IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., at al.

Plaintiffs,

vs.

No. 13-465C
(Judge Sweeney)

THE UNITED STATES,

Defendant.

MOTION TO INTERVENE

Michael Sammons ("Sammons"), a member of the plaintiff-class with beneficial ownership[1] of $1,000,000 par amount of GSE preferred stock, hereby moves to intervene as a matter of right for the limited purpose of challenging this Court's jurisdiction. FRCP, Rule 24(a)

In support thereof Sammons would show that this motion is (a) timely, where no substantive issues have been addressed[2], (b) Sammons has a legally protected financial interest in the case, (c) the case threatens to impair such financial interest, and (d) no party to the action is willing to raise the meritorious issue that Judge Sweeney, as a non-Article III judge, does not have authority under the Constitution to hear this case.

ARGUMENT

This the largest Constitutional takings case ever filed against the United States, with the class Plaintiffs essentially seeking the return of $125 BILLION taken from the GSEs and their private equity holders without any compensation pursuant to a unilateral 2012 "net worth sweep" to the Government of all economic value in the GSEs,, including those owned

[1] Cede & Co. is the nominal holder of record.

[2] This case has languished for THREE YEARS pending a simple Government Rule 12(b)(6) motion to dismiss. Judge Sweeney, who is not an Article III judge, is faced with an impossible choice: ruling against the Government in the largest takings case ever filed against the United States, or ending her judicial career. The fact is that this case would have been decided long ago by any competent Article III judge – unable to rule on even relatively simple jurisdictional discovery matters for YEARS, Judge Sweeney openly intends to delay these proceedings until Congress or the President hopefully moot the issues before she must address the merits. Such abdication of her judicial responsibilities for political convenience is easily understandable for a non-Article III judge, whose career rests in the hands of the President and Congress, but the defense of the Takings Clause of the Constitution requires no less that the defense by a truly impartial Article III judge as originally intended by the Founders.

by the Plaintiffs. Those funds went directly into the coffers of the U.S. Treasury for the sole benefit of the Executive and Legislative branches.

While the Supreme Court previously approved the Court of Federal Claims' predecessor, the Court of Claims, considering takings claims, U.S. v. Causby, 328 US 256,267 (1946), that entity was an Article III court, not a legislative or non-Article III court as is this Court of Federal Claims. In addition, although the Supreme Court has held that sovereign immunity principles justified Congress dealing with claims against the United States using a non-Article III court, the Court's takings jurisprudence has also established that sovereign immunity is inapplicable to claims brought under the "self-executing" Takings Clause. First English Evangelical Lutheran Church of Glendale v. County. of Los Angeles, Cal., 482 U.S. 304, 316 n.9 (1987). Since sovereign immunity is irrelevant in the context of a Constitutional takings claim, Congress cannot rely upon such inapplicable immunity defense to justify removing all major Constitutional takings cases from Article III judges.

In a major Constitutional takings case against the Government, the impartiality of an Article III judge is essential. In many respects, a non-Article III judge of this Court serves, to some degree, at the pleasure of the same President and Congress which in this case took $125 BILLION from private GSE equity investors without any compensation, a de facto nationalization of two of the largest private corporations in the country. The President can remove the chief judge of this Court at will, and the chief judge, in turn, has authority to decide which judge will hear any particular case and can replace the judge assigned to any case at will – including Judge Sweeney.

Because takings cases have a Constitutional basis, neither the President nor Congress should be able to prejudice the litigation of such claims. Yet the President and Congress, in less than subtle terms, can exert pressure upon a non-Article III judge in a takings case, as in this takings case in particular – the fact the President has the indirect power to pick and choose the judge for any given takings case (because he controls the chief judge), is an implicit warning to every non-Article III judge of this Court that those really important cases, such as this $125 BILLION takings case, better not go against the Government. And to those who naively believe that the President and the Congress are above self-interested self-dealing interference in the judicial process, attention should be paid to the well-known *Pocono Pines Assembly Hotels Co. v. United States* cases.

Pocono Pines and other examples like it demonstrate that Article III's purpose of ensuring "that the acts of each [branch of government] shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments," is as much implicated by the Court of Federal Claims as it is by any other legislative entity. As the Supreme Court recently explained, those issues about which the other branches care deeply are precisely when an independent and impartial Article III judge is most needed. Stern v. Marshall, 131 S. Ct. 2594, 2609 (2011).[3]

The Government would argue that Congress may assign takings cases to non-Article III or legislative judges for the reason that any suit against the United States involves some waiver of sovereign immunity. The theory is that if the United States can only be sued if it consents, it must be able to dictate the judge which will hear the claim if it so chooses, for otherwise it would simply withhold consent. But the Supreme Court emphatically disagreed in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 US 304 (1987), stating that its cases "make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking," regardless whether the United States has or has not agreed to be sued. Simply stated, there can be no sovereign immunity defense available to the United States in a Constitutional takings case.[4]

And while the Supreme Court has approved of non-Article III judges deciding "issues likely to be of little interest to the political branches," or with "little political significance,"

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[3] The concern is not just overt action, such as that taken in *Pocono Pines*. It is that the other branches' influence can be more subtle, perhaps even invisible to the public at large. As noted earlier, the President can designate or remove the chief judge of the Court of Claims at will. The chief judge, in turn, has authority to decide which judge will hear any particular case and can replace the judge assigned to any case at will. In the case at bar, the President has made clear (even in the minuscule discovery Judge Sweeney has allowed) his overt goal of destroying the GSEs and ensuring the GSE private shareholders do not recover one penny of the BILLIONS they invested in good faith in the GSEs. The President can remove the chief judge at will, and the chief judge can effectively end the career of Judge Sweeney, certainly at least he can make her life as a judge unbearable (at least until her appointment ends and she can be replaced). Under the light of such facts, it becomes all too clear why Judge Sweeney has delayed ruling on simple discovery motions for THREE YEARS, and why the public now questions her impartiality.

[4] Indeed, if the Government could seize any private property at will, without any compensation, and yet simultaneously asserting that, as a sovereign, it may not be sued to collect compensation for that taking, then the Takings Clause of the Fifth Amendment, "nor shall private property be taken ... without just compensation" would have no meaning whatsoever.

N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 115–16 (1982), no one can seriously suggest that the taking of $125 BILLION from GSE shareholders in a scheme contrived and implemented by the Executive and Congressional branches themselves is not of over-riding interest to those political branches.

It should also be noted that Congress, in creating the Court of Federal Claims jurisdiction, indicated that such jurisdiction would NOT apply to "cases and controversies" in the constitutional sense. S. REP. NO. 97-275, at 13 (1981). And Justice Scalia would certainly agree: "in my view an Article III judge is required in ***all*** federal adjudications, unless there is a firmly established historical practice to the contrary." Stern v. Marshall, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring).

The Supreme Court has ***never*** approved a political or legislative non-Article III court having plenary authority over a Constitutional takings claim directed at the same political executive or legislative branches which planned and benefited directly from such illegal taking. Forcing a case seeking the return of $125 BILLION illegally and unconstitutionally taken from private GSE shareholders by those same executive (Treasury) and legislative (Congress) branches, into a non-Article III court in which judges' careers are inexorably tied to the whims of the President and of Congress, can never satisfy the appearance of fairness and impartiality absolutely required by the Constitution.

CONCLUSION

Judge Sweeney, because she is not an Article III judge, serves in the shadow of the President and the Congress. If she fails to please her masters her legal career can come to an end, or at least she could wish it would end. And the weight of that shadow explains the past THREE YEARS in which she has done what she could to please the Government and avoid addressing the obvious merits of a $125 BILLION Constitutional takings case against the Government. Discovery motions which would be addressed in weeks in any Article III court, have taken THREE YEARS and counting before Judge Sweeney. No case, in any court, ever, has proceeded so slowly, guaranteeing that no judicial decision would be rendered,

until the President and Congress decide the future of the GSEs.[5] This is not an Article III court of law; it is an Article I court of politics.

WHEREFORE, this Motion to Intervene must be granted to allow Sammons to challenge the jurisdiction of this Court. This Court lacks the necessary Article III jurisdiction to hear a $125 BILLION Constitutional takings case against the United States, particularly one concocted and implemented by the same Executive and Legislative branches which control the judicial future of Judge Sweeney. It is the very performance of Judge Sweeney in this case, or rather almost complete lack of performance, which vindicates the wisdom of the Founders in requiring that such Constitutional rights cases be heard only by Article III judges, essentially immune to the pressures which have so effectively paralyzed Judge Sweeney.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of this motion provided to all parties through the ECF delivery system.

9/15/2016

[5] This is not to say Judge Sweeney has willfully abdicated her judicial responsibility, even if it appears that she has. The point is that Judge Sweeney has no more authority under the Constitution to decide this case than the court bailiff – and indeed apparently has less desire to do so. The fact is that only an Article III federal judge, with all the security such position entails, could possibly be expected to decide against the Government in what is undoubtedly the largest and most brazen financial theft in the history of this nation.