UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 03/14/2017

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the appellant in favor of the appellee under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed Fed. R. App. P. 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

cc: Brian W. Barnes
Charles J. Cooper
Kenneth Dintzer
Howard C. Nielson Jr.
Peter A. Patterson
Michael Sammons
David Thompson

17-1015 - Fairholme Funds, Inc. v. US
United States Court of Federal Claims, Case No. 1:13-cv-00465-MMS

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

FAIRHOLME FUNDS, INC., 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, PREFERRED EMPLOYERS INSURANCE COMPANY,
Plaintiffs-Appellees

v.

UNITED STATES,
Defendant-Appellee

v.

MICHAEL SAMMONS,
Movant-Appellant

2017-1015

Appeal from the United States Court of Federal Claims in No. 1:13-cv-00465-MMS, Judge Margaret M. Sweeney.

Decided: March 14, 2017

CHARLES J. COOPER, Cooper & Kirk, PLLC, Washington, DC, for plaintiffs-appellees. Also represented by BRIAN W. BARNES, HOWARD C. NIELSON, JR., PETER A. PATTERSON, DAVID THOMPSON.

KENNETH DINTZER, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant-appellee. Also represented by BENJAMIN C. MIZER, ROBERT E. KIRSCHMAN, JR.

MICHAEL SAMMONS, San Antonio, TX, pro se.

Before LOURIE, O'MALLEY, and TARANTO, *Circuit Judges.*

PER CURIAM.

In 2013, preferred-stock shareholders of the Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac) sued the United States in the Court of Federal Claims, alleging that certain actions taken by the United States involving the two entities constituted takings without just compensation in violation of the Fifth Amendment. More than three years later, Michael Sammons moved to intervene in the shareholders' action, as of right, for the limited purpose of arguing that the Court of Federal Claims lacks jurisdiction over the plaintiffs' Fifth Amendment claim. The Court of Federal Claims denied Mr. Sammons's motion, determining, among other things, that he can protect his interest through his independent litigation

and that the motion was untimely. Finding no error in those determinations, we affirm.

I

We have described much of the background of this appeal in our recent non-precedential decision in *In re United States*, No. 2017-1122, 2017 WL 406243 (Fed. Cir. Jan. 30, 2017). In July 2008, Congress created the Federal Housing Finance Agency (FHFA) and authorized it to place Fannie Mae and Freddie Mac into conservatorship. *See* 12 U.S.C. §§ 4617(b)(2)(A), 4617(b)(2)(B)(i). Congress also authorized the Department of the Treasury to purchase obligations and securities issued by Fannie Mae and Freddie Mac. *See* 12 U.S.C. § 1445(1)(1)(A). In September 2008, FHFA placed Fannie Mae and Freddie Mac into conservatorship, and FHFA, as conservator, entered into certain agreements with Treasury. Under the agreements, Treasury committed to provide up to $100 billion to each of Fannie Mae and Freddie Mac, and in return, Treasury received $1 billion in senior preferred stock from each company, a 10% dividend on the amount that was invested, and a warrant to purchase 79.9% of the companies' common stock. In 2012, FHFA and Treasury amended the purchase agreements to replace Treasury's 10% dividend entitlement with an entitlement to 100% of Fannie Mae and Freddie Mac's profits.

In 2013, Fairholme Funds, Inc., and other owners of Fannie Mae and Freddie Mac preferred stock sued the United States in the Court of Federal Claims, alleging that the 2012 amendment of the purchase agreements constituted a Fifth Amendment taking of private property without just compensation. *See* Complaint, *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl. July 9, 2013), ECF No. 1. Since then, the government has moved to dismiss the action for lack of subject-matter jurisdiction and failure to state a claim. Motion to Dismiss, *Fairholme Funds*, No. 13-465C (Fed. Cl. Dec. 9, 2013), ECF

No. 20. The parties have conducted discovery related to the court's jurisdiction and the merits of the case. *See In re United States*, No. 2017-1122.

On September 16, 2016, Mr. Sammons filed, and on September 30, 2016, he was authorized to file, a motion to intervene as of right in the action under Court of Federal Claims Rule 24(a). He alleged that, like the plaintiffs, he owns Fannie Mae and Freddie Mac preferred stock. He stated that the purpose of his intervention was to challenge the Court of Federal Claims' jurisdiction to hear the asserted Fifth Amendment claim. He argued that, because the Court of Federal Claims is an Article I court, not an Article III court, it is barred from hearing the constitutional claim. Although 28 U.S.C. § 1491 authorizes the Court of Federal Claims to hear takings claims, Mr. Sammons contended that the Constitution prohibits that result. *See* Motion to Intervene, *Fairholme Funds*, No. 13-465C (Fed. Cl. Sept. 16, 2016), ECF No. 337.

The Court of Federal Claims denied intervention on September 30, 2016. Order, *Fairholme Funds*, No. 13-465C (Fed. Cl. Sept. 30, 2016), ECF No. 338 ("Order"). The court stated the statutory basis for its jurisdiction over takings claims and cited numerous cases recognizing that jurisdiction, at least as a statutory matter. But it did not analyze Mr. Sammons's constitutional contention, which invoked *Stern v. Marshall*, 564 U.S. 462 (2011), and other decisions, that only an Article III court may hear takings claims. Order 2–5. The court then concluded that Mr. Sammons had not met Rule 24(a)'s requirements for intervention. Among other things, the court reasoned that Mr. Sammons had failed to establish that the denial of his motion would impair his ability to protect his own interests, because he could file his own suit on his takings claim. *Id.* at 8. The court also determined that Mr. Sammons's motion was untimely. The court explained that more than three years had passed since Mr. Sammons was aware, or should have been aware, of his rights;

that the existing parties would be more prejudiced if the motion were granted than Mr. Sammons would be prejudiced if the motion were denied; and that there were no unusual circumstances favoring the granting of the motion. *Id.* at 8–9.

Mr. Sammons appeals. The shareholders and the government—who neither briefed the issue in the Court of Federal Claims nor challenged that court's jurisdiction on Mr. Sammons's constitutional grounds, *see* Order 1–2 n.2—defend the denial of intervention as of right. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

II

Rule 24(a) provides, in relevant part: "On 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." R. Ct. Fed. Cl. 24(a)(2). Under intervention rules materially identical to the Court of Federal Claims rule, the denial of a motion to intervene for untimeliness is reviewed for abuse of discretion. *See NAACP v. New York*, 413 U.S. 345, 365 (1973); *Belton Indus., Inc. v. United States*, 6 F.3d 756, 760 (Fed. Cir. 1993). In a nonprecedential decision, we have followed the same approach for the Court of Federal Claims. *Doe v. United States*, 44 F. App'x 499, 501 (Fed. Cir. 2002). We have not decided which standard of review applies to the denial of a motion to intervene on other grounds. *See Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fisherman's Ass'ns*, 695 F.3d 1310, 1314 (Fed. Cir. 2012). In this case, the standard does not affect our decision.

Here, denial of intervention would not "as a practical matter impair or impede [Mr. Sammons's] ability to protect his interest." R. Ct. Fed. Cl. 24(a)(2). Mr. Sam-

mons, if denied intervention, would not be bound as a party to any result reached in the present case. He is also free to file his own action asserting his own takings claim as a basis for his own relief. And in that action, he may litigate his contention that the Constitution entitles him to an Article III forum for his takings claim.

Indeed, Mr. Sammons has filed such an action in district court, seeking $900,000 in damages. *Sammons v. United States*, No. 5:16-cv-1054-FB (W.D. Tex. Oct. 21, 2016), ECF No. 1. In that action, he immediately moved for a declaration that, despite the $10,000 limit on district courts' jurisdiction over such claims, 28 U.S.C. § 1346(a)(2)(a)(2), the Constitution entitles him to an Article III forum. ECF No. 3 (Oct. 21, 2016). The government opposed Mr. Sammons's motion and also moved to dismiss, ECF No. 15 (Jan. 9, 2017); Mr. Sammons replied and responded, ECF No. 16 (Jan. 9, 2017); ECF No. 21 (Jan. 18, 2017); and the government replied, ECF No. 29 (Feb. 1, 2017).[1] A Magistrate Judge has now issued a report and recommendation, which rejects Mr. Sammons's argument based on *Stern v. Marshall* and other authorities discussing Article I courts and concludes that the case should be dismissed for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). ECF No. 30 (Feb. 7, 2017). Mr. Sammons has filed an objection with the district court pursuant to Federal Rule of Civil Procedure 72, ECF No. 31 (Feb. 7, 2017); and the govern-

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[1] Mr. Sammons furnished to the Magistrate Judge a lengthy law review article addressing the issue he raised regarding an entitlement to an Article III court for a takings claim. *See* Michael P. Goodman, *Taking Back Takings Claims: Why Congress Giving Just Compensation Jurisdiction to the Court of Federal Claims Is Unconstitutional*, 60 Vill. L. Rev. 83 (2015). He has supplied a pre-publication version of that article to this court as well.

ment has responded, ECF No. 32 (Feb. 17, 2017). It appears that, after Mr. Sammons replies, the issue will be ripe for decision.

We agree with the Court of Federal Claims that Mr. Sammons has not shown why denial of intervention in the present matter would impair or impede his ability to protect his interest in the property or transaction that is the subject of this case. Order 8. From all that appears, he may fully litigate, in the Texas case, his claim of entitlement to an Article III forum for his takings claim. He may litigate his takings claim in that case if he prevails on his argument that he is entitled to keep his case there. And if he does not prevail on that argument, he may have his takings claim adjudicated in the Court of Federal Claims, whether by filing his own action there or by including himself within what he has asserted is at least one class action in that court covering his claim. *See* R. Ct. Fed. Cl. 23(c)(2)(B)(v).

We also see no reversible error in the Court of Federal Claims' determination that Mr. Sammons's intervention motion was not "timely," as required by Rule 24. In deciding whether a motion is timely, a court may consider (1) "the length of time during which the would-be intervenor[] actually knew or reasonably should have known of [his] rights," (2) "whether the prejudice to the rights of existing parties by allowing intervention outweighs the 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." *Doe*, 44 F. App'x at 501; *Belton*, 6 F.3d at 762. The Court of Federal Claims properly considered those factors.

The court found that Mr. Sammons had filed his motion to intervene more than three years after the shareholders filed their complaint—the time at which Mr. Sammons was or should have been aware of the right to

relief that he now claims. Order 8–9. As just explained, the court found, too, that Mr. Sammons would not be prejudiced by denying intervention in this case. *Id.* at 8. The court further found that, because of the passage of time, the action had progressed "too far down the discovery track to be disrupted by a motion for intervention." *Id.* at 9. Although no answer has been filed in this case, discovery has proceeded, the docket has expanded to more than 350 entries, and the parties' privilege disputes have spilled over into this court. *See In re United States*, No. 2017-1122. Finally, the court concluded that there were no unusual circumstances that would affect the determination of untimeliness. Order 9. We see no legal error or other abuse of discretion in that analysis.[2]

We therefore find no reversible error in the denial of intervention in this case. We do not here address Mr. Sammons's constitutional argument against the jurisdiction of the Court of Federal Claims. *See Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327–29 (D.C. Cir. 2013) (upon denying intervention, refusing to address challenge to trial court's subject matter jurisdiction). That argument, to the extent it is a jurisdictional one, must be addressed by the Court of Federal Claims and (if there is an appeal) by this court even if Mr. Sammons is not a party and even if no party makes the argument he makes.

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[2] Mr. Sammons moved to intervene only as of right under Rule 24(a), and the Court of Federal Claims accordingly did not separately address whether he qualified for permissive intervention under Rule 24(b). No Rule 24(b) issue is before us. But because Mr. Sammons now invokes Rule 24(b), we note that untimeliness, which the Court of Federal Claims has found, bars permissive intervention as well as intervention as of right. *See* R. Ct. Fed. Cl. 24(b)(1), (3).

CONCLUSION

For the foregoing reasons, we affirm the order of the Court of Federal Claims denying intervention.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Questions and Answers

Petitions for Rehearing (Fed. Cir. R. 40)
and
Petitions for Hearing or Rehearing En Banc (Fed. Cir. R. 35)

Q. When is a petition for rehearing appropriate?

A. Petitions for panel rehearing are rarely successful because they most often fail to articulate sufficient grounds upon which to grant them. For example, a petition for panel rehearing should not be used to reargue issues already briefed and orally argued; if a party failed to persuade the court on an issue in the first instance, a petition for panel rehearing should not be used as an attempt to get a second "bite at the apple." This is especially so when the court has entered a judgment of affirmance without opinion under Fed. Cir. R. 36. Such dispositions are entered if the court determines the judgment of the trial court is based on findings that are not clearly erroneous, the evidence supporting the jury verdict is sufficient, the record supports the trial court's ruling, the decision of the administrative agency warrants affirmance under the appropriate standard of review, or the judgment or decision is without an error of law.

Q. When is a petition for hearing or rehearing en banc appropriate?

A. En banc decisions are extraordinary occurrences. To properly answer the question, one must first understand the responsibility of a three-judge merits panel of the court. The panel is charged with deciding individual appeals according to the law of the circuit as established in the court's precedential opinions. While each merits panel is empowered to enter precedential opinions, the ultimate duty of the court en banc is to set forth the law of the Federal Circuit, which merit panels are obliged to follow.

Thus, as a usual prerequisite, a merits panel of the court must have entered a precedential opinion in support of its judgment for a suggestion for rehearing en banc to be appropriate. In addition, the party seeking rehearing en banc must show that either the merits panel has failed to follow identifiable decisions of the U.S. Supreme Court or Federal Circuit precedential opinions or that the merits panel has followed circuit precedent, which the party seeks to have overruled by the court en banc.

Q. How frequently are petitions for rehearing granted by merits panels or petitions for rehearing en banc accepted by the court?

A. The data regarding petitions for rehearing since 1982 shows that merits panels granted some relief in only three percent of the more than 1900 petitions filed. The relief granted usually involved only minor corrections of factual misstatements, rarely resulting in a change of outcome in the decision.

En banc petitions were accepted less frequently, in only 16 of more than 1100 requests. Historically, the court itself initiated en banc review in more than half (21 of 37) of the very few appeals decided en banc since 1982. This sua sponte, en banc review is a by-product of the court's practice of circulating every precedential panel decision to all the judges of the Federal Circuit before it is published. No count is kept of sua sponte, en banc polls that fail to carry enough judges, but one of the reasons that virtually all of the more than 1100 petitions made by the parties since 1982 have been declined is that the court itself has already implicitly approved the precedential opinions before they are filed by the merits panel.

Q. Is it necessary to have filed either of these petitions before filing a petition for certiorari in the U.S. Supreme Court?

A. No. All that is needed is a final judgment of the Court of Appeals. As a matter of interest, very few petitions for certiorari from Federal Circuit decisions are granted. Since 1982, the U.S. Supreme Court has granted certiorari in only 31 appeals heard in the Federal Circuit. Almost 1000 petitions for certiorari have been filed in that period.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

INFORMATION SHEET

FILING A PETITION FOR A WRIT OF CERTIORARI

There is no automatic right of appeal to the Supreme Court of the United States from judgments of the Federal Circuit. You must file a petition for a writ of certiorari which the Supreme Court will grant only when there are compelling reasons. (See Rule 10 of the Rules of the Supreme Court of the United States, hereinafter called Rules.)

Time. The petition must be filed in the Supreme Court of the United States within 90 days of the entry of judgment in this Court or within 90 days of the denial of a timely petition for rehearing. The judgment is entered on the day the Federal Circuit issues a final decision in your case. [The time does not run from the issuance of the mandate, which has no effect on the right to petition.] (See Rule 13 of the Rules.)

Fees. Either the $300 docketing fee or a motion for leave to proceed in forma pauperis with an affidavit in support thereof must accompany the petition. (See Rules 38 and 39.)

Authorized Filer. The petition must be filed by a member of the bar of the Supreme Court of the United States or by the petitioner representing himself or herself.

Format of a Petition. The Rules are very specific about the order of the required information and should be consulted before you start drafting your petition. (See Rule 14.) Rules 33 and 34 should be consulted regarding type size and font, paper size, paper weight, margins, page limits, cover, etc.

Number of Copies. Forty copies of a petition must be filed unless the petitioner is proceeding in forma pauperis, in which case an original and ten copies of the petition for writ of certiorari and of the motion for leave to proceed in forma pauperis. (See Rule 12.)

Where to File. You must file your documents at the Supreme Court.

Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543
(202) 479-3000

No documents are filed at the Federal Circuit and the Federal Circuit provides no information to the Supreme Court unless the Supreme Court asks for the information.

Access to the Rules. The current rules can be found in Title 28 of the United States Code Annotated and other legal publications available in many public libraries.

Revised December 16, 1999