Fairholme Funds, et al
Plaintiffs-Appellees

v. United States
Defendant-Appellee

v. Michael Sammons
Movant-Appellant

Federal Circuit Case No. 17-1015

Court of Federal Claims No. 13-465C

APPELLANT'S INFORMAL REPLY BRIEF

The United States correctly notes that "no court has explicitly addressed Mr. Sammons's (Article III) argument premised upon Stern v. Marshall." Appellee Brief, pg. 16. Perhaps this issue of ***first impression*** will finally be addressed. Suffice it to say that the Government's argument that because numerous courts have held that the Court of Federal Claims has ***statutory*** jurisdiction, it is therefore not necessary to consider whether it also has the required ***constitutional*** authority, cannot be squared with Stern v. Marshall, 131 S. Ct. 2594 (2011)("statutory authority" and "constitutional authority" are two separate and independent issues).

Aside from the Government's argument that the Article I Court of Federal Claims must have Article III authority over constitutional takings claims because courts have always found statutory authority (without ever

really considering the *separate* "constitutional" jurisdiction issue), the Government also argues that the order denying intervention, even if void for want of constitutional jurisdiction, should still be affirmed under Rule 24(a).

A motion to intervene is to "be determined by the court in the exercise of its sound discretion," NAACP v. New York, 413 U.S. 345, 366 (1973), but a court "by definition abuses its discretion when it makes an error of law," Koon v. United States, 518 U.S. 81, 100 (1996). Accord Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 98 (2d Cir.2007)("a court by definition abuses its discretion when it makes an error of law."); United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)(same). The lower court judge clearly exercised her discretion on the basis of her erroneous legal conclusion that Sammons Article III argument was ""frivolous," "vexatious," "ill-conceived," "specious," and "vacuous."

If the lower court had conducted even a cursory unbiased analysis of her "constitutional authority" under Stern v. Marshall, and she correctly concluded that she has no "*constitutional authority*" over the six consolidated or coordinated takings cases before her, would she have ruled differently on the motion to intervene? All one can say for sure is, "One would hope so."

In any event, Appellant Sammons has the right as an unnamed class member to intervene as a matter of right pursuant to Rule 24(a) because the case has advanced procedurally no further than a typical case filed for only a couple of months – **no answer has even been filed** - the cases below would not be delayed at all by the motion to intervene "limited" to a single Article III question solely of law, no party would be harmed, and the interests of justice would be best served.

REQUIREMENTS UNDER RULE 24(a) ARE SATISFIED

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).

The First Element (financial interest) is Satisfied

The lower court correctly found that Sammons, as an inevitable unnamed class member[1] has a direct and legally protectable interest:

> **"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 stock ... 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)" Order, pg. 6-7 (emphasis added).

The lower court exercised its discretion in finding that Sammons, as an unnamed member of what the court expected would eventually be a certified shareholder class, has an interest in the consolidated individual and class cases (what the court termed the "Coordinated Actions"). In re Community Bank of Northern Virginia Mortgage Loan Litigation, 418 F.3d 277, 314 (3d Cir. 2005) (finding when unnamed class member seeks to intervene in class

[1] The consolidated or "coordinated" cases are Cacciapelle v. U.S., No. 13-466C, American European Ins. Co. v. U.S., No. 13-496C, Dennis v. U.S., No. 13-542C, Fisher v. U.S., 13-608C, Shipmon v. U.S., No. 13-672C, Fairholme Funds v. U.S., No. 13-465C, Arrowood Indemnity Co. v. U.S., No. 13-698C. All involve the same facts and law, and all allege the identical August, 2012, constitutional takings claim against the United States. The lower court also ordered that all future cases based upon the same facts and claim would be consolidated with these cases.

action, significant protectable interest factor "is satisfied by the very nature of class action litigation").

The Second Element ("ability to protect his interests") is Satisfied[2]

The lower court rejected this element primarily upon its erroneous conclusion of law that, even though not an Article III court, it nevertheless had "*constitutional authority*" over the takings case below. Again, "a court by definition abuses its discretion when it makes an error of law."

But even more basically, it is well established that an "unnamed member" of a class action case, or one which the judge believes will be a

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[2] The lower court cites Ackley v. United States, 12 Cl. Ct. 306, 309 (1987)(finding intervenor would not be prejudiced by denial since he already filed a separate action). Of course, this case is inapposite since Sammons had *not* filed his own case. And only ***after*** being denied leave to intervene did Sammons file his own lawsuit in Texas – however, when this denial is reversed Sammons intends to voluntarily dismiss his similar Texas case because he has always preferred to be represented by able class counsel – at least when the class cases are properly transferred to an Article III court.

Next the lower court seems to suggest that an intervenor must always be denied because he "remains free to bring a separate suit." This reasoning would completely vitiate Rule 24, because in *class action* cases every class member intervenor could, almost by definition, file his own identical case. But one of the stated purposes of Rule 24 is to *avoid* multiple identical lawsuits. But even this flawed reading of TRW Envtl. Safety Sys. Inc. v. United States, 16 Cl. Ct. 516, 519 (1989)(which held only that intervention was *untimely* and, in any event, there was no prejudice to the movant because relief was available elsewhere) is inapposite, because (1) Sammons' motion was *not* untimely (no answer had even been filed), and (2) even if Sammons filed his own lawsuit, it would simply be consolidated with all the other individual and class cases involving the 2012 New Worth Sweep, **pursuant of the lower court's order dated October 29, 2013**. All roads lead to Judge Sweeney for any claim against the United States for more than $10,000 based upon the 2012 "net worth sweep" of the GSEs.

certified class action case (assuming it survives a Rule 12(b) motion to dismiss challenge), has an absolute right under Rule 24(a) to intervene. Diaz v. Trust Territory of Pacific Islands, 876 F.2d 1401, 1405, fn. 1 (9th Cir. 1989) ("[A] member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court").

Finally, Sammons has made clear his desire to participate in this action as a member of the shareholder class (but only in a court with proper Article III jurisdiction). As such, "disposition of the action may, as a practical matter, impair or impede his ability to protect his interests." For example, should this Court find that the 2012 "net worth sweep" did not constitute a constitutional taking warranting compensation, Sammons would be foreclosed from raising the same argument or claim in a subsequent lawsuit.

Therefore, Sammons, who has expressed his desire to participate in these consolidated or coordinated private and class action takings, all involving the same facts and claims, as a member of the shareholder-class, any judgments by this court will affect any future litigation based upon the same facts and claims; therefore, Sammons meets the requirement that "disposition of the action may, as a practical matter, impair or impede his ability to protect his interests."

The Third Element ("inadequate representation") is Satisfied

"If" Sammons Article III challenge is valid this requirement is easily met. Failure to raise the meritorious claim that the lower court lacks "*constitutional authority*" to preside over the case is hardly "adequate" representation. Failure to raise the issue means enormous private and judicial resources are completely wasted and any result will simply be *void*, all while the statute of limitations runs out.

The Fourth Element ("timeliness") is Satisfied

Although this case has been ongoing for over three years, little has actually been done. The case is stuck in Rule 12(b) "jurisdictional discovery." **No answer has even been filed.** Without an answer, it is unclear what facts are, or are not, in dispute. The procedural clock for all pretrial matters, from discovery, experts, and dispositive motions has not even begun to run. Most cases are this advanced after only a couple of months.

"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, supra). But again, "sound discretion" is impossible given the material Article III error of law.

The lower court did not consider the material fact that Sammons explicitly sought to intervene for the "limited purpose" of challenging the court's Article III authority. Cf. Roane v. Leonhart, 741 F. 3d 147, 152 (DC Cir 2014) citing United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1294 (D.C.Cir.1980) (explaining that intervention motion, which would have been untimely if made for the purpose of "presenting evidence or argument," was timely because made for a more "limited purpose").

"This case is still in the pleading stage, and intervention would [therefore] not unduly delay this case or prejudice the original parties." U.S. Specialty Ins. Co. v. Southern Copters, LLC, 2009 U.S. Dist. LEXIS 116369, at *8 (W.D. N.C. 2009). See also CVLR Performance Horses, Inc. v. Wynne, Case No. 6:11-CV-000035 (U.S.D.C. WD Vir. December 9, 2013)("Because of the lengthy and circuitous path the litigation in this case has taken, the lawsuit is not "within sight of the terminal" despite Plaintiff's two year delay."); *See also* Scardelletti v. Debarr, 265 F.3d 195, 202 (4th Cir.2001) ("The purpose of the [timeliness] requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal."); Reid L. v. Illinois State Bd. of Educ., 289 F. 3d 1009, 1018 (7th Cir 2002)(same quote).

By no conceivable stretch of the imagination can anyone say the cases below are "within sight of the terminal." Nationwide Property & Casualty

Insurance Co. v. Jacobsen, Dist. Court, Case 7:14-00516 (WD Virginia 2015) ("the parties have not yet concluded discovery nor have they filed dispositive motions").

For three years the only thing being litigated was jurisdictional discovery relevant to a government Rule 12(b) motion to dismiss. **No answer has even been filed.** All of that delay is attributable to the Government raising every conceivable (and inconceivable) privilege claim, and the lower court indulging such nonsense. But as noted law Professor Richard A. Epstein (NYU) courageously pointed out:

> "Even if we allow some time for the inevitable pretrial wrangling, it is hard to see why it takes over three years to brief issues and conduct hearings in order to deny a government (discovery) motion that is laughingly weak on the facts." http://www.forbes.com/sites/richardepstein/ 2016/10/06/ discovery-made-simple-in-fannie-and-freddie/#48781f053637

As a result these cases are no further along procedurally than a typical case only a few months old. **No answer have even been filed.**[3] There is no

[3] No court has ever held that a motion to intervene was untimely where filed ***before an answer has even been filed.*** Without an answer having been filed, how is a movant to know what is or is not being admitted or contested. A complaint and answer "start" a lawsuit and from there all the pretrial procedural steps begin. It would seem more logical to suggest Sammons motion to intervene was "premature" before an answer is filed, rather than "untimely." Although it must be conceded that there is no telling how long until an answer is actually filed and the parties can define the allegations, defenses, and begin the list of procedural steps necessary to start down the path towards an actual trial.

deadline for fact discovery, for experts, for dispositive motions, for trial, no settlements talked have occurred, or anything else consistent with a case having been open more than a few months. We are not "within sight of the terminal" – we have barely left the station.

In any event, it is the "prejudice" to the other parties that is the most important consideration in deciding "timeliness." As the court in Amador County, Cal. v. U.S Dept of the Interior, 772 F.3d 901, 905 (DC Cir 2014) explained:

> "As we recently stated, the length of time passed "`is not in itself the determinative test.'" Roane v. Leonhart, 741 F.3d 147, 151 (D.C.Cir.2014) (quoting Hodgson v. United Mine Workers of Am., 473 F.2d 118, 129 (D.C.Cir.1972)). This is because "we do not require timeliness for its own sake." *Id.*; *see also* 7C Charles Alan Wright et al., Federal Practice and Procedure § 1916, at 532 (3d ed.2007) ("The timeliness requirement is not intended as a punishment for the dilatory...."). Rather, "the requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." Roane, 741 F.3d at 151. Accordingly, in assessing timeliness, a district court must weigh whether the intervention will "`*unfairly* disadvantage[] the original parties.'" *Id.* (quoting NRDC v. Costle, 561 F.2d 904, 908 (D.C.Cir.1977)) (emphasis added).

Initially, it should be noted that, while the lower court and all parties, expect that class certification will be granted (once various Rule 12(b) motions to dismiss filed by the United States are addressed), no class has officially been designated yet. Therefore, Sammons was not even aware of all

these "consolidated or coordinated takings cases" before Judge Sweeney until a few months ago. Cf. D'amato v. Deutsche Bank, 236 F. 3d 78, 84 (2nd Cir 2001)(notice sent to class members alerted proposed intervenors of their interests).

But even if Sammons knew of these consolidated/coordinated cases prior to this year[4], which he did not, he would still satisfy the "timely" requirement where (1) he seeks to intervene for a very limited purpose, (2) no answer by the Defendant has been filed, (3) the case is still in jurisdictional Rule 12(b) discovery, with no date set for ending motion practice or fact discovery, let alone a trial date, (4) his motion would not delay the case one day, and (5) enormous private and judicial resources would otherwise be wasted.

In focusing on the amount of time that had elapsed between the filing of the lawsuit and Sammons motion to intervene, the lower court simply ignored the unusual procedural posture of the cases, where the United States has not even filed an answer yet. The court also overlooked what the relevant case law says is the most important consideration: the fact that granting Sammons

[4] And even if we assume Sammons knew of the consolidated cases before 2016, it would have made sense to await a ruling on the pending 2013 Rule 12(b) motions to dismiss, a threshold matter raised even before an answer, before Sammons sought to intervene. To everyone's surprise the Rule 12(b) motions, which should have been decided over two years ago, are still in never-ending jurisdictional discovery.

"limited" intervention could not possibly disadvantage the existing parties. *See* NRDC v. Costle, 561 F.2d 904, 907-08 (DC Cir 1977). Prejudice is the most important consideration in deciding whether a motion to intervene is timely. U.S. v. Oregon, 745 F.2d 550, 552 (9th Cir. 1984).

"The purpose of the [timeliness] requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." United States v. South Bend Comm. Sch. Corp, 710 F.2d 394, 396 (7th Cir 1983). It is ridiculous to suggest a case in which an answer has not even been filed yet, is nevertheless "within sight of the terminal." Without an answer being filed, all the typical procedural steps and time limits leading to a trial date do not even begin to run.

And again, Sammons seeks to intervene for the very narrow and limited purpose of contesting Article III constitutional authority under a single Supreme Court case, Stern v. Marshall. Given the unending jurisdictional Rule 12(b) discovery delays in the cases, Sammons' motion could not possibly delay these cases at all.

"Special circumstances" also clearly exist where, if Sammons Article III argument is valid, enormous private and judicial resources are being wasted in conducting a prolonged and extremely complicated case (actually six consolidated cases) which will result in nothing more than a *void* judgment.

Cf. Chippewa Cree Tribe, 85 Fed. Cl. 646, 658 (2009). As the Fifth Circuit explained in Ross v. Marshall, 426 F.3d 745, 753 (5th Cir 2000): "**Federal courts should allow intervention where no one would be hurt and greater justice could be attained.**" Accord Utah Ass'n of Counties v. Clinton, 255 F. 3d 1246, 1250 (10th Cir 2001); Stallworth v. Bryant, Dist. Court, Cause No. 3:16-CV-246 (U.S.D.C. Miss. July 19, 2016)

Deciding the Article III issue requires no more than the few minutes it takes to reads the controlling Stern v. Marshall decision. The motion to intervene, explicitly limited to the narrow Article III issue, which is wholly a question of law, will not delay the case at all. All parties to the six or so consolidated/ coordinated takings cases below before Judge Sweeney will benefit by not wasting another three years in trying a case just to get a *void* judgment. The interests of justice are not served by wasting enormous private and judicial resources just to get a *void* judgment. This is particularly true where the statute of limitations for the "net worth sweep" will run out in about 20 months, long before these cases even get to trial before a court lacking in jurisdiction.

"Federal courts should allow intervention where no one would be hurt and greater justice could be attained." Allowing the cases to drag on for years, wasting enormous private and judicial resources, for the inevitable

void judgment helps no one. "Greater justice" is not attained by turning a blind eye to the lower court presiding illegally over these six consolidated constitutional takings cases.

CONCLUSION

The lower Court and the Appellee incorrectly argue that the Article I Court of Federal Claims has constitutional authority under Article III of the U.S. Constitution to hear constitutional takings cases. The Government's citing dozens of cases holding that the Court of Federal Claims has "***statutory***" jurisdiction over constitutional takings cases, is completely irrelevant to the separate and independent question (never considered by *any* court) of whether "***constitutional***" jurisdiction also exists. Cf. Stern v. Marshall, supra.

If this Court finds that Sammons's Article III argument is valid, and the lower court lacks Article III authority to consider constitutional takings cases, no one would seriously suggest the lower court might not have exercised its discretion as to intervention differently.

WHEREFORE, the Order denying leave to intervene below is due to be vacated upon this Court finding that the lower Article I court, while having the necessary ***statutory*** authority under the Tucker Act to hear constitutional takings cases, does not have the necessary Article III ***constitutional*** authority as explained in Stern to hear constitutional takings cases.

11/21/2016

Michael Sammons, pro se
15706 Seekers St.
San Antonio, TX 78255
michaelsammons@yahoo.com
1-210-858-6199

Certificate of Service

I certify that a true copy of this motion was delivered to all parties of record in this case.

11/21/2016

Michael Sammons