IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	No. 13-465C
v.	)	(Judge Sweeney)
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S
NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs respectfully submit this response to Defendant's Notice of Supplemental Authority (June 24, 2015), Doc. 167 ("Notice"), discussing the Court of Federal Claims' recent decision in *Piszel v. United States*, 2015 WL 3654399 (Fed. Cl. June 12, 2015). The plaintiff in *Piszel* was the beneficiary of a "golden parachute" employment contract with Freddie Mac that FHFA refused to honor after placing that Company into conservatorship. Pointing to provisions of federal law that existed when the contract was signed allowing federal regulators to abrogate golden parachute employment contracts in the event of conservatorship (or otherwise), the Court held that FHFA's actions did not effect a taking. *Piszel*, 2015 WL 3654399, at *9 (citing 12 U.S.C. § 4518(c) and the Safety and Soundness Act)).[1] In so ruling, *Piszel* relied on two Federal Circuit precedents—*Golden Pacific Bancorp v. United States*, 15 F.3d 1066, 1073 (Fed. Cir. 1994), and *California Housing Securities, Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992)—that held that federal regulators did not take shareholders' investments in failing financial institutions when they placed those institutions into receivership as authorized by

[1] Notably, the *Piszel* Court assumed that FHFA acted as the United States and thus was subject to suit under the Tucker Act.

longstanding federal law. But those precedents suggest at most that in certain situations when the Government exercises statutory authority to *place* an entity into conservatorship or receivership, the shareholders of that entity cannot challenge *that* act—the imposition of the conservatorship or receivership itself pursuant to well-established criteria—because they were on notice when they made their investments that the Government might take such an action if the statutory prerequisites were satisfied. Here, of course, Plaintiffs are not challenging the imposition of the conservatorships, but rather the expropriation of their property four years after the conservatorships were established and at a time when Fannie and Freddie had been rehabilitated and had begun generating record profits.

Defendant cites *Piszel* for the startling proposition that one who "voluntarily enter[s] a heavily-regulated industry subject to Government control" forfeits all property rights related to his participation in that industry. Notice at 4. The *Piszel* Court held nothing of the kind, although it recognized that Freddie "operated in a heavily regulated environment." 2015 WL 3654399, at *8. Such a rule would severely inhibit, if not foreclose, the ability of financial institutions to raise capital. Instead, the Court's analysis turned on specific provisions of federal law that empowered federal regulators to cancel golden parachute employment contracts during conservatorship. *See id.* at *9. Similar to *Golden Pacific Bancorp* and *California Housing Securities*, the *Piszel* plaintiff could not claim that it was a taking for the government to cancel a contract that was, as a matter of law, subject to the government's authority to do exactly that from the moment it was signed.

Unlike in *Piszel*, nothing in the history of federal conservatorships or the body of federal law predating the governmental action at issue in this case alerted Plaintiffs to the possibility that Defendant could expropriate their property. To the contrary, when FHFA placed Fannie and

Freddie into conservatorship, FHFA Director Lockhart publicly acknowledged that, as required by HERA, "the common and all preferred stocks [of Fannie and Freddie] *will continue to remain outstanding*" during conservatorship, whose central purpose was to rehabilitate the Companies and return them to "normal business operations." Press Release, FHFA, Statement of FHFA Director James B. Lockhart at News Conference Announcing Conservatorship of Fannie Mae and Freddie Mac (Sept. 7, 2008), *available at* http://goo.gl/hCsFmR (emphasis added). And shortly thereafter he testified to Congress that Fannie's and Freddie's "shareholders are still in place; both the preferred and common shareholders have an economic interest in the companies" and that "going forward there may be some value" in that interest. *Oversight Hearing to Examine Recent Treasury and FHFA Actions Regarding the Housing GSEs: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 29–30, 34 (Sept. 25, 2008) (statement of the Honorable James B. Lockhart III, Director, FHFA), H.R. Hrg. No. 110-142, *available at* http://goo.gl/F3bZYx. Indeed, consistent with that understanding, HERA recognizes that private shareholders retain a property interest in the Companies both during conservatorship *and even if they are placed in receivership and their assets are liquidated*. *See* 12 U.S.C. §§ 4617(b)(2)(K)(i), 4617(b)(3), 4617(c)(1)(D). Defendant's decision to expropriate Plaintiffs' property four years later was an unprecedented departure from laws governing federal conservatorships of financial institutions and the longstanding practice of federal conservators and receivers pursuant to those laws, and that fact readily distinguishes this case from *Piszel*.

Defendant's more sweeping reading of *Piszel* would lead to the absurd result that the Government may take and refuse to pay for the assets of any heavily regulated business, irrespective of its financial condition. Such a rule would be antithetical to the Constitution's treatment of private property, and courts routinely reject it. Indeed, just two weeks ago, the

Supreme Court refused to accept the United States' argument that raisin growers consent to the uncompensated appropriation of a portion of their crop by participating in the heavily-regulated raisin industry.[2] That result accords with long-established precedent, which holds that "mere participation in a heavily regulated environment does not bar a plaintiff from showing that it has a property interest compensable under the Fifth Amendment." *Acceptance Ins. Cos. v. United States*, 84 Fed. Cl. 111, 117 (2008); *see also, e.g.*, *United States v. Pewee Coal Co.*, 341 U.S. 114, 115–16 (1951) (United States required to pay just compensation for coal mine it seized despite extensive wartime regulation of coal industry); *Cienega Gardens v. United States*, 331 F.3d 1319, 1334 (Fed. Cir. 2003) (statute preventing the prepayment of federally subsidized mortgages effected taking of private property despite heavy regulation of federal housing program); *United Nuclear Corp. v. United States*, 912 F.2d 1432, 1433 (Fed. Cir. 1990) (government required to pay just compensation in suit involving the highly regulated mining industry).

Apparently recognizing that *Piszel* is easily distinguished, Defendant readily acknowledges that *Piszel* "does not involve a shareholder claim" and suggests only that if affirmed it will "bear[ ] upon Fairholme's takings claim in this case." Notice at 3, 4. But as explained, neither *Piszel* nor the Federal Circuit precedents on which it relied support Defendant's theory that the Constitution allows it to freely take property belonging to any heavily regulated business. Accordingly, there is no reason for the Court to stay proceedings in

[2] *Horne v. Department of Agric.*, -- S. Ct. --, 2015 WL 2473384, at *10 (S. Ct. June 22, 2015). ("The Government contends that the reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market. According to the Government, if raisin growers don't like it, they can 'plant different crops,' or 'sell their raisin-variety grapes as table grapes or for use in juice or wine.' 'Let them sell wine' is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history. In any event, the Government is wrong as a matter of law." (internal citation omitted)).

this case to await a ruling from the Federal Circuit in *Piszel*. Indeed, to do so now, after the parties have expended substantial resources on discovery that is nearing completion, would be enormously inefficient and only serve to further delay resolution of this unrelated action. The Court has previously declined to stay proceedings in this case to await appeals in tangentially related cases, and there is no reason for the Court to change course now. *See* Gov't Mot. to Stay Proceedings at 14–15 (Oct. 28, 2014), Doc. 103 (requesting stay); Status Conference Tr. at 33:10 (Jan. 28, 2015) (THE COURT: "[T]he stay request will be denied.").

Date: July 2, 2015

Respectfully submitted,

s/ Charles J. Cooper

Charles J. Cooper
Counsel of Record
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)
ccooper@cooperkirk.com

Of counsel:
Vincent J. Colatriano
David H. Thompson
Peter A. Patterson
Brian W. Barnes
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 2nd day of July, 2015, via the Court's Electronic Case Filing system.

s/ Charles J. Cooper
Charles J. Cooper