IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION TO AMEND

Defendant, the United States, respectfully submits this response to the motion to amend (Pls. Mot.) filed by plaintiffs, Fairholme Funds, Inc., *et al*. (Fairholme). On August 3, 2018—two days after the United States filed its omnibus motion to dismiss the Coordinated Actions[1]—Fairholme filed a motion for leave to file a second amended complaint to assert a new legal theory in support of its illegal exaction claims. Specifically, Fairholme now alleges that the

[1] The Court previously coordinated seven cases (Coordinated Actions) for "discovery, motion practice, case management, case scheduling, and other pretrial proceedings as appropriate." *See, e.g.*, Order, *Owl Creek Asia I, L.P. v. United States*, No. 18-281C (Fed. Cl. Apr. 24, 2018), ECF No. 9. The following suits initially comprised the Coordinated Actions: *Washington Federal v. United States*, No. 13-385C (Fed. Cl.); *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl.); *Cacciapalle v. United States*, No. 13-466C (Fed. Cl.); *Fisher v. United States*, No. 13-608C (Fed. Cl.); *Arrowood Indemnity Co. v. United States*, No. 13-698C (Fed. Cl.); *Reid v. United States*, No. 14-152C (Fed. Cl.); *Rafter v. United States*, No. 14-740C (Fed. Cl.).

In February and March of 2018, shareholders filed four new complaints, which the Court added to the Coordinated Actions: *Owl Creek Asia I L.P. v. United States*, No. 18-281C (Fed. Cl.); *Akanthos Opportunity Master Fund L.P. v. United States*, No. 18-369C (Fed. Cl.); *Appaloosa Inv. L.P. v. United States*, No. 18-370C (Fed. Cl.); and *CSS LLC v. United States*, No. 18-371C (Fed. Cl.). The United States also consented to add *Mason Capital L.P. v. United States*, No. 18-529C (Fed. Cl. filed April 11, 2018), to the Coordinated Actions. However, because *CRS Master Fund LP v. United States*, No. 18-1155C (Fed. Cl.), was not filed until August 8, 2018—a week after the United States filed its omnibus motion to dismiss—we anticipate moving to stay that case pending resolution of the dismissal motion. *See* Pls. Mot. at 3 n.3.

Department of the Treasury's (Treasury) funding agreements with the Federal Housing Finance Agency (FHFA) as conservator of Fannie Mae and Freddie Mac constituted an illegal exaction because FHFA allegedly "has been operating in violation of constitutional separation of powers principles." Pls. Mot. at 1.

In conjunction with their motion to amend, Fairholme proposed a briefing schedule in which Fairholme suggested that, by October 1, 2018, the United States may elect to "supplement" its omnibus motion to dismiss with another motion to address Fairholme's newly-pled theory. *See id.* at 6. The remaining briefing schedule deadlines—with Fairholme's response due on October 23, 2018, and the United States' omnibus reply due on January 22, 2019—would remain unchanged. *See id*. at 7; *see also* Order, June 21, 2018, ECF No. 408.

Although Fairholme's motion is untimely, because several other plaintiffs in the Coordinated Actions have filed amended complaints as a matter of right reflecting the separation-of-powers theory, we do not oppose Fairholme's request to file a second amended complaint. However, we raise the following two points in response to Fairholme's proposed briefing schedule: (1) the United States does not intend to address plaintiffs' separation-of-powers argument in its omnibus motion to dismiss, but reserves its right to address that argument in a separate filing, if necessary, after the Court resolves the United States' dismissal motion; and (2) the United States will need to file an updated motion to dismiss, rather than a supplement to the existing motion.

Although Fairholme alleges that the United States need not "re-brief its Motion, but rather will simply need to supplement that Motion with another one addressed to the new theories," Pls. Mot. at 7, the United States must re-file its motion for several reasons.

First, because Fairholme's second amended complaint would supersede the first amended complaint addressed in the United States' omnibus motion to dismiss, the United States' motion would no longer apply to Fairholme's operative complaint. *See Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1365 (Fed. Cir. 2000) ("A pleading that has been amended under Rule 15(a) [of the Federal Rules of Civil Procedure] supersedes the pleading it modifies . . . Once an amended pleading is interposed, the original pleading no longer performs any function in the case[.]") (quoting Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1476 (2d ed. 1990)) (alteration in original); *Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017) (where plaintiff filed amended complaint one hour before district court dismissed original complaint, the dismissal order was non-final because it did not address the operative complaint). Thus, a new motion is necessary for the Court to dismiss Fairholme's operative complaint.

Second, simply supplementing the United States' motion to dismiss is not feasible because Fairholme's additional allegations have resulted in inconsistent paragraph numbering between the original and amended complaints. *Compare*, *e.g.*, *Fairholme* Second Am. Compl. ¶ 183 ("FHFA has a manifest conflict of interest with respect to the Net Worth Sweep. . . ."), *with Fairholme* First Am. Compl. ¶ 183 ("FHFA and Treasury therefore have illegally exacted Plaintiffs' economic interest in Fannie and Freddie without due process."). Thus, to avoid confusion, the United States needs to re-file its omnibus motion to dismiss to reflect citations to Fairholme's second amended complaint.

Finally, until the Court resolves the United States' omnibus motion to dismiss, the Court should modify the briefing schedule to prohibit any further amendments after September 12, 2018; this would avoid the complications associated with seriatim amendments. Such a

restriction will ensure that the Court and the parties possess certainty as to the pool of operative complaints to which the United States' omnibus motion to dismiss will apply. Indeed, after Fairholme filed its motion to amend, the *Arrowood* plaintiffs moved for leave to file a second amended complaint reflecting the separation-of-powers theory.

Accordingly, to conserve Court and party resources, and ensure the efficient resolution of the United States' omnibus motion to dismiss, the Court should adopt the schedule below:

1. The United States will file an updated omnibus motion to dismiss the operative complaints by **October 1, 2018**. The United States' motion to dismiss will be substantively the same as its existing omnibus motion to dismiss, but will reflect the numbering in plaintiffs' operative complaints. Should further briefing be necessary after the Court's resolution of the United States' motion to dismiss, the United States will respond to plaintiffs' newly-pled separation-of-powers theory at that time. Under no circumstances should the United States' decision to defer addressing the separation-of-powers theory until the Court's resolution of the omnibus motion to dismiss be construed as a forfeiture of any argument in favor of that theory's dismissal.
2. Plaintiffs in the Coordinated Actions will file responses to the United States' omnibus motion to dismiss on or before **October 23, 2018**.
3. The United States will file an omnibus reply on or before **January 22, 2019**.
4. Until resolution of the United States' omnibus motion to dismiss, the Court will not entertain further requests to amend complaints filed after **September 12, 2018**.

CONCLUSION

For these reasons, the Court should adopt defendant's proposed briefing schedule and otherwise grant plaintiffs' motion to amend.

Respectfully submitted,

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