UNITED STATES COURT OF FEDERAL CLAIMS

OWL CREEK ASIA I, L.P., *et al.*, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-281C (Chief Judge Sweeney)
APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, *et al.*, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-370C (Chief Judge Sweeney)
AKANTHOS OPPORTUNITY MASTER FUND, L.P., Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-369C (Chief Judge Sweeney)
CSS, LLC, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-371C (Chief Judge Sweeney)

MASON CAPITAL L.P., *et al.*, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-529C (Chief Judge Sweeney)
CRS MASTER FUND, L.P., *et al.*, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-1155C (Chief Judge Sweeney)

PLAINTIFFS' JOINT MOTION TO MODIFY THE BRIEFING SCHEDULE

In connection with the filing of amended complaints (the "Amended Complaints") in each of the above-captioned actions pursuant to Rule 15(a)(1)(A) and Rule 15(a)(1)(B)[1] of the Rules of the United States Court of Federal Claims (the "RCFC"), the plaintiffs ("Plaintiffs") in *Owl Creek Asia I, L.P., et al., v. United States* (No. 18-281C) ("*Owl Creek*"), *Appaloosa Investment Limited Partnership I, et al., v. United States* (No. 18-370C) ("*Appaloosa*"),[2]

[1] The *Cyrus* Plaintiffs (as defined herein) amended their complaint as of course pursuant to Rule 15(a)(1)(A) because it has been less than 21 days since the *Cyrus* Plaintiffs filed their complaint on August 8, 2018. The *Owl Creek*, *Appaloosa*, *Akanthos*, *CSS*, and *Mason* Plaintiffs (as defined herein) amended their complaints as of course pursuant to Rule 15(a)(1)(B) because it has been less than 21 days since the Government filed its Motion to Dismiss (as defined herein) on August 1, 2018.

[2] The *Appaloosa* Plaintiffs filed a First Amended Complaint on May 10, 2018 (Docket No. 11). That amendment was made with the Government's consent and leave of the Court pursuant to RCFC 15(a)(2) (*See* Docket No. 10). As such, the *Appaloosa* Plaintiffs have not yet amended their pleadings "once as a matter of course" as permitted by RCFC 15(a)(1). *See*

Akanthos Opportunity Master Fund, L.P., v. United States (No. 18-369C) ("*Akanthos*"), *CSS, LLC, v. United States* (No. 18-371C) ("*CSS*"), *Mason Capital L.P., et al., v. United States* (No. 18-529C) ("*Mason*") and *CRS Master Fund, L.P., et al. v. United States* (No. 18-1155C) ("*Cyrus*"[3] and, together with *Owl Creek*, *Appaloosa*, *Akanthos*, *CSS*, and *Mason*, the "Actions"), hereby jointly move this Court for an Order modifying the briefing schedule with respect to the Omnibus Motion to Dismiss (the "Motion to Dismiss") filed by the Government in the Actions on August 1, 2018, on the terms requested herein.

Concurrently with this Motion, Plaintiffs are each filing an Amended Complaint in their respective Actions that amends their illegal exaction claims to include the theory that the imposition of the Sweep Amendment was unauthorized because, at all relevant times, the Federal Housing Finance Agency ("FHFA") has been operating in violation of constitutional separation of powers principles. The proposed amendment follows a recent decision of the United States Court of Appeals for the Fifth Circuit holding that FHFA is unconstitutionally structured. *See Collins v. Mnuchin*, 2018 WL 3430826, at *18 (5th Cir. July 16, 2018).

By way of this Motion, Plaintiffs request a briefing schedule under which the Government shall be permitted to move forward with its Motion to Dismiss but to separately move to dismiss the new illegal exaction theories contained in the Plaintiffs' Amended

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Ramirez v. Cty. of San Bernardino, 806 F.3d 1002, 1007 (9th Cir. 2015) (A plaintiff may file a first amended complaint with consent from the opposing party under 15(a)(2) and subsequently amend as a matter of course under 15(a)(1)). Although the court in *Ramirez* was addressing Federal Rule of Civil Procedure 15(a), this Court's rules were designed to be "consistent with the Federal Rules of Civil Procedure." RCFC 83(a). "RCFC 15(a)" in particular "is identical to Federal Rule of Civil Procedure 15(a); thus, case law applying FRCP 15(a) also may be applicable when applying RCFC 15(a)." *Northrop Grumman Sys. Corp. v. United States*, 137 Fed. Cl. 677, 680 n.1 (2018).

[3] Although the *Cyrus* Plaintiffs join this Motion, the Motion does not seek to amend the briefing schedule in the *Cyrus* Action because the Government has stated that it is not inclined to consent to incorporating the *Cyrus* Action into the existing briefing schedule.

Complaints by October 1, 2018. If the Government elects to file such a separate motion to dismiss, Plaintiffs request that their response deadline be set as October 23, 2018, the same date on which the response to the Motion to Dismiss is due currently. From there, the schedule on the Motion to Dismiss can move forward as currently set. Furthermore, although the Amended Complaints are filed as of right pursuant to RCFC 15(a)(1), to the extent that the Court finds that a motion to amend is required with respect to any or all of the Amended Complaints, Plaintiffs respectfully request that this Motion be considered such a motion to amend.

The briefing schedule sought by Plaintiffs in this Motion is the same as that sought in the Plaintiffs' Motion to Amend the Complaint (the "Fairholme Motion to Amend") filed in *Fairholme Funds Inc., et al. v. The United States*, No. 13-465C (Docket No. 412), on August 3, 2018. Defendant has not consented to the relief sought by this motion and plans to file a response.

QUESTION PRESENTED

Whether Plaintiffs should be permitted to amend the briefing schedule on the Motion to Dismiss.

STATEMENT OF THE CASE

Plaintiffs are shareholders of Fannie Mae and Freddie Mac (the "Companies"), which since 2008 have been under the control of FHFA as conservator. In August 2012, four years into the conservatorships and at a time when Fannie and Freddie were immensely profitable and poised to begin rebuilding their capital levels, FHFA and the United States Department of the Treasury imposed the "Sweep Amendment," which had the purpose and effect of eliminating the economic interest of private shareholders in the Companies, transferring that interest to Treasury, and ensuring that Fannie and Freddie could never recapitalize and return value to their private

shareholders. Indeed, Treasury itself publicly proclaimed that the Sweep Amendment was intended to ensure both that "every dollar of earnings each firm generates is used to benefit taxpayers" and that the Companies "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." *See, e.g., Owl Creek Compl.*, ¶ 76 (Docket No. 1). The Sweep Amendment accomplished these objectives by requiring the Companies to send nearly their entire net worth to Treasury on a quarterly basis. To date, Fannie and Freddie have handed over to Treasury over $223 billion in "dividends" under the Sweep Amendment. *Id.* ¶ 92.

The Actions were filed between February and April 2018, seeking (a) compensation for the taking of Plaintiffs' property in violation of the Fifth Amendment to the Constitution or (b) in the alternative, the illegal exaction of their property in violation of the Fifth Amendment; (c) breach of fiduciary duty; and (d) breach of implied contract. The Government filed its Motion to Dismiss on August 1, 2018; Plaintiffs' response is due October 23, 2018; and the Government's reply is due January 22, 2019.

In addition to the Actions, several additional cases have been filed in this Court and other courts challenging the Sweep Amendment. In a significant decision in one of those additional cases, the Fifth Circuit in *Collins v. Mnuchin*, 2018 WL 3430826 (5th Cir. July 16, 2018), recently held that FHFA's structure violates Article II of the Constitution because the agency is unconstitutionally structured. The court reached this conclusion "after assessing the combined effect" of a number of FHFA's attributes, including its "single-Director leadership structure" and the Director's "for-cause removal" protection. *Id.* at *18. Rather than undoing the Sweep Amendment, however, the court simply struck down the for-cause removal limitation prospectively. *Id.* at *26.

On August 1, 2018, a new action was filed in this Court challenging the Sweep Amendment, *Wazee Street Opportunities Fund IV LP v. United States*, No. 18-1124C. The complaint in that action includes direct and derivative illegal exaction claims alleging that the Sweep Amendment was unauthorized because it was adopted by FHFA, an unconstitutionally structured agency. *See Wazee Compl.* ¶¶ 144, 198-99.

ARGUMENT

The amended briefing schedule sought herein will not in any way prejudice the Government or delay resolution of the case. As stated above, the Government's Motion to Dismiss was filed on August 1, 2018. Plaintiffs do not propose to make the Government rewrite that motion. Rather, Plaintiffs propose allowing the Government to move forward with its Motion to Dismiss and to separately move to dismiss the new illegal exaction theories by October 1, 2018. If the Government elects to file such a motion, we propose setting Plaintiffs' response deadline as October 23, 2018, the same date that Plaintiffs' response to the Motion to Dismiss is due currently. From there, the schedule can move forward as currently set.

The amended briefing schedule will not prejudice the Government. First, this Court's predecessor held "the need to re-brief [a] motion to dismiss . . . to merely constitute a vexing inconvenience rather than the visitation of measurable prejudice." *Effingham Cty. Bd. of Educ. v. United States*, 9 Cl. Ct. 177, 180 (1985). As just explained, here the Government will not even need to re-brief its Motion, but rather will simply need to supplement that Motion with another one addressed to the new theories.

Second, while additional briefing is not a substantial burden, the briefing required by Plaintiffs' amendment here will not even rise to the level of a "vexing inconvenience" for the Government. That is because the plaintiffs in *Wazee Street Opportunities Fund IV LP v. United*

States, No. 18-cv-1124, are also asserting the illegal exaction theories Plaintiffs propose to add to this case. The Government will therefore be required to brief these issues regardless of whether Plaintiffs' Motion is granted. In addition, the Government has already briefed and argued the separation of powers arguments underlying the new illegal exaction theories in *Collins*, 2018 WL 3430826; *Bhatti v. FHFA*, 2018 WL 3336782 (D. Minn. 2018) (currently on appeal); and *Rop v. FHFA*, No. 17-cv-497 (W.D. Mich.).[4]

Third, the briefing schedule proposed herein is identical to the briefing schedule proposed by the *Fairholme* plaintiffs in the Fairholme Motion to Amend.

As explained above, Plaintiffs are entitled to amend their complaints as of right pursuant to RCFC 15(a)(1). Nevertheless, even if leave of court were required to amend the complaint, such leave would be justified. This Court's rules provide that the Court "should freely give leave" to amend "when justice so requires," RCFC 15(a)(2), an admonition that the Supreme Court has said "is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). That is because "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.*

Plaintiffs should be afforded the opportunity to test on the merits the Fifth Circuit's recent separation of powers ruling. While the Fifth Circuit in *Collins* declined to unwind the Sweep Amendment, its decision indicates that the Sweep Amendment was adopted at a time when FHFA was operating unconstitutionally and that FHFA has been operating unconstitutionally ever since. This has implications for this case, because this Court has jurisdiction to hear claims "to recover . . . exactions said to have been illegally imposed by

[4] One of the theories Plaintiffs seek to add—that Mr. DeMarco's lengthy service as Acting Director violated the Appointments Clause—was not at issue in *Collins* but is present in *Bhatti* and *Rop*.

federal officials." *Eastport S. S. Corp. v. United State*s, 372 F.2d 1002, 1008 (Ct. Cl. 1967). "[T]he Tucker Act's waiver" of sovereign immunity thus "encompasses claims where the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum." *Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298, 1301 (Fed. Cir. 2004) (quotation marks omitted). That is what Plaintiffs seek here. Plaintiffs allege that the Government has, in effect, exacted Plaintiffs' stock and that the Government has Fannie and Freddie's "money in its pocket," *id*., from hundreds of billions of dollars' worth of Sweep Amendment dividend payments. Plaintiffs seek the return of the value of their stock directly for themselves. *See Casa de Cambio Comdiv S.A. de C.V. v. United States*, 48 Fed. Cl. 137, 145 (2000) ("Several cases hold that, under the illegal exaction doctrine, a plaintiff may seek the return of the monetary value of property seized or otherwise obtained by the government."). The new theories Plaintiffs are adding to their illegal exaction claims simply provide additional grounds for finding that the exaction was unauthorized—namely, that FHFA has been operating in violation of the separation of powers.

The Supreme Court has identified factors that may support denying a motion to amend in certain circumstances, "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman*, 371 U.S. at 182. None of these are present here, and the lack of any undue prejudice in particular demonstrates that leave to amend, if it were deemed necessary, should be granted. "Because RCFC 15 was 'designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result,' the critical factor in determining whether to allow leave to amend is if the amendment will prejudice the non-moving party." *Northrop*, 137

Fed. Cl. at 681 (quoting *United States v. Hougham*, 364 U.S. 310, 316 (1960)); *see also Advanced Aerospace Techs., Inc. v. United States*, 130 Fed. Cl. 564, 567 (2017) ("The most important factor is prejudice to the opposing party."). Indeed, denying leave to amend in the absence of prejudice to the opposing party "would subvert the basic purpose of the Rule." *Hougham*, 364 U.S. at 317. "Undue prejudice may be found when an amended pleading would cause unfair surprise to the opposing party, unreasonably broaden the issues, or require additional discovery." *Anaheim Gardens v. United States*, 2011 WL 4090899, at *6 (Fed. Cl. 2011) (quotation marks omitted). Undue prejudice has also been described as "a severe disadvantage or inability to present facts or evidence; the necessity of conducting extensive research shortly before trial due to the introduction of new evidence or legal theories; or an excessive delay that is unduly burdensome." *Hanover Ins. Co. v. United States*, 134 Fed. Cl. 51, 61–62 (2017) (quotation marks and brackets omitted). However described, undue prejudice cannot be shown here.

The lack of prejudice is further established because Plaintiffs are "'merely proposing alternative legal theories for recovery on the same underlying facts,'" not seeking to "'fundamentally alter the nature of the case.'" *King v. United States*, 119 Fed. Cl. 51, 56 (2014) (quoting *Mayeaux v. Louisiana Health Serv. & Indem. Co.*, 376 F.3d 420, 427 (5th Cir. 2004)). At bottom, this case is a challenge to the Sweep Amendment, and the amendment does not change that. Indeed, the alternative theories do not implicate any disputed factual issues.

Furthermore, and relatedly, the amendment does not "necessitate substantial and burdensome additional discovery." *Hanover Ins. Co*., 134 Fed. Cl. at 62–63 (quotation marks omitted). Indeed, because the facts underlying Plaintiffs' new theories are not subject to reasonable dispute the amendment should not require any discovery at all.

Finally, this is not a case in which Plaintiffs have exhibited a "repeated failure to cure deficiencies by amendments previously allowed." *Foman*, 371 U.S. at 182. To the contrary, *Owl Creek*, *Akanthos*, *CSS*, *Mason*, and *Cyrus* have not previously requested leave to amend and *Appaloosa* has been allowed just a single amendment to date. Moreover, as explained in footnote 1 herein, the prior amendment to the *Appaloosa* complaint was made with the Government's consent and leave of this Court, and thus did not exhaust *Appaloosa*'s right under RCFC 15(a)(1) to amend its complaint once as a matter of course. Further, the prior amendment to the *Appaloosa* complaint did not amend the substance of the complaint—it simply added a Plaintiff and made a minor correction with respect to the date of formation of another Plaintiff.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Modify the Briefing Schedule should be granted such that any motion to dismiss the new theories shall be filed by October 1, 2018 and that any response by the Plaintiffs shall be filed by October 23, 2018. To the extent that the Court determines that leave is required for Plaintiffs to file their Amended Complaints, such leave should be granted.

Respectfully submitted:
August 16, 2018

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