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' REPLY IN SUPPORT OF THEIR MOTION TO STAY BRIEFING ON DEFENDANT'S SUPPLEMENTAL MOTION TO DISMISS

INTRODUCTION

The Government does not deny that, irrespective of whether this Court were to grant the Government's supplemental motion to dismiss, this Court would retain subject matter jurisdiction over this case and discovery would move forward. That was our principal argument for staying briefing on the Government's supplemental motion, and it is a conclusive basis for granting our requested relief. There is no reason for this Court to resolve a motion that will have no effect on its jurisdiction over this case or on the progression of discovery, and there is no reason to rule on a supplemental motion that could be rendered completely irrelevant when this Court addresses all jurisdictional issues after the close of discovery. This Court should not waste any more time than it has already been forced to expend on the Government's supplemental motion.

ARGUMENT

It is black letter law that "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *see also Bowsher v. Synar*, 478 U.S. 714, 721 (1986). In our motion, we pointed out that, because the Government concedes that its supplemental motion

does not affect Berkley Insurance Company's standing, it is clear that there is a live "controversy" under Article III, and this Court's jurisdiction over this case would not be affected even if the Government's motion were granted. The Government's response does not argue otherwise. It is undisputed, then, that this Court's subject matter jurisdiction over this case will not be affected by resolution of the Government's supplemental motion.

Instead, the Government stresses that Article III requires standing "for each claim." *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). But no one disputes that Plaintiffs must have standing for their respective claims; the question is whether that standing inquiry must occur *right now* or can instead be adjudicated as part of the other jurisdictional disputes that this Court will address after discovery. For this reason, the Government's attempt to distinguish *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* ("*FAIR*") and its citations to imputed-standing cases miss the point. *See* Gov't Resp. to Pls.' Motion to Stay Briefing on Def.'s Supp. Mot. to Dismiss at 3–4 (July 6, 2015), Doc. 182 ("Gov't Resp."). Plaintiffs are *not* arguing that *FAIR* permits the standing of Berkley Insurance Company to be imputed to the other Plaintiffs. Rather, the point is that, under *FAIR*, this Court will have jurisdiction over this *case* even if *individual Plaintiffs* do not have standing (of course, they *do* have standing, *see infra* pages [[X–X]]), which the Government does not deny. The only question at issue, then, is *when* the Court will make its standing determination as to individual Plaintiffs. And because it is undisputed that this Court will have jurisdiction to proceed with discovery and rule on the other jurisdictional questions regardless of the Government's supplemental motion, there is nothing to be gained by adjudicating the Government's supplemental motion now.

That is particularly true because, as the Government notes in footnote 2 of its response, the Government's principal motion to dismiss argues that *all Plaintiffs* lack standing. Gov't

Resp. 4 n.2. If, when this Court addresses jurisdictional issues after discovery, it were to agree with the Government on this point (which, we respectfully submit, would be error), the Government's supplemental motion would be *entirely superfluous*. The Government offers no substantive response to these efficiency arguments; it simply asserts that they should not matter because standing can be raised at any time. *See* Gov't Resp. 8–9. But just because standing can be *raised* now does not mean it should be *adjudicated* now. The decision to stay briefing is about timing,[1] and Plaintiffs' efficiency arguments demonstrate the senselessness of adjudicating this dispute now. On a motion to stay, that should be decisive. *Cf. San Francisco Tech., Inc. v. The Glad Prods. Co.*, 2010 WL 2943537, at *3 (N.D. Cal. July 26, 2010) (staying proceedings after defendant moved to dismiss for lack of standing "because a stay will promote judicial economy, prevent unnecessary expenditure of resources and cause no prejudice to Plaintiff").

Moreover, the Government misunderstands our argument that staying briefing will permit a more orderly presentation of the issues and that it would be premature to resolve the Government's supplemental motion while discovery on related issues is ongoing. We pointed out that it will be far more efficient to cover all dispositive legal questions with a single briefing schedule once all relevant facts have been revealed through discovery. *See* Pls.' Mot. to Stay Briefing on Def.'s Supp. MTD at 4 (June 17, 2015), Doc. 164 ("Pls.' Mot. to Stay"). At that point, Plaintiffs intend to move for leave to amend their complaint to account for such facts, and the Government would presumably have an opportunity to respond. The Government never engages with this point; rather, it claims that it can simultaneously argue that the taking occurred on August 17,

[1] The Government says that it failed to raise this standing issue until now because it only learned about the basis for its motion during discovery. *See* Gov't Resp. 8. Obviously, nothing prevented the Government from filing a supplemental motion to dismiss—precisely what it has done here—when it first learned of the underlying information *over a year ago*. *See* Pls.' Mot. to Stay 2.

2012, *and* deny that the timing of the taking is even knowable. *See* Gov't Resp. 4–5. But Plaintiffs were not charging the Government with inconsistency; we were pointing out that the timing of the taking has been a subject of dispute that prompted this Court's discovery order. It would be premature to adjudicate a motion that depends on issues being developed in discovery.

In light of these considerations, it makes sense that this Court has rejected the Government's piecemeal approach to litigation in the past, a track record that the Government tries to diminish by calling it "iron[ic]" that Plaintiffs seek a stay here based on this Court's denial of a stay of discovery. *Id.* at 8–9. But a stay here would be consistent with this Court's denial of a discovery stay: both actions reject the Government's efforts to slow or interfere with the discovery ordered by this Court.[2]

Finally, the Government insists that this Court could rule in its favor quickly because the standing question is an "easy one." Gov't Resp. 6. Yet, for all the space the Government spends describing the facts of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Bailey v. United States*, 78 Fed. Cl. 239 (2007), its only *argument* distinguishing those cases is that they "both involved challenges to land-use regulations, which are subject to unique considerations regarding when a Fifth Amendment takings claim can accrue." Gov't Resp. 6. Curiously, the Government never gets around to explaining what those "unique considerations" are or how they distinguish this case. Nor does the Government point out that, just last month, the Supreme Court emphatically rejected the notion that real property and personal property are subject to different levels of protection under the Takings Clause, at least in the context of appropriation of property. *Horne v.*

[2] The Government never responds to Plaintiffs' other example of this Court rejecting a piecemeal approach: this Court's decision to order jurisdictional discovery despite the Government's insistence that some issues could be resolved without discovery. *See* Pls.' Mot. to Stay 3–4.

Department of Agric., 2015 WL 2473384, at *5 (U.S. June 22, 2015) ("[The Takings Clause] protects 'private property' without any distinction between different types.").

Even a casual perusal of *Palazzolo* or *Bailey* dispels the notion that this standing issue is straightforward. In *Palazzolo*, the Supreme Court rejected the idea that passage of title to property necessarily extinguishes the successor's regulatory takings claim: "It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title." 533 U.S. at 629–30. To hold otherwise, in the Court's view, would have "work[ed] a critical alteration to the nature of property" in which the State "secure[s] a windfall for itself" when property is transferred. *Id.* at 627. *Bailey* relied upon *Palazzolo* in holding that a property owner had standing to challenge a pre-acquisition regulatory taking. 78 Fed. Cl. at 271. And, *contra* the Government's argument, the whole point of *Bailey* was that, *even as to land*, a regulatory taking claim may, in at least some circumstances, be maintained by an individual who acquired the land after the taking commenced. *Id.* at 268–75.[3] The *Bailey* Court reaffirmed that analysis even after the Federal Circuit's decision in *CRV Enterprises, Inc. v. United States*, 626 F.3d 1241 (2010), *see Bailey v. United States*, 116 Fed. Cl. 310, 317–18 (2014), upon which the Government relies, *see* Gov't

[3] The Government states that *Bailey* held that the plaintiff could not bring a takings claim for lots he did not own at the time of the taking. *See* Gov't Resp. 7. This claim is erroneous. As the Government's parenthetical quoting *Bailey* indicates, the Court held that the plaintiff could not bring a takings claim for property he owned neither at the time of the taking *nor* at the time he brought the case. *See id.* ("Plaintiff neither held a property interest in lots 7, 8, and 11 at the various times he alleged that a taking had transpired *nor since*." (quoting *Bailey*, 78 Fed. Cl. at 275 (emphasis added))). But the Court held that the plaintiffs *could* bring a takings claim for property he acquired after the taking. *See Bailey*, 78 Fed. Cl. at 274.

Resp. 6–7. The Government's portrayal of the standing inquiry as "easy" is, therefore, quite mistaken, and this Court should defer adjudicating this complicated question until it examines all jurisdictional issues after discovery.[4]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order staying all briefing on the Government's Supplemental Motion to Dismiss, Doc. 161, until the Court lifts its stay on the Government's principal Motion to Dismiss, Doc. 20.

Date: July 16, 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)

[4] Because *Palazzolo* and *Bailey* demonstrate that Plaintiffs have standing irrespective of when they purchased their stock, the Government is wrong when it alleges that there is a "fatal inconsistency" in Plaintiffs' complaint. Gov't Resp. 5.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 16th day of July, 2015, via the Court's Electronic Case Filing system.

s/ Charles J. Cooper
Charles J. Cooper