No. 2017-1015

In The United States Court of Appeals for the Federal Circuit

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FAIRHOLME FUNDS, INC., THE FAIRHOME FUND, ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, Plaintiffs-Appellees

v.

UNITED STATES, Defendant-Appellee

v.

MICHAEL SAMMONS, Movant-Appellant

APPEAL FROM THE COURT OF FEDERAL CLAIMS
(No. 1:13-cv-465C, Hon. Margaret M. Sweeney, J.)

BRIEF OF PLAINTIFFS-APPELLEES, FAIRHOLME FUNDS, INC., THE FAIRHOME FUND, ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY

(caption continued on inside cover)

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Fairholme Funds, Inc. **v.** United States

Case No. 17-1015

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☒ (name of party)

Fairholme Funds, Inc., et al. (see attachment)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
Fairholme Funds, Inc.	None	None
The Fairholme Fund	Fairholme Funds, Inc.	None
Acadia Insurance Company	None	W.R. Berkley Corporation
Admiral Indemnity Company	None	W.R. Berkley Corporation
Admiral Insurance Company	None	W.R. Berkley Corporation
Berkley Insurance Company	None	W.R. Berkley Corporation
(see attachment for additional parties)		

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Vincent J. Colatriano, Cooper & Kirk, PLLC

Dec 5, 2016
Date

/s/ Charles J. Cooper
Signature of counsel

Please Note: All questions must be answered

Charles J. Cooper
Printed name of counsel

cc: Michael Sammons

Reset Fields

Certificate of Interest – Additional Parties

Name of Parties, continued:

The Fairholme Fund, Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Continental Western Insurance Company, Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, and Preferred Employers Insurance Company

1. Full Name of Party Represented by me	2. Name of Real Party in interest represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Berkley Regional Insurance Company	None	W.R. Berkley Corporation
Carolina Casualty Insurance Company	None	W.R. Berkley Corporation
Continental Western Insurance Company	None	W.R. Berkley Corporation
Midwest Employers Casualty Insurance Company	None	W.R. Berkley Corporation
Nautilus Insurance Company	None	W.R. Berkley Corporation
Preferred Employers Insurance Company	None	W.R. Berkley Corporation

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STATEMENT OF RELATED CASES

This Court previously denied a mandamus petition in which Mr. Sammons challenged the trial court's denial of his motion to intervene. Order, *In re Michael Sammons*, No. 17-102 (Fed. Cir. Nov. 28, 2016), ECF No. 5 (per curiam). In addition, the United States filed a separate mandamus petition and appeal in this Court challenging the trial court's privilege rulings. *See In re United States*, No. 17-104 (Fed. Cir.); *Fairholme Funds, Inc. v. United States*, No. 17-1122 (Fed. Cir.).

STATEMENT OF JURISDICTION

The Court of Federal Claims has jurisdiction to hear Plaintiffs' takings claims under 28 U.S.C. § 1491(a)(1). *See also infra* at 18–23. The trial court's denial of Mr. Sammons' motion to intervene is appealable as a final order under 28 U.S.C. § 1295(a)(3). The trial court denied Mr. Sammons' motion on September 30, 2016, and he filed a timely notice of appeal on October 3, 2016.

INTRODUCTION

In August 2012, just as the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie," and together with Fannie, the "Companies") had entered a period of sustained, record-breaking profitability, two agencies of the federal government—the Federal Housing Finance Agency ("FHFA") and the Department of the Treasury ("Treasury," and together with FHFA, the "Government")—expropriated the entire economic value of the

Companies for the exclusive benefit of the federal government. This action had the purpose and effect of destroying the economic interests of the Companies' private shareholders and nationalizing the Companies by making Treasury their de facto sole shareholder.

FHFA and Treasury accomplished their objective by "amending" the terms of Fannie and Freddie equity securities held by Treasury. Before the amendment (the "Net Worth Sweep"), these securities entitled Treasury to dividends at an annual rate of 10 percent of the outstanding liquidation preference of Treasury's stock, if paid in cash, or 12 percent if paid in kind. After the Net Worth Sweep, the Companies are *forever* required to pay their *entire* net worth to Treasury *every quarter*, minus a small capital reserve that will soon decrease to zero.

The Net Worth Sweep has been tremendously profitable for the government. In the time since the Net Worth Sweep took effect, the Companies will soon have paid Treasury over *$200 billion*—funds far in excess of Treasury's original 10 percent dividend. Had those excess funds been used to partially redeem Treasury's senior preferred stock, Treasury's remaining investment in the Companies would today be roughly $16 billion. Because the Government treats these payments as mere "dividends," not pay downs of principal, however, the face value of Treasury's stock has not decreased by one cent. The Companies' private shareholders, by contrast, are guaranteed to *never* receive *any* return *of* their investments nor any return *on* their investments. Their economic interest in the Companies has been entirely eliminated.

Plaintiffs, who own stock in Fannie and Freddie, seek just compensation for the Government's taking of their entire economic interest in the Companies. They oppose Mr. Sammons' belated attempt to intervene in their litigation against the Government, as well as his meritless attempt to divest the Court of Federal Claims ("CFC") of jurisdiction over their takings claim.

STATEMENT OF THE CASE[1]

Fannie and Freddie are two of the world's largest privately owned financial institutions. They insure trillions of dollars of mortgages and provide essential liquidity to the residential mortgage market. The Companies operate for profit, and their debt and equity securities are privately owned and publicly traded.

As mortgage insurers, Fannie and Freddie are designed to generate ample cash to cover their operating expenses. And unlike the nation's largest banks, the Companies took a relatively conservative approach to investing in mortgages during the national run up in home prices from 2004 to 2007. For both reasons, the

[1] This statement reflects Plaintiffs' current understanding of the relevant events, as informed by documents and deposition testimony obtained through discovery, the Companies' public financial reports, and public government records and reports. At the conclusion of discovery, Plaintiffs plan to amend the complaint that they filed in 2013 to incorporate subsequent developments, as well as the insights and information they have obtained through discovery.

Companies remained in a comparatively strong financial condition during the ensuing financial crisis, and were at all times capable of meeting their obligations to insureds and creditors and of absorbing any losses they might reasonably incur as a result of the financial downturn. The Government nevertheless implemented a deliberate strategy to seize the Companies and operate them for its exclusive benefit.

Despite prior statements assuring investors that the Companies were in sound financial shape, the Government forced the Companies into conservatorship on September 6, 2008. Neither Fannie nor Freddie was experiencing a liquidity crisis or a short-term fall in operating revenue at the time.

Treasury then exercised its temporary authority under the Housing and Economic Recovery Act to enter agreements with FHFA to purchase equity in the Companies ("Preferred Stock Purchase Agreements" or "PSPAs"). The PSPAs created an entirely new class of securities with very favorable terms, known as Senior Preferred Stock ("Government Stock"). Treasury received one million shares of Government Stock in each Company and warrants to purchase 79.9 percent of each Company's common stock at a nominal price in return for a commitment to increase its equity in the future. Treasury's equity in each Company had an initial liquidation preference of $1 billion. The PSPAs required the Companies to draw funds from Treasury as needed (up to a specified cap) to avoid a negative net worth, and the liquidation preference increases by one dollar for each dollar the Companies draw. If the Companies liquidate, Treasury is entitled to recover its entire liquidation preference before any other shareholder receives anything.

The PSPAs required the Companies to pay quarterly dividends on the outstanding liquidation preference. These dividends could be paid in cash, at an annual rate of 10 percent, or in kind, at an annual rate of 12 percent, by adding to the liquidation preference the amount of dividends due.

The Government Stock diluted, but did not eliminate, the economic interests of the Companies' private shareholders. The warrants to purchase 79.9 percent of the Companies' common stock gave Treasury "upside" via participation in the Companies' profitability, but this upside would be *shared* with private preferred shareholders (who were contractually entitled to dividend and liquidation payments before common shareholders) and common shareholders (who would retain rights to 20.1 percent of the Companies' residual value). Indeed, FHFA's Director assured Congress shortly after imposing the conservatorship that that both the private preferred and common shareholders retained an economic interest in the Companies, which might have some value in the future.

After the Companies were placed in conservatorship, the Government forced them to dramatically write down the value of their assets and to incur substantial non-cash accounting losses in the form of loan loss provisions and write-offs of deferred tax assets.[2] Tens of billions of dollars of these accounting adjustments were based on FHFA's wildly pessimistic assumptions about potential future losses and were wholly unwarranted. Nonetheless, by June 2012, the Government had forced Fannie and Freddie to draw $161 billion from Treasury to make up for the balance-sheet deficits caused by these accounting decisions, even though there was no indication that the Companies' actual cash expenses could not be met by their cash receipts. The Companies were forced to draw $26 billion more to pay dividends to Treasury.

Because the Companies were forced to draw funds from Treasury that were not needed to continue operations and because the PSPAs barred the Companies from redeeming the Government Stock or paying down the liquidation preference, that preference—and thus the dividends owed to Treasury—were artificially and permanently inflated. Indeed, Treasury's liquidation preference swelled to $189 billion as a result of the transactions.

Even so, based on the Companies' performance in the second quarter of 2012,

[2] Loan loss reserves reduce the Companies' reported net worth to reflect anticipated future defaults on the mortgages they own. Deferred tax assets arise because the tax laws sometimes require the Companies to pay taxes years before the financial accounting rules permit them to recognize the taxed income on their financial statements. In such circumstances, the tax laws permit the Companies to credit the amount of the taxes paid on unrecognized income against future taxes. The amount of the potential credit constitutes a deferred tax asset. A company may only recognize a deferred tax asset on its books if it is more likely than not that the company will earn sufficient additional taxable income in the future to use the asset.

it was apparent that the Companies' private shares still had value. The Companies were thriving, paying cash dividends on the Government Stock without drawing additional capital from Treasury. And based on the improving housing market and the high quality of the newer loans backed by the Companies, the Government knew the Companies would enjoy stable profitability for the foreseeable future. For example, minutes of a July 2012 Fannie management meeting indicating that the Company was entering a period of "golden years" of earnings were circulated broadly within FHFA, including to Acting Director Edward DeMarco, and projections attached to those minutes showed that Fannie expected its cumulative dividend payments to Treasury to exceed its total draws under the PSPAs by 2020 and that over $115 billion of Treasury's commitment would remain available after 2022. Similar projections were shared with Treasury.

The Government also knew that the Companies would soon reverse many of the non-cash accounting losses previously imposed upon them. Indeed, at an August 9, 2012 meeting, just eight days before the Net Worth Sweep, Fannie's CFO told senior Treasury officials that release of the valuation allowance on Fannie's deferred tax assets was likely in mid-2013 and would generate profits in the range of $50 billion—a prediction that proved remarkably accurate. This $50 billion reversal was not included in the projections from the month before. Treasury was keenly interested in the deferred tax assets; indeed, it had discussed them with its financial consultant as early as May 2012, and a key item on Treasury's agenda for the August 9 meeting was how quickly Fannie forecasted releasing its reserves.

By August 2012, the Government thus fully understood that the Companies were on the precipice of generating huge profits, far in excess of the dividends owed on the Government Stock. The Government, moreover, had secretly resolved to ensure existing common equity holders would not have access to any positive earnings from the Companies in the future. Therefore, on August 17, 2012, just days after the Companies announced their robust second quarter earnings, the Government imposed the Net Worth Sweep to ensure that every dollar of earnings that Fannie Mae and Freddie Mac generate would be paid into the Government's coffers. The Government thus nationalized the Companies and expropriated all of their value, thereby depriving the private shareholders of all of their economic rights.

The Government has claimed, both publicly and before the courts, that the Net Worth Sweep was necessary to prevent the Companies from falling into a "death spiral" in which the Companies' increasing dividend obligations to Treasury would consume Treasury's remaining funding commitment. But, as explained above, at all times prior to the Net Worth Sweep, the PSPAs permitted the Companies to pay dividends in kind—they were never required to pay cash dividends, let alone to do so by drawing on Treasury's funding commitment. As the Congressional Research Service recognized one week before the announcement of the Net Worth Sweep, under the terms of the PSPAs Fannie and Freddie could pay a 12 percent annual senior preferred stock dividend indefinitely. Any concern that the PSPAs' dividend provisions would force Fannie and Freddie into a death spiral was thus wholly pretextual.

More important, the Government's "death spiral" narrative cannot be squared with internal government documents and deposition testimony obtained through discovery. As summarized above, this evidence reveals that the Net Worth Sweep was imposed *after* the Companies had returned to stable profitability, and *just days after* Treasury learned that they were on the verge of reporting tens of billions of dollars in profits that would far exceed their existing dividend obligations. Indeed, the *same day* that Fannie's CFO told senior Treasury officials that Fannie anticipated making accounting adjustments that would cause it to report an additional $50 billion in profits within the next year, an FHFA official wrote that Treasury was making a renewed push to finalize the Net Worth Sweep.

The evidence thus makes clear that the Net Worth Sweep was adopted not out of concern that the Companies would earn too little, but rather out of concern that the Companies would earn *too much* and thus complicate the Government's plans to hold them in perpetual conservatorship and to prevent their private shareholders from ever recouping their investment principal, let alone seeing any return on that investment. Indeed, an internal Treasury document finalized the day before the sweep was announced specifically identified the Companies' improving operating performance and the potential for near-term earnings to *exceed* the 10 percent dividend as reasons supporting the Net Worth Sweep. And after the Net Worth Sweep was finalized, a senior White House advisor wrote to a Treasury official, celebrating that the Net Worth Sweep had closed off the possibility that Fannie and Freddie would ever return to private control. Edward DeMarco, FHFA's Acting Director at the time of the Net Worth Sweep, has likewise testified that he had no intention of allowing the Companies to emerge from conservatorship under what he viewed as flawed charters.

As the Government expected, the Net Worth Sweep has resulted in massive and unprecedented payments to the Government. From the fourth quarter of 2012, the first fiscal quarter subject to the Net Worth Sweep, through the third quarter of 2016, the most recently reported fiscal quarter, the Companies generated over $200 billion in comprehensive income. But rather than using this income to prudently build capital reserves and prepare to exit conservatorship, the Companies have instead been forced to pay these funds as "dividends" to Treasury—nearly $125 billion more than Treasury would have received under the original PSPAs. Altogether, Treasury will soon have recouped nearly $69 billion *more* than it disbursed to the Companies. Yet Treasury insists that the outstanding liquidation preference remains firmly fixed at $189 billion and that it has the right to all of the

Companies' net worth *in perpetuity*.

Plaintiffs, who own shares of both Companies' stock, brought suit against the United States in the CFC in 2013, seeking just compensation for the Government's taking of the entire economic value of their stock in Fannie and Freddie. The Government responded by filing a motion that, although styled as a motion to dismiss, asked the CFC to resolve numerous disputed factual issues in its favor. Disputing the factual premises that underlay nearly all of the Government's defenses and unable to respond fully because the most relevant evidence was in the Government's sole possession, Plaintiffs moved for discovery. The CFC granted Plaintiffs' motion on February 26, 2014. Since that time, the parties have engaged in discovery and multiple rounds of briefing relating to discovery disputes. The CFC has held multiple status conferences to resolve those disputes. Most recently, the CFC granted Plaintiffs' motion to compel production of numerous documents over which the Government had asserted privilege. The Government filed a petition for a writ of mandamus seeking reversal of the CFC's ruling on the motion to compel. That petition is currently pending before this Court.

On September 15, 2016—more than three years after Plaintiffs filed their complaint—Mr. Sammons sought leave to intervene pursuant to RCFC 24(a) in order to advance the argument that the CFC, as a tribunal established pursuant to Congress's Article I powers rather than Article III, lacked authority to adjudicate

Plaintiffs' takings claim.[3] The CFC denied this motion on September 30, 2016. The CFC reasoned that the motion was untimely; that although Mr. Sammons claimed an interest in the litigation as a shareholder in the Companies, the instant litigation would not impair his ability to protect that interest; and that even if Plaintiffs did represent Mr. Sammons' interest, he had failed to identify any inadequacy in that representation. The CFC also concluded that the argument that Mr. Sammons wished to present was entirely without merit. Mr. Sammons now appeals the CFC's denial of his motion.

SUMMARY OF ARGUMENT

The CFC properly denied Mr. Sammons' motion to intervene. It did not abuse its discretion in finding that the motion—filed more than three years after this litigation commenced and after the parties have engaged in extensive discovery—was untimely. It also correctly concluded that the instant litigation (which is neither a class action nor a derivative action) would not impair Mr. Sammons' ability to protect his interest since he could simply bring his own lawsuit and that even if Plaintiffs did represent Mr. Sammons' interest, he had failed to identify any inadequacy in that representation.

[3] The *pro se* motion is dated September 15, 2016. It was received by the CFC on September 16, 2016, and filed on September 30, 2016.

Rather than address the CFC's cogent reasons for denying his Motion, Mr. Sammons argues in his opening brief that the CFC, as an Article I court, lacked jurisdiction to rule on his motion to intervene or to consider Plaintiffs' takings claim. This argument is foreclosed by longstanding practice and by controlling precedent. *See Williams v. United States*, 289 U.S. 553 (1933); *Bauman v. Ross*, 167 U.S. 548 (1897). Contrary to Mr. Sammons' contentions, nothing in the Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462 (2011), calls these precedents into question or suggests that the CFC may not entertain takings claims against the United States.

ARGUMENT

I. Standard of Review

This Court reviews the denial of a motion to intervene for untimeliness only for abuse of discretion. *Doe v. United States*, 44 F. App'x 499, 501 (Fed. Cir. 2002); *Belton Indus., Inc. v. United States*, 6 F.3d 756, 760 (Fed. Cir. 1993). This Court has not determined whether the denial of a motion to intervene on other grounds should be reviewed *de novo* or only for abuse of discretion. *Wolfsen Land & Cattle Co. v. Pacific Coast Fed'n of Fishermen's Assocs.*, 695 F.3d 1310, 1314 (Fed. Cir. 2012). This Court reviews challenges to the CFC's jurisdiction *de novo*. *Rick's Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1342 (Fed. Cir. 2008).

II. The CFC Properly Denied the Motion To Intervene.

RCFC 24(a) provides, in relevant part, that

> [o]n 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.

To establish his right to intervene, Mr. Sammons was thus required to demonstrate (1) that his motion was timely, (2) that he claims an interest relating to the property or transaction that is the subject matter of the action, (3) that, absent intervention, disposition of Plaintiffs' case may as a practical matter impair or impede his ability to protect that interest, and (4) that Plaintiffs do not adequately represent that interest. *See Wolfsen Land & Cattle*, 695 F.3d at 1315. The CFC correctly found that Mr. Sammons failed to establish three of these four requirements.[4]

A. The CFC clearly did not abuse its discretion in finding that Mr. Sammons' motion to intervene was untimely. In reaching that conclusion, the CFC correctly considered (1) "the length of time during which the would-be intervenor[ ] actually knew or reasonably should have known of [his] right[s]," (2) "whether the prejudice to the rights of existing parties by allowing intervention outweighs the

[4] The CFC did find that Mr. Sammons claimed an interest relating to the property or transaction that is the subject of this action. Plaintiffs do not concede that Mr. Sammons satisfied this requirement.

prejudice to the would-be intervenor[ ] by denying intervention," and (3) the "existence of unusual circumstances militating either for or against a determination that the application is timely." *Belton Industries*, 6 F.3d at 762 (analyzing Court of International Trade's analogue to RCFC 24); *see also Aeroplate Corp. v. United States*, 112 Fed. Cl. 88, 91 (2013) (applying *Belton*'s framework to RCFC 24).

First, the CFC explained that "the complaint in the instant action was filed on July 9, 2013"—more than three years ago—and "other related Fifth Amendment takings cases were filed" shortly thereafter. Order at 9, *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl. Sept. 30, 2016), ECF No. 338 ("CFC Op."). Thus, Mr. Sammons was—or at least should have been—"aware of his rights at least since the filing in 2013 of the instant action or the related cases." *Id*. Second, the CFC concluded that the parties to the case "would be more prejudiced by the court's granting Mr. Sammons' motion than he would be prejudiced by the court's denying it" because "the parties are actively engaged in massive discovery efforts" and "the case is simply too far down the discovery track to be disrupted by a motion for intervention to challenge the court's jurisdiction." *Id*. Finally, the CFC found that there were no "unusual circumstances" that would "tip the balance in favor of either granting or denying the motion." *Id.*

This analysis and these conclusions are eminently reasonable. Indeed, Mr. Sammons did not even address—let alone dispute—them in his opening brief, and the arguments he advances for the first time in his reply brief are forfeited. *See Lismont v. Alexander Binzel Corp.*, 813 F.3d 998, 1004 n.4 (Fed. Cir. 2016) ("[A]n issue not raised by an appellant in its opening brief . . . is waived." (omission in original) (quoting *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990)).[5] Because Mr. Sammons failed to satisfy the threshold requirement of timeliness, it does not matter whether he satisfied any of the other requirements for intervention and this Court need not address those requirements. *See, e.g.*, *John R. Sand & Gravel Co. v. Brunswick Corp*., 143 F. App'x 317, 319 (Fed. Cir. 2005).[6]

[5] The arguments Mr. Sammons advances in his reply brief are also without merit. While Mr. Sammons makes much of the fact that the United States has not yet filed an answer to the complaint, there can be no dispute that the parties and the CFC have already devoted substantial resources to discovery in this case. Neither is it accurate to say that Mr. Sammons' motion should be treated more favorably because he seeks to intervene for only a "limited purpose." *See* Appellant's Informal Reply Br. at 8 (Nov. 21, 2016), Doc. 19. Mr. Sammons seeks to intervene so he can argue that the entire case should be dismissed on jurisdictional grounds—not to assert an evidentiary privilege, as in *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1294 (D.C. Cir. 1980). Furthermore, the fact that other plaintiffs in other cases have brought putative class actions seeking to challenge the Net Worth Sweep is not a reason to permit Mr. Sammons to intervene in *this* case. The putative class representatives in those other cases, which have not been formally consolidated with this action, have not attempted to intervene in this case. Mr. Sammons' status as an unnamed member of a putative class gives him no greater rights than the putative class representatives.

[6] Because Mr. Sammons' motion to intervene was untimely, he likewise could not have satisfied the requirements for permissive intervention under RCFC 24(b). *See* RCFC 24(b)(1) ("*On timely motion*, the court may permit anyone to intervene who . . . .") (emphasis added); *cf.* RCFC 24(b)(3) ("In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.").

B. The CFC also concluded that "Mr. Sammons cannot demonstrate that his ability to protect his interest . . . 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." CFC Op. 8. This conclusion is clearly correct. Plaintiffs' suit is not a class action and, even if it were, Mr. Sammons would not be a member of the class unless he chose to opt into the class, *see* RCFC 23(c)(2)(B)(v). Further, Plaintiffs' claims are direct, not derivative: Plaintiffs seek compensation for the taking of their own stock in Fannie and Freddie; they do not seek to assert claims on behalf of the Companies. For all of these reasons, Mr. Sammons will not be bound by the judgment in this case and will be free to seek to protect his own interests in a separate suit in whatever manner (and forum) he chooses.

C. Finally, the CFC correctly concluded that even if Plaintiffs represented Mr. Sammons' interests, Mr. Sammons "fails to identify any inadequacy in plaintiffs' representation of his interests." CFC Op. 8. As this Court has explained, "[i]f an applicant for intervention and an existing party share the same ultimate objective, a presumption of adequacy of representation arises," and "[t]o rebut the presumption, an applicant must make a compelling showing of inadequacy of representation." *Wolfsen Land & Cattle*, 695 F.3d at 1316 (quotation marks omitted). Here Plaintiffs seek the same ultimate objective as Mr. Sammons—to obtain just compensation for the Government's taking of their entire economic interest in

Fannie and Freddie by means of the Net Worth Sweep. And Mr. Sammons does not—and cannot—make any showing, let alone a *compelling* showing, that Plaintiffs' zealous efforts to achieve this objective are somehow lacking. To be sure, Plaintiffs have not argued (and have no intention of arguing) that the CFC lacks jurisdiction to consider their takings claim. But even assuming that advancing such an argument would further, as opposed to frustrate, the ultimate objective of obtaining just compensation, it is well settled that "[w]here parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). Further, as discussed next, the argument that Mr. Sammons wishes to present is contrary to long-standing practice and Supreme Court precedent. Certainly Plaintiffs' refusal to advance such an argument does not make their representation inadequate.

III. The CFC Had Jurisdiction To Deny Mr. Sammons' Motion.

Rather than address the CFC's cogent reasons for denying his motion to intervene, Mr. Sammons argues in his opening brief that the CFC lacked jurisdiction to rule on his motion because it was not established pursuant to Article III of the United States Constitution. *See* Informal Opening Br. of Appellant at 3 n.1 (Oct. 26, 2016), Doc. 14. Mr. Sammons appears to regard this assertion as a corollary to his primary argument in this Court and the trial court: that the CFC, as an Article I court, lacks constitutional authority to hear and decide takings claims. This argument is foreclosed by longstanding practice and binding precedent.

From its inception in 1855, *see* 10 Stat. 612, continuing through the enactment of the Tucker Act in 1887, *see* 24 Stat. 505, and until Congress changed its status in 1953, *see* 67 Stat. 226, the Court of Claims was an Article I court. *See, e.g*., *Glidden Co. v. Zdanok*, 370 U.S. 530, 585–87 (1962) (Clark, J., joined by Warren, C.J., concurring in judgment); *Williams v. United States*, 289 U.S. 553 (1933) (holding that Congress could reduce the salaries of Court of Claims judges because that court was established pursuant to Article I rather than Article III); *see also Ex parte Bakelite Corp*., 279 U.S. 438, 452 (1929) (explaining that the Court of Claims "was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States" pursuant to Congress's Article I "power to pay the debts of the United States").[7] And when the Court of Claims was abolished in 1982, its trial-level jurisdiction was assumed by the Claims Court (renamed the

[7] Justice Harlan's plurality opinion in *Glidden* would have overruled *Williams* and *Ex parte Bakelite* and held that the Court of Claims was an Article III court from its inception. Only three of the seven Justices who participated in the case were willing to subscribe to that proposition, however. *Compare* 370 U.S. at 531, 584 (plurality), *with id*. at 585–89 (Clark, J., joined by Warren C.J., concurring in judgment) (declining to overrule *Williams* and *Ex parte Bakelite* and concluding that Court of Claims had become an Article III court in 1953 when Congress enacted 67 Stat. 226), and *id*. at 589–605 (Douglas, J., joined by Black, J., dissenting) (concluding that the Court of Claims remained an Article I court). Because it rests on the narrowest ground supporting the Court's judgment, Justice Clark's concurrence is controlling. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

CFC in 1992, *see* 106 Stat. 4506, 4516), which was established pursuant to Article I. *See* 96 Stat. 25, 27 (codified at 28 U.S.C. § 171(a)). Although these Article I courts have heard innumerable takings claims against the United States during most of the last 130 years, Mr. Sammons fails to identify even a single decision questioning these courts' authority to do so—let alone any decisions holding that takings claims against the United States must be heard by an Article III court. To the contrary, as the United States demonstrates in its brief, both the Supreme Court and this Court have repeatedly recognized the CFC's authority to resolve takings claims against the United States. *See* Defendant-Appellee's Informal Response Br. at 17 (Nov. 16, 2016), Doc. 16 (collecting cases).

Furthermore, in the course of holding that the Court of Claims was an Article I court, the Court in *Williams* held that all of the Court of Claims' jurisdiction—which included jurisdiction over takings claims against the United States—could be exercised by an Article I Court:

> Since all matters made cognizable by the Court of Claims are equally susceptible of legislative or executive determination, they are, of course, matters in respect of which there is no constitutional right to a judicial remedy, and the authority to inquire into and decide them may constitutionally be conferred on a nonjudicial officer or body.

289 U.S. at 579–80 (citations omitted); *see also id*. at 580 ("Congress, whenever it thinks proper, undoubtedly may, without infringing the Constitution, confer upon an executive officer or administrative board, or an existing or specially constituted

court, or retain for itself, the power to hear and determine controversies respecting claims against the United States . . . .”).

Significantly, the *Williams* Court specifically considered and rejected the contention, advanced by Mr. Sammons here, that the self-executing language of the Fifth Amendment’s Takings Clause somehow requires that takings claims be heard by Article III courts. After concluding both that the Court of Claims was an Article I court, and also that it could properly exercise all of the jurisdiction that Congress had conferred upon it, the *Williams* Court explained:

> We find nothing which militates against the foregoing views in the requirement that the Court of Claims, in cases properly brought before it in respect of property expropriated in the exercise of the power of eminent domain, must award just compensation under the Fifth Amendment . . . . [This] requirement is one imposed by the Constitution and equally applicable whether jurisdiction be exercised by a legislative court or a constitutional court . . . .

Id. at 581.

The Court has also made clear that takings claims need not be heard by Article III courts in the course of rejecting the argument that the Seventh Amendment right to trial by jury extends to claims for just compensation. As the Court explained in *Bauman v. Ross*:

> By the constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be intrusted by congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury.

167 U.S. 548, 593 (1897); *see also id*. (Offsets to just compensation for benefits conferred by the taking may be determined by "commissioners appointed as the legislature may prescribe."); *United States v. Reynolds*, 397 U.S. 14, 18 (1970) (reaffirming *Bauman*'s holding "that there is no constitutional right to a jury in eminent domain proceedings").

Nothing in *Stern v. Marshall*, 564 U.S. 462 (2011), calls these precedents into question or in any way suggests that the CFC may not hear takings claims against the United States. To be sure, the Court in *Stern* held that certain common-law counterclaims asserted by one private party against another may not be resolved by bankruptcy judges, who are appointed pursuant to Article I. *See id*. at 469, 503. The Court did not, however, hold or suggest that takings claims against the United States cannot be decided by Article I courts such as the CFC. To the contrary, it expressly acknowledged longstanding precedent holding that cases involving public rights—which include, at their core, cases "arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments' "—may be resolved by Article I courts. *Id*. at 489 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)); *see also id*. at 503 (Scalia, J., concurring) ("I adhere to my view, however, that—our contrary precedents notwithstanding—a matter of public rights . . . must at a minimum arise between the government and others . . . .") (quotation marks omitted). Significantly, the public rights doctrine was integral to the Supreme Court's conclusion that the Court of Claims was an Article I court before 1953. *See, e.g. Williams*, 289 U.S. at 579–81; *Ex parte Bakelite*, 279 U.S. at 451–55.

In all events, even if anything in *Stern* could somehow be read to call into question the Supreme Court's holding in *Williams* that takings claims against the United States may be heard by an Article I court, that would not justify this Court in declining to follow *Williams*. For as the Supreme Court has explained, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

CONCLUSION

For the foregoing reasons, this Court should affirm the CFC's denial of Mr. Sammons' motion to intervene.

Date: December 5, 2016 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2016, I caused a copy of the foregoing Brief for Plaintiffs-Appellees to be filed electronically via the Court's CM/ECF system. This filing was served electronically to Appellee the United States by the Court's electronic filing system. Service was accomplished on the following by First Class U.S. Mail:

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