UNITED STATES COURT OF FEDERAL CLAIMS

ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, and FINANCIAL STRUCTURES LIMITED, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 1:13-cv-00698 MMS

SUPPLEMENTAL BRIEF OF ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY AND FINANCIAL STRUCTURES LIMITED IN OPPOSITION TO DEFENDANTS' OMNIBUS MOTION TO DISMISS

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Plaintiffs Arrowood Indemnity Company ("Arrowood Indemnity"), Arrowood Surplus Lines Insurance Company ("Arrowood Surplus Lines"), and Financial Structures Limited ("FSL") (collectively, the "Arrowood Plaintiffs") respectfully submit this Supplemental Brief in opposition to Defendant's Amended Omnibus Motion to Dismiss, to address facts and issues that are specific to the Arrowood Plaintiffs and to address one issue, with respect to standing, upon which the position of the Arrowood Plaintiffs differs from the position taken in Plaintiffs' Omnibus Brief.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THE ARROWOOD PLAINTIFFS

Arrowood Indemnity, Arrowood Surplus Lines, and FSL are affiliated insurance companies, each of which is in "run-off." *Arrowood*[1] ¶¶ 24-25. As insurance companies in run-off, the Arrowood Plaintiffs do not issue any new insurance policies, and have an obligation to manage their businesses, and conservatively invest their assets, so that funds will be available to fulfill their obligations to existing policyholders. *Id.*

Over a period of years prior to the imposition of the conservatorships in September 2008, the Arrowood Plaintiffs made substantial investments in Fannie Mae and Freddie Mac, collectively acquiring an aggregate of $42,297,500 (at par value) shares of preferred stock. *Arrowood* ¶¶ 19-23. They continued to own that stock through August 2012 (when the Net Worth Sweep was imposed), and thereafter through September 18, 2013, when they commenced this action. Sometime after the commencement of this action, Arrowood Indemnity and Arrowood Surplus Lines each sold some of its stock; FSL did not sell any of its stock. Each

[1] Citations to *"Arrowood"* are to the Second Amended Complaint, Dkt. 44 (Sept. 17, 2018) in *Arrowood Indem. Co. v. United States*, No. 1:13-cv-00698-MMS (Fed. Cl.)

Arrowood Plaintiff continues to own preferred stock in Fannie Mae and/or Freddie Mac. Collectively, they own an aggregate of $11,237,500 (at par value) of such shares. *Id.*

* * *

As noted above, the Arrowood Plaintiffs commenced this action on September 18, 2013.

Two days later, on September 20, 2013, the Arrowood Plaintiffs filed an action related to the Net Worth Sweep in the United States District Court for the District of Columbia. *Arrowood Indem. Co. v. Fed. Nat'l Mortg. Ass'n,* No. 1:13-cv-01439-RCL (D.D.C.).

The Arrowood Plaintiffs served their Second Amended Complaint in this action on September 17, 2018, asserting direct claims for taking, *Arrowood* ¶¶ 130-138; illegal exaction, *Id*. ¶¶ 139-149; breach of fiduciary duty, *Id*. ¶¶ 150-160; and breach of implied-in-fact contract, *Id*. ¶¶ 161-170. The Arrowood Plaintiffs do not assert any derivative claims.

ARGUMENT

I. DIRECT CLAIMS CAN ONLY BE MADE BY SHAREHOLDERS THAT HELD THEIR STOCK IN FANNIE AND FREDDIE AT THE TIME OF THE AUGUST 2012 NET WORTH SWEEP (AND SUCH CLAIMS ARE NOT AFFECTED IF THEY LATER SOLD SUCH STOCK)

A. The Arrowood Plaintiffs Have Unquestioned Standing

As shareholders that held Fannie and Freddie preferred stock at the time of the August 2012 Net Worth Sweep, and that continue to hold a portion (but not all) of such stock as of today, the Arrowood Plaintiffs unquestionably have standing to pursue their direct claims for taking, illegal exaction, breach of fiduciary duty, and breach of implied-in-fact contract.

The Government does not challenge the Arrowood Plaintiffs' standing.

However, the Government's argument that those plaintiffs that did not acquire their stock in Fannie and Freddie until after the Net Worth Sweep ("after-the-Sweep purchasers") lack

standing to pursue direct claims (MTD[2] at 46-48) indirectly raises the issue of the measure of the recovery that may be sought by shareholders, such as Arrowood Indemnity and Arrowood Surplus Lines, with respect to stock that they owned at the time of the Net Worth Sweep but later sold. If after-the-Sweep purchasers lack standing to assert direct claims, then shareholders that held stock on August 17, 2012 are entitled to seek compensation for the full amount of the expropriation, whether or not they have since sold some or all of their stock. If after-the-Sweep purchasers have standing to assert direct claims, then shareholders that held stock on August 17, 2012 but later sold that stock would likely be limited to seeking compensation, with respect to the shares they sold, for the period of time from the taking to the sale.

However this issue is resolved, the Arrowood Plaintiffs have standing. The only impact of this issue on the Arrowood Plaintiffs is the measure of damages that they may recover with respect to stock that they held on the date of the Net Worth Sweep and later sold.

B. Because It is Undisputed that Some Plaintiffs (Including the Arrowood Plaintiffs) Have Standing, this Court Need Not and Should Not Address Whether After-the-Sweep Purchasers Have Standing

Since the Arrowood Plaintiffs, other plaintiffs asserting direct claims, and putative class representatives have unquestioned standing, it is premature and unnecessary for this Court to determine any issue of standing at this time, because that determination would only affect which plaintiffs could potentially recover. The Arrowood Plaintiffs agree with the Omnibus Brief of Plaintiffs that this Court need not, and should not, address the issue of whether after-the-Sweep purchasers have standing to assert direct claims.

Were this Court to address the issue of standing, and however it resolved that issue, such a ruling would not affect this Court's jurisdiction because "the presence of one party with

[2] Citations to "MTD" are to Defendant's Amended Omnibus Motion to Dismiss, Dkt. 45 (Oct. 1, 2018) in *Arrowood Indem. Co. v. United States*, No. 1:13-cv-00698-MMS (Fed. Cl.)

standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *see also Bowsher v. Synar*, 478 U.S. 714, 721 (1986). The presence of some plaintiffs with standing also means that resolution of the standing issue could not dispose of all of these consolidated cases. Nor would resolution of the standing issue render moot any question as to the sufficiency of the substantive claims pled in these cases. Put simply, there is no need to address standing at this time.

C. If this Court Addresses Whether After-the-Sweep Purchasers Have Standing, It Should Hold That Direct Claims Can Only Be Made by Shareholders That Held Their Stock in Fannie and Freddie at the Time of the August 2012 Net Worth Sweep (and Such Claims Are Not Affected If They Later Sold Such Stock)

If this Court addresses the standing issue, it should hold that direct claims can only be made by shareholders—such as the Arrowood Plaintiffs—that held their stock in Fannie and Freddie at the time of the August 2012 Net Worth Sweep, and that such claims are not limited, or otherwise affected, if they later sold such stock.

The principle that "only persons with a valid property interest at the time of the taking are entitled to compensation," *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001), quoted in *CRV Enterprises, Inc. v. United States*, 626 F.3d 1241, 1249 (Fed. Cir. 2010), is grounded in the nature of a taking. With limited exceptions discussed below (and not applicable here), a taking is a discrete event that takes place on a specific date. "For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment." *Danforth v. United States*, 308 U.S. 271, 284 (1939); *see also United States v. Dow*, 357 U.S. 17, 20-21 (1958) (quoting *Danforth*, 308 U.S. at 284). This is true whether the government conduct is a *per se* taking, *Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 614 (2013) ("when the government commands the relinquishment of funds linked to a

specific, identifiable property interest such as a bank account or parcel of real property, a '*per se* [takings] approach' is the proper mode of analysis. . ."), or as a categorical regulatory taking that caused a "total wipeout" that "completely deprive[s] an owner of 'all economically beneficial us[e]' of her property." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 538 (2005) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

Here, the Net Worth Sweep was a discrete event that took place on a specific date—August 17, 2012—and was a taking (or illegal exaction) of the full value of Fannie and Freddie preferred stock on that date. Thus, *e.g.* plaintiffs in *Cacciapalle* allege:

> As of August 16, 2012, the day before the Net Worth Sweep, private shareholders had vested rights to dividends and liquidation proceeds, and those rights had economic value. ***Once the Net Worth Sweep was put in place, however, those legal rights were obliterated.*** * * *
>
> The Third Amendment [which imposed ***the Net Worth Sweep***] eliminated the contractual rights of the Preferred Stockholders, and ***expropriated for the Government the economic value of these privately-held securities***.

Cacciapalle[3] ¶¶ 9, 57. Preferred shareholders that held stock as of the date of the Net Worth Sweep were left "holding worthless stock," the full value having been transferred to Treasury. *Saxton v. FHFA*, 901 F.3d 954, 961 (8th Cir. 2018) (Stras, J., concurring).

Applying the axiom that compensation is due to the owner on the date of the taking, in *Maniere v. United States*, 31 Fed. Cl. 410, 421 (Fed. Cl. 1994), the court held that a shareholder who purchased stock in a savings and loan association after the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101–73, 103 Stat. 183, lacked standing to claim that FIRREA caused a taking of the value of his shares.

[3] Citations to "*Cacciapalle*" are to First Amended Consolidated Class Action Complaint, Dkt. 57 (Mar. 8, 2018) in *Cacciapalle v. United States*, No. 1:13-cv-00466-MMS (Fed. Cl.)

"As the plaintiff owned no shares of the subject stock on the date of the taking, therefore, the plaintiff maintains no standing to sue." 31 Fed. Cl. at 421.

To be sure, Treasury has received, and continues to receive, the benefit of the Net Worth Sweep on an ongoing basis, as Fannie and Freddie pay dividends to Treasury in each quarter. But that is no different than a classic taking of real property, under which the government compensates the owner at the time of the taking, and the government receives the benefit of the taking (*e.g.*, the right to occupy the property, to develop the property, to collect rent from the tenants of the real property, etc.) on an ongoing basis.

Takings jurisprudence recognizes a limited exception to the axiom that "compensation is due at the time of taking, [to] the owner at that time, not the owner at an earlier or later date." *Danforth*, 308 U.S. at 284. That exception applies only to the temporary "regulatory taking of real property interests," such as excessive land use restrictions. *Bailey v. United States*, 78 Fed. Cl. 239, 274 (2007). That exception is predicated on the notion that such a regulatory taking is not permanent. Land use regulations, by their nature, are subject to change. The government may ease land use restrictions because of a decision that less stringent regulation would fully serve the public purpose of the regulation, or to reduce the obligation to pay just compensation. That exception is thus irrelevant here. This case does not concern the "regulatory taking of real property interests." *Id.* And the Net Worth Sweep bears none of the characteristics of a land use regulation that could be changed over time. To the contrary, the Net Worth Sweep, by its terms, permanently changed the capital structure of Fannie and Freddie, wiping out the interests of all shareholders other than Treasury; it was not a temporary regulation that might be changed. The expropriation of the full value of the Fannie and Freddie preferred stock held by private

shareholders was a discrete act that had its full impact on the date of the Net Worth Sweep, August 17, 2012.

It also bears noting that, if the principle of *Bailey* applied here, so that after-the-Sweep purchasers had standing to assert claims with respect to the Net Worth Sweep, their claims would be limited to compensation relating to the period of time after their purchase of the stock. "[T]emporary takings compensation would be owed to the prior owner for the period of time up to the date of conveyance, and to the subsequent owner after that date." 78 Fed. Cl. at 274.

If this Court addresses the standing of after-the-Sweep purchasers, it should hold that direct claims can only be made by shareholders—such as the Arrowood Plaintiffs—that held their stock in Fannie and Freddie at the time of the August 2012 Net Worth Sweep, and that such shareholders have standing to make such claims for the full value of the expropriation, whether or not they continue to hold such stock.

II. THE FILING BY THE ARROWOOD PLAINTIFFS (AND OTHER PLAINTIFFS) OF ACTIONS IN THE DISTRICT COURT AFTER FILING IN THIS COURT DID NOT DIVEST THIS COURT OF JURISDICTION

The Government concedes that under controlling Federal Circuit precedent, *Tecon Engineers, Inc. v. United States,* 343 F.2d 943 (Ct. Cl. 1965), this Court is not divested of its jurisdiction when the plaintiff files suit in another court after filing suit in this Court. MTD at 48-50.[4] Under *Tecon*, the "[28 U.S.C.] §1500 bar [to litigation on the same claim by the same plaintiff in the Court of Federal Claims and another court] operates 'only when the suit shall have been commenced in the other court before the claim was filed in [the Court of Federal

[4] The Government mischaracterizes *Tecon* as a "judicially-created exception to 28 U.S.C. § 1500 . . ." MTD at 48. *Tecon* is more accurately described as a sound judicial construction of 28 U.S.C. §1500, based on "[t]he long established rule of comity . . . that the court having equal and concurrent jurisdiction over the subject matter which first obtains and exercises this jurisdiction, retains jurisdiction until a final judgment is entered," which " clearly recognized rule of comity has not been abrogated or repealed by any language in Section 1500." 343 F.2d at 946.

Claims].'" *Res. Invs., Inc. v. United States*, 785 F.3d 660, 669-70 (Fed. Cir. 2015) (quoting Tecon, 343 F.2d at 949).

Nevertheless, the Government argues that this Court should ignore controlling precedent, and dismiss the *Arrowood*, *Fairholme*, and *Cacciapalle* cases because the plaintiffs in those cases filed suit in the District Court after filing suit in this Court. The Government is wrong.

Whether or not (as the Government argues) *Tecon* has been criticized, it cannot be disputed that *Tecon* remains controlling precedent in this Circuit. *See, e.g., Petro-Hunt, L.L.C. v. United States*, 862 F.3d 1370, 1384 (Fed. Cir. 2017) ("We are bound by *Tecon*, which remains the law of this circuit."); *Brandt v. United States*, 710 F.3d 1369, 1379 n.7 (Fed. Cir. 2013) (*Tecon*'s order-of-filing rule "remains the law of this circuit"). Indeed, the cases cited by the Government in its argument that *Tecon* was wrongly decided recognize that *Tecon* is controlling precedent. *See, e.g., United States v. Tohono O'Odham Nation*, 563 U.S. 307, 314 (2011) (describing *Tecon* as "Circuit precedent"); *Brandt*, 710 F.3d at 1380 (Prost, J., concurring) ("we are bound to follow the order-of-filing rule established by *Tecon*").

This Court should decline the Government's invitation to ignore controlling Federal Circuit precedent and should hold, consistent with *Tecon*, that the later-filed cases in the District Court did not divest this Court of jurisdiction of the *Arrowood*, *Fairholme*, and *Cacciapalle* cases.

III. THE ARROWOOD PLAINTIFFS PROPERLY STATE CLAIMS FOR TAKING, ILLEGAL EXACTION, BREACH OF FIDUCIARY DUTY, AND BREACH OF IMPLIED-IN-FACT CONTRACT

The Government's arguments that the Arrowood Plaintiffs (and other plaintiffs) have failed to state claims for taking, illegal exaction, and breach of fiduciary duty are fully addressed in the Omnibus Brief of Plaintiffs. The Government's arguments that the Arrowood Plaintiffs

(and other plaintiffs) fail to state claims for breach of implied-in-fact contract are fully addressed in the Brief being filed by Oak Creek Asia L.P. *et al.* To avoid burdening the Court with duplicative briefing, we respectfully refer the Court to those briefs, and incorporate those arguments herein. The Arrowood Plaintiffs also respectfully refer the Court to, and incorporate by reference, arguments made in supplemental briefs filed by other plaintiffs addressing issues that also provide support to the position of the Arrowood Plaintiffs.

CONCLUSION

The Arrowood Plaintiffs respectfully request that (a) the Government's motion to dismiss their Second Amended Complaint be denied, (b) this Court defer addressing the issue of whether after-the-Sweep purchasers have standing, and (c) if this Court addresses the issue of standing, this Court hold that only shareholders that held their stock at the time of the Net Worth Sweep have standing to assert direct claims with respect to such stock, and that such claims are not affected by whether or not they have subsequently sold such stock.

Respectfully submitted,

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