FORM 12. Informal Brief (District Court, Court of International Trade, and Court of Federal Claims Cases) **Form 12 Rev. 03/16**

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

FAIRHOLME FUNDS, et al v. UNITED STATES

IN RE: MICHAEL SAMMONS

Case No. 17-1015

INFORMAL BRIEF OF APPELLANT

Read the Guide for Pro Se Petitioners and Appellants before completing this form. Attach a copy of the final decision or order of the trial court. Answer the following questions as best you can. Your answers should refer to the decision or order you are appealing where possible. Use extra sheets if needed.

1. Have you ever had another case in this court? ☐ Yes ☒ No If yes, state the name and number of each case.

2. Did the trial court incorrectly decide or fail to take into account any facts? ☐ Yes ☒ No If yes, what facts? (Refer to paragraph 7 of the Guide.)

3. Did the trial court apply the wrong law? ☒ Yes ☐ No If yes, what law should be applied?

Stern v. Marshall, 131 S. Ct. 2594 (2011)

4. Did the trial court fail to consider important grounds for relief? ☒ Yes ☐ No If yes, what grounds?

Stern v. Marshall, 131 S. Ct. 2594 (2011)

5. Are there other reasons why the trial court's decision was wrong? ☒ Yes ☐ No If yes, what reasons?

See attached continuation of this Informal Brief

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FORM 12. Informal Brief (District Court, Court of International Trade, and Court of Federal Claims Cases) Form 12 Rev. 03/16

6. What action do you want the court to take in this case?

Reverse and remand.

7. Do you believe argument will aid the court? ☐ Yes ☒ No If yes, submit a separate notice to the court requesting oral argument and include the reasons why argument will aid the court. (Refer to paragraph 15 of the Guide.)

8. Do you intend to represent yourself? ☒ Yes ☐ No If you have not filed an Entry of Appearance, indicate your full name, address, telephone number and e-mail address.

9. I certify that a copy of this brief and any attachments were sent to: Benjamin Mizer, Asst. Attorney Gen. and Plaintiff's attorney (Charles Cooper), the attorney for appellee, at the following address: US DOJ, PO Box 480, Wash, DC 20044 and (for Mr. Cooper, 1523 NH Ave NW, Wash DC). (Address is found on the Entry of Appearance served on you by the attorney for the appellee. If you do not send a copy of this brief to the appellee, the court will not file the brief.)

10/8/2016
Date

Appellant's signature

In addition to mailing a copy to the attorney for the appellee, mail three copies of this informal brief and attachments to:

Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

Reset Fields

Fairholme Funds, et al v. United States
In re Michael Sammons
Federal Circuit Case No. 17-1015
Court of Federal Claims No. 13-465C

APPELLANT'S INFORMAL BRIEF (#5 continued)

ISSUE RAISED ON APPEAL:

Whether a non-Article III "legislative" judge presiding over a $125 billion constitutional takings case against the United States violates Article III and Stern v. Marshall, 131 S. Ct. 2594 (2011).

1. Jurisdiction
   a. Timeliness of Appeal:
      (i) Date of entry of judgment or order of originating court: **September 30, 2016**
      (ii) Date notice of appeal filed: **October 3, 2016**
   b. The denial of a motion to intervene as of right pursuant to Rule 24(a) is an appealable "final decision" within the meaning of 28 U.S.C. § 1291. League of United Latin American Citizens v. Wilson, 131 F. 3d 1297, 1302 (9th Cir. 1997); Cook v. Powell Buick, Inc., 155 F.3d 758 (5th Cir. 1998); United States v. City of Milwaukee, 144 F.3d 524 (7th Cir. 1998).

PREFACE

Michael Sammons ("Sammons") appeals the denial of a Rule 24(a) motion to intervene. Sammons argues that the lower court Article I judge did not have the "constitutional authority" under Article III to even rule on his motion, or for that matter to preside over the consolidated constitutional takings cases below.

Surprisingly, while this Court has frequently held that the Article I Court of Federal Claims has "statutory authority" under the Tucker Act to hear constitutional takings cases, this Court has *never* actually considered the separate question of whether that court has the "*constitutional authority*" under Article III to hear such cases.

So while the lower court judge ridiculed such a constitutional challenge to her authority[1], this Court's respect for the Constitution requires at least a

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[1] Although not actually considering the Article III issue at all, the lower Article I court judge colorfully assessed it as "frivolous," "vexatious," "ill-conceived," "specious," and "vacuous (mindless)," apparently believing that a valid statute (the Tucker Act in this case) can never be "unconstitutional as applied." This lack of understanding of the Constitution would, no doubt, come as quite a surprise to the Supreme Court, which has itself found numerous otherwise valid statutes "unconstitutional as applied." U.S. v. Salerno, 481 US 739 (1987).

And this *exact*, if "mindless," Article III constitutional argument against the non-Article III Court of Federal Claims deciding constitutional takings cases, has been advanced by some of the finest legal minds in this country as recently as 2015, including Prof. Frank Marks of George Washington Univ. School of Law, Prof. Robert Brauneis of the Univ. of Maryland School of Law, and noted constitutional law expert Michael Goodman, Ph.D. These legal scholars all opined that Stern v. Marshall, 131 S. Ct. 2594 (2011) cannot possibly be squared with an Article I court deciding constitutional takings cases.

But no *court* has ever actually been presented, let alone seriously considered, the merits of the Article III argument.

cursory analysis under the controlling Article III case of Stern v. Marshall, 131 S. Ct. 2594 (2011). Such an analysis compels rather unsettling conclusions.

FACTS

The case below, with several consolidated cases, all present exactly the same Fifth Amendment constitutional takings claim against the United States. In 2008 the United States came to the aid of Federal National Mortgage Association (Fannie) and Federal Home Loan Mortgage Corporation (Freddie), collectively the "GSEs," during a time of national financial crisis. In return for its financial support, the United States received an option to purchase 79.9% of the GSEs for a token $10,000 (now worth $100 billion+), as well as a 10% priority preferred dividend payment per year on all funds advanced to the GSEs.

By 2012 the country had substantially recovered and the GSEs revealed to the United States that they could now produce sustainable profits going forward, and specifically that an accounting adjustment/reversal in 2013 would result in over $50 BILLION in profits. Learning of this change in GSE fortunes, the United States quickly and unilaterally changed the 2008 agreement to provide that ***all*** equity and ***all*** of the enormous expected profits in the GSEs would go to the United States ... ***forever***. This was the infamous "Net Worth Sweep ("NWS")."

As a result of the NWS, from 2012 until today, the GSEs have paid the United States $125 BILLION in excess of what would have been paid under the 2008 agreement. Private investors in the GSEs, who had invested over $36 billion in GSE preferred stock, and far more in common stock, and who all believed they were "partners" with the United States, will never receive a penny from their investments in the GSEs under the NWS.

The "taking" of $125 BILLION from the GSE private equity investors, as well as the extinguishment of *all* future value in their GSE investments, constituted the largest most blatant "regulatory taking" by the United States in the history of this nation. Cf. Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978).

Plaintiff-Intervenor-Appellant Michael Sammons ("Sammons"), like all the Plaintiffs in the consolidated cases below, is a GSE equity investor, holding $1,000,000 in preferred shares. So on September 20, 2016 Sammons filed a motion to intervene to protect his financial interest.[2] **The Court below**

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[2] The pro se motion was filed under FRCP, Rule 24(a). Given the "liberal" construction due pro se pleadings, the Court could have granted leave to intervene under either RCFC Rule 24(a)(as a matter of right), or RCFC Rule 24(b)(discretionary). Serious consideration by the Court under RCFC Rule 24(a), and ANY consideration under RCFC Rule 24(b), was foreclosed by the Judge's incorrectly rejecting Sammons' claim that, as an Article I legislative court, the Court did not have Article III jurisdiction over a constitutional takings claim. Indeed, if Sammons' argument that the presiding judge had no jurisdiction because she is not an Article III judge is valid, then ***the presiding judge had no authority to even rule on the motion to intervene.***

correctly found that "the outcome of this litigation[3] may impact (Sammons) ownership rights." Order, page 7.

Having found that Sammons had standing to intervene, the lower Court nevertheless *summarily* denied leave to intervene, without even *considering* the Article III issue, finding that the Sammons "challenge (to) the (Article III) jurisdiction of this Court," was "frivolous," "vexatious," "ill-conceived," "specious," and "vacuous." Points for style, if not for substance.

The lower court implicitly held that the Tucker Act is dispositive of not only proper "statutory authority" (which certainly exists) but is also dispositive of the independent issue as to whether "*constitutional authority*" also exists. Apparently to the lower court, "constitutional authority" must always be present if "statutory authority" is found to properly exist. But a distinction must exist as the Supreme Court has said "both" must exist, not only one. **"We conclude that, although the (Article I) Court had the statutory authority to enter judgment on Vickie's (common law) claim, it lacked the**

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[3] The case below has been consolidated with a half dozen other similar individual and class action takings cases, *all* alleging the same Fifth Amendment regulatory takings claim based upon the Net Worth Sweep. This specific case, Fairholme Funds v. United States, has been designated as the lead case to handle "discovery, motion practice, case management and scheduling" so it will materially affect the litigation, success, or failure of all the other consolidated cases – which explains why Sammons sought to intervene in this case. Order below, filed October 29, 2013.

constitutional authority to do so." Stern v. Marshall, 131 S. Ct. 2594, 2601 (2011).

THIS COURT HAS NEVER CONSIDERED WHETHER ARTICLE III AND STERN V. MARSHALL ALLOW A COURT OF FEDERAL CLAIMS ARTICLE I JUDGE TO DECIDE CONSTITUTIONAL TAKINGS CASES

This Court has repeatedly (and correctly) held that the Tucker Act, 28 USC §1491(a)(1), provides *exclusive* "statutory jurisdiction" for the Court of Federal Claims to hear takings cases against the United States exceeding $10,000. McGuire v. United States, 707 F.3d 1351, 1356 (Fed. Cir. 2013). But "statutory" jurisdiction is not the same as "constitutional" jurisdiction. History is replete with examples of the Government enacting and enforcing statutes later deemed unconstitutional, in whole or *as applied*.

As did the lower court, this Court appears to have assumed that jurisdiction was proper based *solely* upon its statutory source, the Tucker Act, without assessing the Act's constitutionality (at least "a*s applied*" to constitutional takings claims). Again, "statutory authority" and "constitutional authority" are two *separate* issues – and a court must have *both* to properly have jurisdiction over a particular case. **"We conclude that, although the (Article I) Court had the statutory authority to enter judgment on Vickie's**

(common law) claim, it lacked the constitutional authority to do so." Stern v. Marshall, 131 S. Ct. 2594, 2601 (2011).

It bears repeating, this Court has *never* addressed – in fact the issue has never been raised in *any* court – whether the Tucker Act is itself constitutional *under Article III* of the U.S. Constitution *in constitutional takings cases*, let alone one of this magnitude and directly involving both the President and the Congress. As will be discussed in detail below, allowing an Article I or "legislative" judge to decide the largest constitutional takings case ever filed against the United States cannot possibly be squared with Stern or its Article III predecessors.

HOW CONSTITUTIONAL TAKINGS CASES CAME TO THE COURT OF FEDERAL CLAIMS

Congress did not create the Court of Federal Claims as an Article III court, but explicitly created it as a "legislative court" pursuant to Article I.

Article III of the Constitution, which created an independent judiciary, is an essential prong of the separation of powers doctrine, "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." Stern v. Marshall, 131 S. Ct. at 2608:

> "The basic concept of separation of powers ... that flows from the scheme of a tripartite government adopted in the Constitution, the

> judicial Power of the United States ... can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto."

It is the protections of lifetime tenure and the Compensation Clause that safeguards the independence of Article III judges:

> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support ... In the general course of human nature, a power over a man's subsistence amounts to a power over his will." The Federalist No. 79, at 1 (Alexander Hamilton, 1788).

Neither protection applies to Article I or "legislative" judges. Thus the judges who serve on the Court of Federal Claims are exactly what Congress intended: Article I judges, unprotected by the guarantees of independence afforded Article III judges, and therefore susceptible to influence by the other branches.

This is not to say that Congress can never create Article I courts and judges. Such courts have been approved by the U.S. Supreme Court since 1828, when Justice Marshall first approved such legislative courts in the non-state territories. Subsequent approval was afforded Article I military courts, Article I Indian Territory courts, and most recently for District of Columbia Article I courts.

The rationale behind *all* these "legislative" courts under Article I was simply that the cases heard "involve a constitutional grant of power that has been historically understood as giving (Congress) extraordinary control over the precise subject matter at issue." Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 66 (1982).[4]

So the legal principle behind allowing Article I legislative courts is actually simple: a legislative or Article I court *only* decides cases and controversies which the legislature itself has the authority to resolve. Rights created by the legislature are subject to control by the legislature, whether through itself or legislative courts or any other entity or agency it creates. As Justice Brennan explained in his plurality opinion in Northern Pipeline, "it is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be

[4] The parties below have not "waived" the Article III issue. A similar argument was rejected by the Supreme Court in Northern Pipeline because Article III serves the separate structural interest in "safeguarding the role of the Judicial Branch in our tripartite system by barring congressional attempts to transfer jurisdiction [to non-Article III judges] for the purpose of emasculating constitutional courts," an interest which cannot be waived, at least not for true constitutional claims. Waiver cannot be found here for several additional reasons: (1) as in Northern Pipeline, Plaintiffs had no Article III alternative – there was no "considered Article I choice" as there was *no* Article III alternative due to the restrictions of the Tucker Act; (2) no "public rights exception" applies because the claim at issue was not created by either state or federal legislatures – but rather arises directly under the Constitution and therefore requires the Constitution's Article III protections; (3) the right to an Article III court cannot be intelligently waived without knowing such right exists; and (4) the question whether Congress has exceeded its authority in designating a constitutional issue for non-Article III adjudication cannot be waived – see Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).

adjudicated – including the assignment to an adjunct of some functions historically performed by judges." 458 U.S. at 80.[5]

But Congress did *not* create the Takings Clause of the U.S. Constitution, and Congress has no authority to suspend, regulate, or otherwise undermine its guarantees. "Congress has nothing to do with it." Stern, 131 S. Ct. at 2614. Congress can no more require such a constitutional case be heard in only an Article I legislative court, than it could decree that all *constitutional* claims shall be heard *only* by Congress itself or by some other legislative entity or agency it creates. That is a judicial function. "Congress has nothing to do with it." *id.*

The Supreme Court long ago rejected the idea that constitutional takings claims are the province of the legislature. As explained in Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893):

> "When the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

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[5] It is true that the dissent in Northern Pipeline would have allowed non-Article III bankruptcy judges to decide cases, perhaps even constitutional cases, involving "issues likely to be of little interest to the political branches ... with little political significance." Northern Pipeline, 458 U.S. at 115-16 (White, dissenting). But, no one would seriously argue that this case, involving a claim against the United States for $125 BILLION, is not of interest to the political branches – the very same President and Congress which authorized, engineered, and continue to profit from the largest regulatory takings violation in the history of this nation.

The United States would argue that it is the waiver of sovereign immunity granted by Congress which justifies Article I courts. If Congress has the authority whether to allow a lawsuit to even be filed, it follows that it should be able to dictate the standards and terms for such hearing. With virtually all cases before the Court of Federal Claims this argument prevails; however, constitutional takings claims do *not* require a waiver of sovereign immunity. See Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 302-303 (1923)("just compensation is provided for by the Constitution and the right to it cannot be taken away by statute"). See also Jacobs v. United States, 290 U.S. 13 (1933):

> "That right was guaranteed by the Constitution. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary."

Thus no waiver of sovereign immunity is needed or relevant to a constitutional takings case, due to what has been termed the "self-executing" nature of the Takings Clause. United State v. Clarke, 445 U.S. 253, 257 (1980).

"These Fifth Amendment (takings) cases are tied to the language, purpose, and *self-executing* aspects of that constitutional provision, and are not authority to the effect that the Tucker Act eliminates from consideration the sovereign immunity of the United States." United States v. Testan, 424 U.S. 392, 400-401 (1976)(emphasis added). The Tucker Act has nothing to do with it.

That the Takings Clause trumps sovereign immunity can no longer be seriously contested in the wake of First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). In that case the United States, as amicus, argued that the "Constitution did not work a surrender of the immunity of the States, and the Constitution likewise did not withhold this essential attribute of sovereignty from the United States." The Supreme Court rejected that argument, noting that all its cases "make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking." First English, 482 U.S. at 316 n.9.

On a side note, the United States might also argue that the Court of Federal Claims, though not an Article III court, may nevertheless decide takings cases as an "adjunct" of the Federal Circuit, a true Article III court, and also perhaps because the Federal Circuit reviews the lower Article I court's decisions. But clearly the Court of Federal Claims is no more an "adjunct" of the Federal Circuit, than all district courts are adjuncts of the circuit courts of appeals.

But such an extended analysis in this case is unnecessary – this Court need look no further than the recent Supreme Court analysis in Stern. The Supreme Court in that case considered whether a bankruptcy judge, a non-

Article III judge similar to a Court of Federal Claims judge, could consider a tortious interference common law counterclaim.[6]

The Stern Court began by rejecting any notion that a right created by legislation was involved, noting that it is "not a matter that can be pursued only by the grace of the other branches," or "one that historically could have been determined exclusively by those branches," but instead was one that "does not depend on the will of congress; Congress has nothing to do with it." 131 S. Ct. at 2614. The Supreme Court went on to explain:

> "We deal here not with an agency but with a court, with substantive jurisdiction reaching any area of the *corpus juris*. This is not a situation in which Congress devised an "expert and inexpensive method" for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task. The "experts" in the federal system at resolving common law claims such as [the one at issue] are the Article III courts, and it is with those courts that the claim must stay." 131 S. Ct. at 2615

And since the bankruptcy courts have power to enter final judgments, as does the Court of Federal Claims, the Supreme Court concluded they were not permissible adjuncts of higher Article III appeal courts. 131 S. Ct. at 2618-19.

And even in the dissent in Stern, every factor advanced in dissent is readily distinguishable and militates against the Court of Federal Claims considering constitutional takings cases. The key points of Justice Beyer's

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[6] It should go without saying that a constitutional takings claim has *at least* the gravamen of a common law tort claim.

dissent were that (a) "the right in question was created by a federal statute," at 2624, (b) that litigants had the option of filing their claim in an Article III court, at 2627 (due to the Tucker Act there is simply *no* Article III court with jurisidction to hear the plaintiffs' takings claim in this case), and finally (c) "the control exercised by (supervising) Article III judges" (none in our case).

Relevant History of the Court of Federal Claims

The previous discussion demonstrates that none of the rationales that the Supreme Court has relied upon to justify Congress removing various legal claims from Article III judges apply to constitutional takings claims.

Prior to 1982, all takings claims against the United States were heard by Article III judges, because the old Court of Claims was an Article III court. But in 1982, Congress created the Court of Federal Claims, with Article I judges, and the Court of Appeals for the Federal Circuit, with Article III judges.

Indeed, Congress did not *intend* to deprive citizens of their constitutional right to have "cases and controversies in the constitutional sense" heard by Article III judges. A Senate report captures Congress' thoughts *at the time* about why it departed from the requirements of Article III:

> "The court will be established under Article I of the Constitution of the United States. Because 28 USC §2509 of existing law gives the trial judges of the Court of (Federal) Claims jurisdiction to hear congressional reference cases, which are ***not 'cases and controversies' in the constitutional sense***, and because the cases heard ... are in many ways

> essentially similar to the limited jurisdiction cases considered by the tax court, judges of the (Federal) Claims Court are made Article I judges rather than Article III judges." S. REP. No. 97-275, at 13 (1981), reprinted in 1982 U.S.C.C.A.N. 11, 23. (emphasis added)

For whatever reason, Congress simply failed to realize that, contrary to its intent, "cases and controversies in the constitutional sense" *would* be heard in the new non-Article III Court of Federal Claims. But the fact that Congress never *intended* to deprive citizens of their right to the protection of Article III judges in such cases, obviously did not mean that Congress would not take advantage of that *unintended* result – as this $125 BILLION takings case against the United States shows all too well.

CONCLUSION

This Appeal Court has *never* considered whether non-Article III judges of the Court of Federal Claims deciding constitutional takings claims against the United States is consistent with Stern and its predecessors. This Article III constitutional issue of first impression has simply never been briefed, or even raised, previously in this Court (or *any* Court).

The Supreme Court has ***never*** held that the constitutional protections guaranteed under the Bill of Rights deserve any less than the complete and independent protection of Article III judges. **The Supreme Court has not, and**

will never, approve of non-Article III judges deciding facts and entering final judgments on *constitutional* claims against the Government.

As this very Court explained in zealously (and properly) defending the importance of the Article III Compensation Clause in protecting its own compensation:

> "This Court has an obligation of zealous preservation of the fundamentals of the nation. The question is not how much strain the system can tolerate; our obligation is to deter potential inroads at their inception, for history shows the vulnerability of democratic institutions. The judiciary, weakest of the three branches of government, must protect its independence and not place its will within the reach of political whim." Beer v. US, 696 F.3d 1174, 1186 (2012)

The public deserves no less a zealous defense of their constitutional right to have constitutional grievances heard by Article III judges as the Constitution guarantees. Constitutional rights *must* be decided by Article III judges, not by some branch of Congress or some legislative court or agency or any other entity Congress happens to create.

Based upon *any* possible reading of the Supreme Court case of Stern, *including* the dissent, not *one* U.S. Supreme Court Justice would condone a "legislative" non-Article III judge deciding any constitutional takings case, let alone the largest Constitutional takings case ever filed against the United States. Simply stated, "Article III protects liberty," Stern at 2609, and the U.S.

Constitution deserves the defense of a truly independent Article III judiciary: the Supreme Court has *never* held otherwise, and would not do so now. *If the Supreme Court required Article III judges for a common law tort claim in Stern, how could it possibly require less than an Article III judge in this constitutional takings case?*

"The 'experts' in the federal system at resolving [inalienable rights, whether common law or constitutional] such as [the one at issue] are the Article III courts, and it is with those courts that the claim must stay." Stern v. Marshall ,131 S. Ct. at 2615. While the lower Article I judge in this case might find those words ""frivolous," "vexatious," "ill-conceived," "specious," and "vacuous[7]," this Court, as a true Article III court, is sworn to defend Article III of the Constitution, and the liberties it was meant to preserve, and faithfully respect and apply the Supreme Court decision in Stern.

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[7] Even a cursory review of the motion to intervene filed below shows the degree of frustration thousands of private GSE investors feel watching a case which has languished for over THREE YEARS *and counting*, with no trial date in sight. Stuck in "jurisdictional discovery" while the Government stalls with every inconceivable "privilege claim" imaginable to hide the true facts from public view – an actual trial date is but a distant dream. Only the Government benefits from such delay and the public sees only that justice delayed is justice denied. Sammons *was* too harsh in his criticism of the presiding judge, for no one should expect a "legislative" non-Article III judge not to feel the pressure from the largest constitutional takings case ever filed against the Government. Perhaps this explains the judge's warning that if any attorney ... ever ... questions her jurisdiction under Article III, such attorney *will* be severely sanctioned. Order at 1. But there is simply no excuse, *ever*, for a judge to muzzle, suppress, chill or threaten presentation of a colorable constitutional claim – particularly one of first impression. The threat itself, one made to the entire bar, shows all too well the wisdom of the Framers in allowing only an Article III judge, and *only* an Article III judge, to decide constitutional issues.

RELIEF SOUGHT

The lower court was clearly correct that the Tucker Act bestows *exclusive* jurisdiction of monetary takings claims over $10,000 against the United States upon the Court of Federal Claims. But finding obvious and undisputed "statutory" jurisdiction simply does not end the matter. **As the Supreme Court explained in Stern v. Marshall, "although the (Article I) Court had the statutory authority to enter judgment on Vickie's (common law) claim, it lacked the constitutional authority to do so." 131 S. Ct. at 2601.**

And though the lower court properly found that Sammons had a financial interest in the consolidated cases below, and therefore was entitled to file a Rule 24 motion to intervene, the lower court had no *constitutional authority* to consider the motion, or to preside over any other matter in the consolidated takings cases below. Stern, supra. To remedy the wrong this Court could:

(a) Uphold Article III, invalidate the Tucker Act "as applied" to takings claims, and vacate and remand with instructions to transfer the entire case to a true Article III court; or
(b) try to avoid the Article III issue by making a *de novo* review of the motion to intervene, since this Court is an Article III court.

But option (b) would require the Court to turn a blind eye to what it must now realize is a constitutional wrong – a lower court presiding over constitutional cases without "constitutional authority" to do so - this Court's "supervisory (and constitutional) responsibility" precludes simply "looking the

other way." Furthermore, Sammons will never have received the possible benefit of an *Article III* trial court's *discretion* in considering his Rule 24 motion to intervene.

More importantly, the lower court Order, entered without constitutional authority, is simply *void*. The court bailiff might as well have signed the Order. This Court can hardly affirm an Order "*void*" for lack of "constitutional authority" – nor sit in place of the very court which lacks such authority.

"If" this Court finds that the lower court has no "constitutional authority" to preside over these consolidated constitutional takings cases, *including* the motion to intervene, there is simply no intellectually honest alternative than to rule on the constitutional Article III violation head on, and vacate and remand with instructions to transfer the entire case to a true Article III court.[8]

> "The judge, even when he is free, is still not wholly free ... He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles." Benjamin N. Cardozo, The Nature of the Judicial Process 141 (1921)

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[8] The lower court Article I judge suggested that "if" she has no authority under Article III then the United States would simply win the case by default, since there is no Article III court authorized under the Tucker Act to hear a constitutional takings case against the United States for more than $10,000. The Article I judge again misapprehends that a statute can somehow trump the Constitution. It is the Constitution itself that guarantees the right to judicial review of a constitutional takings claim – Congress has no power, by statute or otherwise, to vitiate that authority. "If" this Court invalidates the Tucker Act "as applied" to constitutional takings cases, that would simply mean any Article III U.S. District Court with venue could consider this case.

This Court is asked to question the very statutes which brought this Court into existence 34 years ago; to correct an inadvertent offense to Article III of the Bill of Rights itself; and to remove from friends and colleagues their judicial authority. But to "turn a blind eye," to simply "wink and look the other way," perhaps relying upon some technicality to simply ignore the constitutional wrong altogether, would betray the very essense of the Constitution this Court is sworn to uphold. "We all know the cliché that hard cases make bad law. But hard cases also make good judges." Professor Thomas Healy, Ariz. School of Law (2011). They do not come any harder.

Respectfully submitted,

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Certificate of Service

I certify that a true copy of this Informal Brief, including all attachments, was delivered by email and USPS to counsel of record for all parties in this case.

10/6/16
Michael Sammons

APPENDIX:

Lower court ORDER, entered September 30, 2016 (attached)

ORIGINAL

#338

In the United States Court of Federal Claims

No. 13-465C
(Filed: September 30, 2016)

FAIRHOLME FUNDS, INC. et al.,	*
	*
Plaintiffs,	*
	*
v.	*
	*
THE UNITED STATES,	*
	*
Defendant.	*

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ORDER

On Friday, September 16, 2006, the clerk's office received from Michael Sammons his pro se motion to intervene in the above-captioned case, which was transmitted to chambers the following business day. By his order, the court directs the clerk of court to file the motion. Because the motion to intervene is ill-conceived, the court need not await a response from all counsel of record before ruling on it. Further, the court notes that because there is no evidence to suggest that Mr. Sammons is an attorney, there is no need to issue a show cause order related to the imposition of sanctions for the filing of a motion that is both frivolous and vexatious.[1]

I. BACKGROUND

In his motion, Mr. Sammons describes himself as "a member of the plaintiff-class with beneficial ownership of $1,000,000 par amount of [government-sponsored enterprise ("GSE")] preferred stock." Intervenor's Mot. 1. He seeks "to intervene as a matter of right for the limited purpose of challenging this Court's jurisdiction" over plaintiffs' Fifth Amendment takings claim pursuant to Rule 24(a) of the Federal Rules of Civil Procedure ("FRCP"). Id. at 1-4. The legal arguments set forth in Mr. Sammons's motion are, among other things, contrary to statute, well-settled case law, and the legal positions asserted by all parties to this litigation.[2]

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[1] Mr. Sammons's motion reflects a profound misunderstanding of this court's operations and procedures, as well as the procedural history of this case. Other than addressing the contours of this court's jurisdiction and explaining the frivolous nature of the motion, the undersigned declines to address the remainder of Mr. Sammons's unfounded claims.

[2] Indeed, defendant's motion to dismiss, which was filed pursuant to Rule 12(b)(1) and 12 (b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), does not challenge this court's authority to entertain Fifth Amendment Takings claims. Rather, defendant argues, among other things, that the court lacks jurisdiction over the complaint because: (1) the

The gravamen of Mr. Sammons's motion to intervene is that the Court of Federal Claims lacks the authority to exercise jurisdiction over and adjudicate Fifth Amendment takings claims. According to Mr. Sammons, only United States district courts, not the Court of Federal Claims, can exercise jurisdiction over Fifth Amendment takings claims. Id. at 1. Mr. Sammons misapprehends this court's jurisdiction.

II. DISCUSSION

A. The Court of Federal Claims Possesses Exclusive Jurisdiction Over Fifth Amendment Takings Claims Exceeding $10,000

The Court of Federal Claims was established under Article I of the United States Constitution. 28 U.S.C. § 171(a) (2012). Article I also provides for the appointment of the court's judges. Id. § 172(a). The judges of this court are appointed by the President and confirmed by the United States Senate. Id.

This court's authority to act was conferred by Congress through the Tucker Act. Id. § 1491. In this statute, commonly referred to as the "Big" Tucker Act, Congress specifically waived sovereign immunity for claims against the United States, not sounding in tort, that are founded upon the United States Constitution, a federal statute or regulation, or an express or implied contract with the United States. Id. § 1491(a)(1). Because the Tucker Act is merely a jurisdictional statute and "does not create any substantive right enforceable against the United States for money damages," United States v. Testan, 424 U.S. 392, 398 (1976), that right must appear in another source of law, such as a "money-mandating constitutional provision, statute or

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Federal Home Finance Agency ("FHFA"), when acting in its role as conservator, is not acting as the United States, Def.'s Mot. Dismiss 12-16; (2) no liability can attach as a result of United States Department of the Treasury's ("Treasury Department") execution of the Third Amendment because Treasury Department was acting as a market participant, not as the sovereign, when it entered into that agreement with the FHFA, id. at 26-28; (3) plaintiffs cannot establish the facts necessary to state a takings claim, id. at 32-38; and (4) plaintiffs' claims are not ripe, id. at 38-42. Then, in its supplemental motion to dismiss, which was filed pursuant to RCFC 12(b)(1), defendant seeks the dismissal of the claims of "plaintiffs Fairholme Funds, Inc., the Fairholme Fund (collectively the Fairholme hedge funds), and all other plaintiffs who did not own shares in Fannie Mae or Freddie Mac (the Enterprises)[] on August 17, 2012, the date of the alleged Fifth Amendment taking in this case." Def.'s Suppl. Mot. Dismiss 1. Defendant argues that "[t]hese plaintiffs lack Article III standing to maintain their takings claim because they did not own the property alleged to have been taken until many months after the alleged taking occurred." Id. (footnote omitted.). All of defendant's comprehensive arguments in support of dismissing plaintiffs' complaint notwithstanding, nowhere in either of its motions to dismiss does defendant argue that the United States Court of Federal Claims ("Court of Federal Claims") lacks jurisdiction to adjudicate takings claims against the United States. The reason is clear: to do so would be contrary to statute and case law and would result in court-imposed sanctions against government counsel for making an argument contrary to the law in violation of RCFC 11.

regulation that has been violated, or an express or implied contract with the United States." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc). One such money-mandating constitutional provision is the Takings Clause of the Fifth Amendment to the United States Constitution, which provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). The Takings Clause does not prohibit the taking of property. Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003). Rather, it proscribes a taking without just compensation. Id.; see also First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A., 482 U.S. 304, 315 (1987) (providing that the Takings Clause "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking" in a claim asserted against a county).

The Court of Federal Claims possesses jurisdiction to entertain Fifth Amendment takings claims against the United States. See McGuire v. United States, 707 F.3d 1351, 1356 (Fed. Cir. 2013) ("Because [the plaintiff's] takings claim fell within the scope of the Tucker Act (and was a claim for over $10,000), jurisdiction was proper only in the Claims Court."); John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1354 (Fed. Cir. 2006) ("The Tucker Act, 28 U.S.C. § 1491(a)(1), provides the Court of Federal Claims with jurisdiction over takings claims brought against the United States."), aff'd, 552 U.S. 130 (2008); Morris v. United States, 392 F.3d 1372, 1375 (Fed. Cir. 2004) ("Absent an express statutory grant of jurisdiction to the contrary, the Tucker Act provides the Court of Federal Claims exclusive jurisdiction over takings claims for amounts greater than $10,000."); Murray v. United States, 817 F.2d 1580, 1583 (Fed. Cir. 1987) (noting that "the 'just compensation' required by the Fifth Amendment has long been recognized to confer upon property owners whose property has been taken for public use the right to recover money damages from the government"). Consequently, Mr. Sammons's attempt to challenge this court's jurisdiction over takings claims by intervening in this case is a pointless exercise.

In sum, regardless of the whether plaintiffs' claims in this case are ultimately found to be meritorious, the Court of Federal Claims and its judges are empowered to exercise jurisdiction over Fifth Amendment takings claims. Congress granted this court jurisdiction over Fifth Amendment takings claims against the United States. 28 U.S.C. § 1491. Consequently, the purpose for which Mr. Sammons seeks intervention is frivolous and would result in a waste the resources of the court and all parties to this litigation.

B. The Jurisdiction of the United States District Courts Is Limited to Claims That Do Not Exceed Damages in the Amount of $10,000

Because Mr. Sammons suggests that Article III district courts are the proper for a for Fifth Amendment takings claims against the federal government, the court finds that it would be beneficial to explain the jurisdiction of the district courts. The "Little" Tucker Act, 28 U.S.C. § 1346(a)(2), specifically provides:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> . . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41.

(emphasis added). The congressional mandate of the "Little" Tucker Act is unambiguous—district courts are specifically precluded from hearing Fifth Amendment takings claims in excess of $10,000. Consequently, if Mr. Sammons seeks to avoid subjecting himself to litigation in this court, he may pursue a takings claim in a district court so long as the amount of damages he seeks does not exceed the "Little" Tucker Act's $10,000 statutory ceiling. Indeed, at least one district court has opined concerning whether the effect of the Third Amendment rose to the level of a taking. Specifically, in Perry Capital LLC v. Lew, 70 F. Supp. 3d 208 (D.D.C. 2014), the United States District Court for the District of Columbia, an Article III tribunal, rejected all of the plaintiffs' challenges regarding the effect of the Third Amendment. The court further observed that it lacked jurisdiction over plaintiffs' takings claims because they exceeded the $10,000 limit of the "Little" Tucker Act:

> As an initial matter, the defendants argue that the class plaintiffs' takings claims belong in the Court of Federal Claims rather than in this Court. Pursuant to the so-called "Big" Tucker Act, 28 U.S.C. § 1491(a)(1), the Court of [Federal] Claims maintains exclusive jurisdiction over claims against the United States that exceed $10,000. Under the "Little" Tucker Act, 28 U.S.C. § 1346(a)(2), the Court of [Federal] Claims shares concurrent jurisdiction with federal district courts over claims against the United States not exceeding $10,000. In this Circuit, for complaints that include potential claims over $10,000, Little Tucker Act jurisdiction is only satisfied by a "clearly and adequately expressed" waiver of such claims. See Waters v. Rumsfeld, 320 F.3d 265, 271-72 (D.C. Cir. 2003) ("[F]or a district

> court to maintain jurisdiction over a claim that might otherwise exceed $10,000, a plaintiff's waiver of amounts over that threshold must be clearly and adequately expressed.") (internal quotation marks and citation omitted). Here, the class plaintiffs argue that "expressly limit[ing] the prospective takings class to individuals who suffered losses less than $10,000" is an adequate alternative to waiver, and that waiver is "premature" until the class certification phase. Class Pls.'s Opp'n at 53. Yet the plaintiffs' refusal to clearly and adequately waive claims exceeding $10,000 in either their pleadings or subsequent opposition brief contravenes Circuit precedent. See Goble v. Marsh, 684 F.2d 12, 15-16 (D.C. Cir. 1982); Stone v. United States, 683 F.2d 449, 454 n.8 (D.C. Cir. 1982) ("Generally a plaintiffs' waiver should be set forth in the initial pleadings."). Nevertheless, the Circuit has also made clear its preference that the District Court should not transfer a case that is defective on Little Tucker Act grounds to the Court of Claims "without first giving [the plaintiffs] an opportunity to amend their complaints to effect an adequate waiver." Goble, 684 F.2d at 17.
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> Thus, while the class plaintiffs' takings pleading is inadequate for jurisdiction in this Court under the "Little" Tucker Act, in keeping with the tenor of Circuit case law, the Court would generally provide the class plaintiffs "an opportunity to amend their complaints to effect an adequate waiver." Id. However, doing so here is unnecessary, since the Court finds that the class plaintiffs' takings claims are dismissed on alternative grounds.[3]

Id. at 240 (footnote added).

C. Plaintiff Has Not Satisfied the Four Requirements for Intervention

Turning to the merits of the motion for intervention, the court's ruling is informed by RCFC 24, which, mirroring FRCP 24(a)(2),[4] provides:

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[3] On October 2, 2014, the district court's decision in Perry Capital was appealed to the United States Court of Appeals for the District of Columbia ("D.C. Circuit"). Of note, documents produced during discovery conducted in the instant action, which remains ongoing, were lodged under seal with the D.C. Circuit prior to the April 15, 2016 oral argument in that case. As of the filing of this order, the D.C. Circuit has not yet ruled on the appeal. In addition, as recently as September 22, 2016, some of the plaintiffs filed a sealed letter advising the D.C. Circuit of additional authorities.

[4] Although Mr. Sammons brings his motion pursuant to the FRCP, the Court of Federal Claims is governed by its own set of rules: the RCFC. In this case, as in many cases, it is a distinction without a difference, as the RCFC tend to mirror the FRCP. See Zoltek Corp. v.

> On a timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

In other words, RCFC 24(a)(2) movants "must show that: (1) they have an interest relating to the property or transaction that is the subject of the action; (2) without intervention the disposition of the action may, as a practical matter, impair or impede the applicants' ability to protect that interest; . . . (3) their interest is inadequately represented by the existing parties," and (4) their motion is timely filed. Freeman v. United States, 50 Fed. Cl. 305, 308-09 (2001). Courts reviewing such motions must construe them "in favor of intervention." Am. Mar. Transp., Inc. v. United States, 870 F.2d 1559, 1561 (Fed. Cir. 1989). However, courts are nonetheless "entitled to the full range of reasonable discretion in determining whether the . . . requirements [for intervention] have been met." Rios v. Enter. Ass'n Steamfitters Local Union No. 638 of U.A., 520 F.2d 352, 355 (2d Cir. 1975), quoted in Chippewa Cree Tribe of Rocky Boy's Reservation v. United States, 85 Fed. Cl. 646, 653 (2009). Indeed, "[i]ntervention is proper only to protect those interests which are of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." Am. Mar. Transp., 870 F.2d at 1561 (internal quotation marks omitted).

Intervention is proper only to protect those interests that are "'of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.'" United States v. AT & T Co., 642 F.2d 1285, 1292 (D.C. Cir. 1980) (quoting Smith v. Gale, 144 U.S. 509, 518 (1892)). Thus, the interest may not be either indirect or contingent. See, e.g., New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463 (5th Cir. 1984); Dilks v. Aloha Airlines, Inc., 642 F.2d 1155, 1157 (9th Cir. 1981) (per curiam).

Performing a proper analysis is difficult when the court is confronted with a specious motion. Nevertheless, the court will scrutinize Mr. Sammons's motion under RCFC 24(a). Pursuant to the first requirement of the test for intervention, the movant must show that his interest in the property is "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." Smith, 144 U.S. at 518, quoted in Chippewa Cree Tribe, 85 Fed. Cl. at 654. In addition, the movant must demonstrate that his interest is legally protectable—"one which the substantive law recognizes as belonging to or being owned by the applicant." Id. (internal quotation marks omitted). In this case, the movant's alleged interest is both direct and legally protectable. Mr. Sammons claims that he is a member of the "plaintiff-class" and is the beneficial owner of one million dollars' worth of GSE

United States, 71 Fed. Cl. 160, 167 (2006) (noting that interpretation of a rule of the FRCP "informs the Court's analysis" of the corresponding rule of the RCFC).

stock through Cede & Co., which he describes as the "nominal holder of record."[5] Intervenor's Mot. 1. Although no motion for class certification has been filed in this case, Mr. Sammons claims that he owns GSE stock. "[N]o Federal law of which this court is aware has ever imposed certainty as a requirement of proof, particularly at the outset of litigation—and RCFC 24(a) is no exception, as it only requires that the disposition of the case may impede or impair an applicant's interests." Klamath Irrigation Dist. v. United States, 64 Fed. Cl. 328, 333 (2005) (internal quotation marks omitted). Assuming that Mr. Sammons is a GSE stockholder, as he claims, then the outcome of this litigation may impact his ownership rights.[6] Thus, Mr. Sammons has satisfied the first requirement of the four-prong test. However, merely satisfying the first requirement does not end the court's inquiry.

With respect to the second requirement, the movant must show that "without intervention the disposition of the action may, as a practical matter, impair or impede the applicant['s] ability to protect [his] interest." Freeman, 50 Fed. Cl. at 308. In other words, intervention is "inappropriate where relief is available elsewhere." Chippewa Cree Tribe, 85 Fed. Cl. at 657. In this case, Mr. Sammons asserts that the purpose of his motion for intervention is to challenge this court's subject matter jurisdiction. According to Mr. Sammons, the Court of Federal Claims cannot adjudicate Fifth Amendment takings claims because it is an Article I court. Mr. Sammons is incorrect. Indeed, as explained above, this court is the exclusive forum for adjudicating Fifth Amendment takings claims against the United States in excess of $10,000. 28 U.S.C. §§ 1346(a)(3), 1491(a)(1). Ironically, by seeking to attack this court's jurisdiction, Mr. Sammons unwittingly aligns himself with the defendant, the only party to this litigation challenging this court jurisdiction, albeit on other grounds. Moreover, if Mr. Sammons elects to limit his damages claim against the United States to an amount that does not exceed $10,000, he may file suit in federal district court. Of course, at least one district court has opined that the

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[5] As explained below, plaintiffs have not yet moved for class certification in this case. Furthermore, if Cede & Co. is a corporation, it may only be represented by counsel. RCFC 83.1(a)(3) specifically provides that an "individual who is not an attorney . . . may not represent a corporation . . . in any other proceeding before this court." See Talasila, Inc. v. United States, 240 F.3d 1064, 1066 (Fed. Cir.) ("[A corporation] must be represented by counsel in order to pursue its claim against the United States in the Court of Federal Claims."), reh'g and reh'g en banc denied (Fed. Cir. 2001); Finast Metal Prods. Inc. v. United States, 12 Cl. Ct. 759, 761 (1987) ("A corporate 'person' can no more be represented in court by a non-lawyer—even its own president and sole shareholder—than can any individual."). This rule applies even in those situations in which a financial hardship is imposed on the corporate plaintiff. Richdel, Inc. v. Sunspool Corp., 699 F.2d 1366, 1366 (Fed. Cir. 1983) (noting that "substantial financial hardship" did not waive the rule requiring corporations to be represented by counsel).

[6] It bears noting that Mr. Sammons also appears to seek to transfer this case to a United States district court, which would, of course, lack jurisdiction over any Fifth Amendment takings claim that exceeded $10,000. Thus, if this court were to transfer the instant action, it would prejudice every plaintiff in this and all the related actions pending before it.

United States is not liable under the Fifth Amendment.[7] See Perry Capital, 70 F. Supp. 3d at 240.

Furthermore, despite Mr. Sammons's objection to this court's adjudication of claims brought under the Fifth Amendment's Takings Clause, claims over which this court undeniably possesses subject matter jurisdiction, Mr. Sammons cannot demonstrate that his ability to protect his interest in GSE stock would be impaired if the court denied his motion for the simple reason that he, at any time, remains free to bring a separate suit. See, e.g., TRW Envtl. Safety Sys., Inc. v. United States, 16 Cl. Ct. 516, 519 (1989) (finding that the putative intervenor "would not appear to be substantially prejudiced by a denial of its motion, for [he] retains [his] right to bring a separate action"); Ackley v. United States, 12 Cl. Ct. 306, 309 (1987) (finding that the rights of the putative intervenor would not be prejudiced by the court's denial of his motion to intervene because he had already filed a separate action).

With respect to establishing the third requirement for intervention, the movant must show that his interests are not adequately being represented by the existing parties. To satisfy this requirement, "a movant need only show that the representation of his interests 'may be' inadequate." Fifth Third Bank of W. Ohio v. United States, 52 Fed. Cl. 202, 205 (2002) (quoting Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 (1972)). In this case, Mr. Sammons claims that "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 the case." Intervenor's Mot. 1. However, as explained above, the Court of Federal Claims has exclusive jurisdiction over Fifth Amendment takings claims against the United States for claims that exceed $10,000 in damages, and concurrent jurisdiction with federal district courts over Fifth Amendment takings claims for less than $10,000. Accordingly, the undersigned possesses the authority to hear plaintiffs' case. Mr. Sammons fails to identify any inadequacy in plaintiffs' representation of his interests. As explained above, the allegations contained in the motion for intervention are not only contrary to law, but are at odds with the postures of both plaintiffs and defendant in this case—none of which has argued that the Court of Federal Claims lacks subject matter over this matter because it is an Article I court. Accordingly, Mr. Sammons fails to meet the third requirement of the test for intervention.

With respect to the final element, timeliness, the court must examine (1) how long the movant knew or reasonably should have known of his rights, (2) whether existing parties would be more prejudiced by the court's granting the motion than the movant would be prejudiced by

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[7] The Perry Capital court found, among other things, that it agreed with the defendants' argument that, "the plaintiffs fail to plead a cognizable property interest, for takings purposes, because the GSEs—and, therefore, the plaintiff shareholders—lack the right to exclude the government from their property." 70 F. Supp. 3d at 241. The court reasoned that because "the GSE shareholders necessarily lack the right to exclude the government from their investment when FHFA places the GSEs under governmental control—e.g., into conservatorship," plaintiffs failed to state a claim upon which relief can be granted pursuant to FRCP 12(b)(6). Id. at 240-42. The court also found that "[e]ven if the class plaintiffs could claim a cognizable property interest—and they cannot—their claims would still fail on a motion to dismiss under existing Supreme Court regulatory takings precedent." Id. at 243.

the court's denying the motion, and (3) whether there exist any unusual circumstances that tip the balance in favor of either granting or denying the motion. Chippewa Cree Tribe, 85 Fed. Cl. at 658. "The court determines timeliness from all the circumstances and exercises 'sound discretion' in making its determination." John R. Sand & Gravel Co. v. United States, 59 Fed. Cl. 645, 649 (2004) (quoting NAACP v. New York, 413 U.S. 345, 366 (1973)), aff'd, 143 F. App'x 317 (Fed. Cir. 2005).

Mr. Sammons does not indicate how long he has known about his rights, but there is no question that the Third Amendment was entered into by the Treasury Department and the FHFA on August 17, 2012. However, stockholders have knowledge of a claim when they do not receive a dividend when it is due. In this case, Mr. Sammons could have proceeded, if he thought it was in his best interest, to file suit in district court in 2012. Indeed, because Mr. Sammons refers to himself as a "class-plaintiff," he may be represented in the Perry Capital litigation. In addition, the court notes that the complaint in the instant action was filed on July 9, 2013, and subsequently, other related Fifth Amendment takings cases were filed. Consequently, the court assume Mr. Sammons was aware of his rights at least since the filing in 2013 of the instant action or the related cases.

With respect to whether the existing parties would be more prejudiced by the court's granting Mr. Sammons's motion than he would be prejudiced by the court's denying the motion, the court concludes that the case is simply too far down the discovery track to be disrupted by a motion for intervention to challenge the court's jurisdiction. To date, there have been over 330 docket entries in this case. Indeed, after defendant filed its initial motion to dismiss on December 9, 2013, the case was suspended on January 2, 2014, based on the parties' joint request. Since that time, the parties, but primarily plaintiffs, have conducted jurisdictional and merits-based discovery. The scope of that discovery has been the subject of numerous status conferences and orders, and much of that discovery is the subject of a protective order and therefore only available to certain counsel and their experts. In addition, following the June 10, 2016, ripening of plaintiffs' motion to compel, the court conducted an in camera review of numerous documents and, in an eighty-one-page decision dated September 20, 2016, granted plaintiffs' motion in its entirety. The documents at issue, which are subject to the court's protective order, will be used by plaintiffs to meet the jurisdictional challenges raised by defendant's motion to dismiss. Thus, because the parties are actively engaged in massive discovery efforts, and because they would be obliged to expend unnecessary time, expense, and other resources to respond to a vacuous motion, the court concludes that they would be more prejudiced by the court's granting Mr. Sammons's motion than he would be prejudiced by the court's denying it.

Furthermore, there do not exist any unusual circumstances that tip the balance in favor of either granting or denying the motion. For these reasons, the court, in an exercise of its discretion, finds Mr. Sammons's motion to be untimely. Accordingly, Mr. Sammons fails to meet the fourth requirement of the test for intervention.

III. CONCLUSION

Because Mr. Sammons's motion to intervene is both ill-conceived and fails to satisfy the requirements of RCFC 24, the motion is **DENIED**.

IT IS SO ORDERED.

MARGARET M. SWEENEY
Judge