IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION TO STAY BRIEFING ON DEFENDANT'S SUPPLEMENTAL MOTION TO DISMISS

Defendant, the United States, respectfully submits this response in opposition to plaintiffs' June 17, 2015 motion (Pls. Mot.) to stay briefing on defendant's supplemental motion to dismiss.

In our supplemental motion to dismiss, we established that – in addition to the other reasons for dismissal addressed in our December 2013 motion to dismiss – the claims of most of the plaintiffs in this case must be dismissed for lack of jurisdiction because they did not acquire the property alleged to have been taken (*i.e.*, shares of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the GSEs)) until months after the alleged taking occurred.[1] Our supplemental motion is not lengthy and it presents a simple and straightforward argument. Even though plaintiffs do not challenge the underlying facts upon which we rely, in their motion to stay, plaintiffs urge the Court to stay the briefing of our supplemental motion until the Court lifts the current stay on our December 2013 motion to dismiss. But plaintiffs offer no valid reason why

[1] If our supplemental motion is granted, the following plaintiffs would be dismissed from the case: Fairholme Funds, Inc., The Fairholme Fund, Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Continental Western Insurance Company, Midwest Employers Casualty Insurance Company and Preferred Employers Insurance Company.

the Court should allow the affected plaintiffs to remain in this case where it is absolutely clear that they lack standing and where it is also clear that the continuing "jurisdictional discovery" will *not* be relevant to the Court's resolution of the standing issue presented in our supplemental motion to dismiss. Accordingly, because prompt resolution of our supplemental motion to dismiss will serve the interests of justice, plaintiffs' motion to stay should be denied.

ARGUMENT

I. The Supplemental Standing Argument Directly Impacts This Court's Jurisdiction

In their motion, plaintiffs argue that, because we do not assert that *all* of the plaintiffs in this case purchased their shares in Fannie Mae and Freddie Mac after the date of the alleged taking, our arguments somehow do not affect this Court's subject matter jurisdiction. Pls. Mot. 2. Plaintiffs are wrong. "[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the *particular plaintiff* is entitled to an adjudication of the *particular claims* asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984) (emphasis added); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006) ("a plaintiff must demonstrate standing for each claim he seeks to press"); *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644, 652 (6th Cir. 2007). The supplemental standing argument directly impacts this Court's subject matter jurisdiction to entertain the claims being asserted by those plaintiffs that did *not* own shares in the GSEs on the date of the alleged taking, and this Court can and should immediately dismiss those plaintiffs from the case pursuant to RCFC 54(b). *Cf. Le Van v. United States*, 53 Fed. Cl. 290, 302 (2002) ("the court finds that plaintiffs Kraar and Bialon must be dismissed from this litigation for lack of standing. It is not disputed that they acquired their shares of stock in Century after the conversion, and without any FHLBB involvement.").

Plaintiffs rely upon *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* (*FAIR*), 547 U.S. 47, 52 n.2 (2006), for the proposition that "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." Pls. Mot. 2. In *FAIR*, several associations and individuals challenged the constitutionality of the "Solomon Amendment," which conditioned the payment of certain Federal funds to universities upon a requirement that they provide equal access to military recruiters. After concluding that the Article III case-or-controversy requirement was satisfied because one of the plaintiffs – FAIR – had standing to challenge the statute, the Supreme Court noted the court of appeals' conclusion that it was not necessary to decide whether the district court had correctly held that the *other* plaintiffs also had standing to raise the same challenge. *FAIR*, 547 U.S. at 52 n.2. Without endorsing that conclusion, the Court stated that it would "limit [its] discussion to FAIR," the party with standing. *Id*.

FAIR is not relevant here. Plaintiffs in this case are not jointly challenging the constitutionality of a statute. They are challenging discrete governmental action that is alleged to have constituted a Fifth Amendment taking of their *individual* property rights, with each plaintiff attempting to recover on *separate* damages claims. Whatever may be the rule with respect to cases seeking injunctive relief, there is no doubt that, in this situation, while a plaintiff who is injured may pursue a suit, that injury to one plaintiff cannot be imputed to another plaintiff who lacks standing:

> Plaintiffs posit that "[b]ecause Plaintiff Dummett has standing, all other Plaintiffs in the instant case, including Liberty Legal Foundation, also have standing." The Court finds that Plaintiffs' theory actually misstates the law. . . . One Plaintiff's standing . . . is not imputed to other named Plaintiff[s] who lack standing. Therefore, the Court will take up standing to participate in this suit as to each named Plaintiff and examine the pleadings to determine

> whether the elements of standing are stated with the requisite specificity.

Liberty Legal Found. v. Nat'l Democratic Party of the USA, Inc., 875 F. Supp. 2d 791, 799-800 (W.D. Tenn. 2012); *see also Sierra Club v. Colorado Springs Utilities*, No. 05-CV-01994-WDM-BNB, 2008 WL 8920047 at *9 (D. Colo. Jan. 24, 2008) ("Thiebaut has not cited any authority that standing for one party in one claim is sufficient to allow another party without standing to pursue a related, but separate, claim.").

Here, it is undisputed that the Fairholme Funds and most of the other plaintiffs in this case did not own shares in Fannie Mae and Freddie Mac on August 17, 2012 – the date the Third Amendment was executed – yet they have joined in an action to recover compensation for an alleged taking of their property on that date. Berkeley Insurance Company obviously cannot maintain an action seeking damages for a taking of Fairholme's property. Nor can the participation of Berkley Insurance Company provide a basis for Fairholme to maintain a separate claim for damages simply because they have joined Berkley Insurance Company in filing one complaint.[2] Thus, all plaintiffs that did not own stock as of August 17, 2012, should be immediately dismissed from this case, and their attempt to perpetuate their participation in the case by deferring resolution of our motion should be rejected.

II. The Plaintiffs That Did Not Own Shares In The GSEs On The Date Of The Third Amendment Cannot Maintain The Takings Claim They Plead In Their Complaint

Plaintiffs argue that the standing argument presented in our supplemental motion to dismiss is inconsistent with an argument raised in our December 2013 motion to dismiss. Specifically, plaintiffs argue that we cannot maintain that ownership of shares on the August 17,

[2] Plaintiffs' assertion that Berkley Insurance Company "has standing even under the Government's view" is, of course, incorrect. Pls. Mot. 1. As we established in our December 2013 motion to dismiss, all of the plaintiffs (including Berkley Insurance Company) lack standing. Def. Mot. to Dismiss 20-24, Dec. 9, 2013, ECF No. 20.

2012 date of the Third Amendment is critical when we have also argued that plaintiffs' takings claims are not ripe for judicial review due to the uncertainty regarding how and when the FHFA's conservatorship will end. Pls. Mot. 5. Plaintiffs are incorrect because our rationale for dismissing the plaintiffs who did not own stock on August 17, 2012 applies irrespective of whether their claims are ripe. If we are correct regarding the prematurity of their takings claims, the Court should enter final judgment dismissing the claims of *all* plaintiffs (and not only those plaintiffs that did not own shares on the date of the Third Amendment). *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("The Fifth Amendment does not require that compensation precede the taking."). But even if the Court concludes that we are not correct on that issue, then these specific plaintiffs must be dismissed because there is a fatal inconsistency between their own complaint – which alleges that the taking occurred on the August 17, 2012 date of the Third Amendment, Compl. ¶¶ 66, 79, 86-87 – and the undisputed facts that almost all of the plaintiffs did not own stock in the GSEs on the date of the taking *they alleged*. Importantly, plaintiffs do not claim a taking occurred at some date *after* these plaintiffs purchased their stock. Thus, the Court should dismiss the plaintiffs who did not own stock on August 17, 2012, and explain that even accepting the theory of ripeness, those plaintiffs lack standing because they did not own stock on the critical date. Regardless, plaintiffs' suggestion that the Court may ultimately find other reasons to dismiss their complaint is not a good reason to delay resolution of our simple and straightforward supplemental motion to dismiss.

III. Our Supplemental Standing Argument Is "An Easy One" And, In Any Event, Plaintiffs' Contrary Opinion Is Not A Valid Basis For Suspension Of Briefing

At the end of their motion, plaintiffs argue that we have provided the Court a "perfunctory" argument that "gives the false impression that the issue is an easy one." Pls. Mot. 5. Plaintiffs cite a few cases that they claim muddy the issue, and then suggest that they will ultimately convince the Court that our standing argument is wrong. Plaintiffs, however, cite no authority for the proposition that a court should stay briefing on a motion challenging the jurisdiction of the Court in these circumstances. Moreover, the cases plaintiffs cite in support of their contention that a plaintiff who acquires property after the alleged taking may nonetheless possess standing to sue – *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Bailey v. United States*, 78 Fed. Cl. 239 (2007), *reconsideration denied*, 116 Fed. Cl. 310 (2014) – are inapposite as both involved challenges to land-use regulations, which are subject to unique considerations regarding when a Fifth Amendment takings claim can accrue.

In *Palazzolo*, the Supreme Court held that a takings claim became ripe after the plaintiff landowner submitted development applications that were denied by the state. Although the plaintiff did not own the property at issue at the time when the regulation was enacted, the Court concluded that, because a takings claim could not be asserted until after the state had denied development through an application process, the later owner could assert a takings claim after the restrictions were actually applied to the property. This interpretation of *Palazzolo* has been confirmed by the Federal Circuit. *See CRV Enterprises, Inc. v. United States*, 626 F.3d 1241, 1249 (Fed. Cir. 2010). Moreover, the Federal Circuit has also suggested that *Palazzolo* has application only in cases involving land use regulations. *A&D Auto Sales v. United States*, 784 F.3d 1142, 1152, n.6 (Fed. Cir. 2013).

The *Bailey* decision is equally unhelpful to plaintiffs. In *Bailey*, the plaintiff, Mr. Bailey, purchased land and tried to develop for resale certain parcels located in wetland areas. 78 Fed. Cl. 241-44. He began constructing a road without the necessary permit. *Id.* Mr. Bailey's application for an "after-the-fact" permit was denied, and he was ultimately ordered to return the area to its previous condition. *Id.* at 243-44. In the interim, Mr. Bailey had already begun re-selling the lots, some of which he later reacquired or retained some interest in. *Id.* at 245. The Court granted-in-part and denied-in-part the Government's summary judgment motion, eliminating from the taking claim any lots that were not owned by Mr. Bailey at the time of the alleged taking. *Id.* at 275 ("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, and accordingly the government's motion for summary judgment is GRANTED as to those three lots. . . . At the time of the denial of the after-the-fact permit application, in addition to lot 1, title was still recorded in the name of the plaintiff for six other lots."). As with *Palazzolo*, *Bailey* turned upon land-use considerations that have no relevance to plaintiffs' takings claims in this case.

Here, it is undisputed that most of the plaintiffs did not own any shares in the GSEs on the August 17, 2012 date of the Third Amendment. Plaintiffs have identified no case that suggests that a stock purchaser can have standing to pursue compensation for a taking that allegedly occurred before the purchaser acquired the stock. To the contrary, the rule that "only persons with a valid property interest at the time of the taking are entitled to compensation" is longstanding. *CRV Enterprises, Inc.*, 626 F.3d at 1249 (quoting *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001)). For this reason, plaintiffs' suggestion that the issue presented to the Court in our supplemental motion to dismiss is "not easy" is wrong.

IV. The Timing Of Our Supplemental Motion To Dismiss Is Irrelevant

Finally, plaintiffs criticize the timing of our supplemental motion to dismiss, complaining that we filed our motion many months after plaintiffs revealed, in an interrogatory response, that most of the plaintiffs in this actions did not own shares on the date of the alleged taking. Pls. Mot. 1, 3. Further, plaintiffs assert that their approach is consistent with the Court's actions in this case, including its oral statement that it would deny our pending motion to stay discovery pending a decision by the District of Columbia Court of Appeals in *Perry Capital LLC v. Lew*, No. 14-5243 (D.C. Cir.). Pls. Mot. at 3-4. These arguments lack merit.

First, given that we learned this information from a discovery response, this issue could not have been properly raised in our original motion to dismiss. Thus, while not relevant to the standing inquiry, this is not a case where the government has sat back and later sprung a key jurisdictional flaw in plaintiff's case.

Second, the timing of our motion is irrelevant because it "is well established that questions of standing can be raised at any time." *Board of Trustees v. Roche Molecular Systems, Inc.*, 583 F.3d 832 (Fed. Cir. 2009). If standing can be raised at any time, including on appeal, then the ongoing discovery in this case should not be an impediment to consideration of our supplemental motion. Further, to the extent that plaintiffs are "consumed" by the continuing jurisdictional discovery, Pls. Mot. 2, they could have requested our consent to a reasonable enlargement of time, but they failed to do so. We also note that the ongoing discovery has not precluded plaintiffs from filing, over the last three weeks, seven motions to remove the protected designation from discovery documents.

Moreover, the Court should not ignore the irony in plaintiffs' contention that they are entitled to a stay of briefing simply because the Court intends to deny our motion to stay

discovery. As demonstrated above, the pendency of the discovery process is not a valid basis upon which to stay a motion to dismiss for lack of standing, which can be raised at any time. Absent a showing that they possess standing in this matter, the affected plaintiffs should not be permitted to continue to avail themselves of the Court's authority to engage in discovery or otherwise participate in this action.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion to stay briefing on defendant's supplemental motion to dismiss.

Respectfully submitted,

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