeit flagged, and so available for whatever guidance they may give to parties and other courts." *Cuviello*, 2014 WL 1379873, at *4; *see also Luciano Farms*, 2016 WL 4884855, at *2.

Thus, even if the more stringent "exceptional circumstances" test applied here—and it does not—the balancing of the equities would justify vacatur.

2. The Parties Did Not Settle for the Purpose of Seeking Vacatur of the Court's Damages Opinions

Furthermore, there can be no question that the parties' primary motive for settling this case was not to vacate the Court's damages ruling. *See Am. Games*, 142 F.3d at 1168 ("[T]he district court should consider the motives of the party whose voluntary action mooted the case[.]"). The parties settled at the urging of this Court and following nine months of arm's-length, good faith negotiations, all of which were overseen and mediated by Judge Kurren. The resulting Agreement provides substantial benefits to both sides that are unrelated to the Court's damages ruling. The Agreement's primary provisions concern amendments to the CLTA that will transform the Chamorro Land Trust program from one that awards land to "native Chamorros," which the United States had challenged as discriminatory, to one that awards land based on the United States' previous acquisition of land. The parties' agreement as to vacatur, while critical to the United States, was an "incidental" part of settlement. *See id.* at 1170. Accordingly, "this is not a case where one party has suffered a litigation defeat and seeks to execute 'a refined form of collateral attack' to negate that defeat." *Luciano Farms*, 2016 WL 4884855, at *2 (quoting *Cuviello*, 2014 WL 1379873, at *4 & *U.S. Bancorp*, 513 U.S. at 27); *see also De La O*, 2008 WL 4192033, at *3 (where "[t]he State's inability to challenge the Court's … ruling is an unintended result of the settlement," court held that "justice requires the vacatur of this ruling."). This factor also weighs towards vacatur.

3. Other Judicial Factors Weigh Towards Vacatur

Finally, other relevant factors weigh in favor of vacatur. *See Cuviello*, 2014 WL 1379873, at *3. First, as noted above, defendants do not oppose vacatur of the Court's damages ruling. Moreover, this ruling did not completely find in favor of defendants. This Court rejected defendants' argument that they are not "persons" subject to suit under the FHA and that sovereign immunity completely barred the United States' lawsuit. ECF No. 53 at 50-55. These rulings would also be vacated if the Court grants this Motion and would allow defendants to make these arguments should they arise again. *See Wal-Mart Stores*, 322 F.3d at 749 ("[V]acating the judgment preserves the ability of both sides to litigate the issues should they arise again."). Where "both parties gained and lost through the order," vacatur is favored. *Luciano Farms*, 2016 WL 4884855, at *2 (distinguishing *U.S. Bancorp* because the respondent won below and opposed vacatur).

Second, "the costs of continuing the action with uncertain results are outweighed by the benefits of the proposed settlement of the action." *Cuviello*, 2014 WL 1379873, at *3 (quoting *De La O*, 2008 WL 4192033, at *1). As stated above, the Court has recognized the enormous cost and dedication of resources required to bring this case to trial. Although the parties had conducted some discovery and exchanged expert disclosures, far more work—including expert discovery, summary judgment motions, motions *in limine*, *Daubert* motions, proposed findings of fact and conclusions of law, trial, and, potentially, appeal by one or both sides—lay ahead. The benefits of settlement to the parties and the public at large, on the other hand, are substantial. The balancing of these interests clearly favors vacatur.

Finally, there are no former parties to this action, and therefore none will be adversely affected by vacatur. *See Cuviello*, 2014 WL 1379873, at *3.

IV. CONCLUSION

For the reasons stated above, the United States respectfully requests that this Court vacate its ruling granting in part and denying in part defendants' motion for judgment on the pleadings and its denial of reconsideration of this ruling.

Dated: June 4, 2020.

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