UNITED STATES COURT OF CLAIMS

Joshua J. Angel, on behalf of himself and all others similarly situated, Plaintiff, v. UNITED STATES DEPARTMENT OF TREASURY 1500 PENNSYLVANIA AVENUE, N.W. WASHINGTON, D.C. 20220, Defendant.	Case No.: 20-737C (Chief Judge Sweeney)

PLAINTIFF'S MOTION FOR A CONTINUATION TO PERMIT DISCOVERY

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Pursuant to Rule 56(d) of the Rules of the United States Court of Federal Claims ("RCFC"), and this Court's power to allow jurisdictional and other discovery, Joshua J. Angel ("Plaintiff") respectfully requests that the Court suspend briefing relating to the United States' (the "Government") motion to dismiss ("Motion to Dismiss") Plaintiff's June 8, 2020 complaint (the "Complaint") so that Plaintiff may undertake discovery needed to present facts essential to the opposition of that motion. Plaintiff also respectfully requests that during the pendency of the present motion, the briefing schedule for the Motion to Dismiss be suspended until the Court resolves the present motion.[1]

QUESTION PRESENTED

Whether the Court should adjourn the Motion to Dismiss, suspend briefing in connection therewith, and afford Plaintiff an opportunity to conduct discovery needed to present facts essential to opposing the Motion to Dismiss, including, but not limited to, jurisdictional discovery?

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[1] The Parties previously agreed to a briefing schedule setting September 30, 2020 as the due date for Plaintiff's opposition to the Motion to Dismiss. That agreement, however, *expressly reserved Plaintiff's right to make the present motion and seek a stay of briefing on the Motion to Dismiss pending the resolution of this motion*. *See* ECF # 8-9.

The Government has represented that it will oppose this motion. It is unclear why the Government intends to do so. First, the Government did not oppose the same reasonable request (to suspend the briefing schedule for the Motion to Dismiss pending the Court's resolution of Plaintiff's motion for discovery), when made in *Fairholme Funds, Inc. v. United States*. *See Fairholme Funds, Inc. v. United States*, No. 1:13-cv-00465-MMS, Dkt. # 25, Order dated January 2, 2014 (granting "plaintiffs' unopposed request to suspend the briefing schedule for the United States' Motion to Dismiss pending the court's resolution of plaintiffs' motion for discovery.").

Second, there is no reason why this Court should not grant Plaintiff's request for discovery necessary to oppose the Government's Motion to Dismiss here as the Court did with respect to the Fairholme plaintiffs' same request. *Fairholme*, Dkt. # 32, Order dated February 26, 2014.

STATEMENT OF THE CASE AND SUMMARY OF PLAINTIFF'S LEGAL THEORY

Plaintiff is a holder of *non-cumulative* preferred shares ("Junior Preferred Shares") issued by the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, the "GSEs" or the "Companies"). Although championing a *different legal theory* from those espoused in the many cases brought relating to the conservatorship of Fannie Mae and Freddie Mac, Plaintiff's class action, is not complicated.

The Government's actions, pre-conservatorship (*i.e.*, pre-September 6, 2008), were instrumental in creating a general market perception that the GSEs' debt and equity securities ("Securities") are effectively risk free by virtue of *inter alia*, (a) the GSEs' Government charters, (b) the Securities' exemption from regulation under the Securities Act of 1933 and the Securities Exchange Act of 1934, and the Securities' designation as "Government Securities" thereunder,[2] and (c) the Government fostering a pre-conservatorship understanding of the applicability of a legally binding Government implicit guaranty of payment for all GSE Securities' obligations.[3] As pled in the Complaint, and as relevant to this action, the implicit guaranty created by the Government's conduct is the Government's guaranty of payment of the GSEs' legally payable obligations, which includes Junior Preferred Share dividend amounts ***once declared*** (the "Implicit Guaranty").[4]

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[2] *See* 15 U.S.C. § 78m(a) (2006) (requiring every security issuer to file with SEC). If a securities issuer only issues "exempted securities," it need not register with the SEC, as required by 15 U.S.C. § 78l; *id.* §§ 78l, 78o(d); *see also* § 78c(12)(A)(i) (defining "exempted securities" to include "government securities"); *id.* § 78c(42)(C) (defining "government securities" to include Fannie and Freddie securities). Fannie and Freddie securities may also be exempt pursuant to 15 U.S.C. § 77c(a)(2) because they are "instrumentalities" of the United States.

[3] ECF # 1 at ¶ 8.

[4] The Government attempts to dodge the actual Implicit Guaranty by: (i) incorrectly framing Plaintiff's claim as a right, upon the conclusion of the conservatorship, to receive dividend

Despite this Implicit Guaranty, the United States Treasury ("Treasury"), beginning on or about January 1, 2013, and *recurring each quarter thereafter*, took advantage of a conservatorship requirement that the GSEs' obtain Treasury's prior written consent before declaring any dividends. Specifically, each quarter, Treasury instructed the respective directors of the GSEs *not to seek Treasury's consent to declare dividends to the holders of Junior Preferred Shares* ("Junior Preferred Shareholders"). Nothing else, including the Third Amendment (as defined below), prohibited the directors from fulfilling their duty to evaluate, on a quarterly basis, whether the declaration of dividends was warranted and, if so, whether to seek Treasury's consent to declare such dividends each quarter. Treasury's quarterly directives to the directors constitute breaches, quarter by quarter, of the certificates of designation ("CODs"), which include the Implicit Guaranty and the covenant of good faith and fair dealing contained therein.

Because of Treasury's quarterly breaches of the CODs and the Implicit Guaranty, the Junior Preferred Shareholders were denied approximately $16 billion in dividends that should have

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payments for every quarter that passes during the conservatorship. *See* ECF # 7 at pp. 8, 12 (asserting that Plaintiff contends that "by virtue of an 'implicit guaranty' of the [GSEs'] contractual obligations, [Treasury] was required to set aside funds each quarter to pay dividends to junior preferred shareholders after the conservatorship ended"). That strawman argument is a red herring. Plaintiff objects not to the fact that funds were not set aside, per se, but rather that each quarter Treasury instructed the GSEs' respective directors not to seek Treasury's consent for the declaration of dividends so that (a) Junior Preferred declared dividend amounts could not and therefore would not reduce GSE quarterly profit amount available for the Net Worth Sweep, and/or (b) Treasury would not have to face almost certain litigation for its breach of the Implicit Guaranty in the event the directors did seek Treasury's consent to declare a declaration and Treasury refused its consent (*i.e.*, "T," the guarantor of the declared dividends of "F," cannot circumvent its payment guaranty by refusing F's request for consent to declare dividends). Thus, in an attempt to avoid such a breach of the Implicit Guaranty, Treasury, each quarter, directed the directors to not even seek such permission. This, however, still breached the Implicit Guaranty as T cannot avoid its guaranty obligations relating to the payment of declared dividends by instructing F not to even request consent to declare such dividends.

been declared between January 1, 2013 and year-end 2020. As a result, Plaintiff filed the Complaint seeking redress for Treasury's quarterly and ongoing breaches.

On August 18, 2020, Defendant filed its Motion to Dismiss seeking dismissal of the Complaint for: (i) lack of subject matter jurisdiction based on the statute of limitations under the Tucker Act; and (ii) failure to state a claim upon which relief may be granted. Importantly, although Plaintiff is *not challenging the legality of the Third Amendment*, Defendant contends that Plaintiff's claims are time-barred because they were not brought within six years of the Third Amendment. In doing so, Defendant indirectly argues that Plaintiff's allegation, that Treasury issued quarterly directions to the GSEs not to seek Treasury's consent to declare dividends – the actual basis for Plaintiff's claims – is false.

Similarly, in order to argue that Plaintiff has failed to state a claim, Defendant wrongly contends that Plaintiff believes that there is an implicit guaranty that Treasury will set aside funds each quarter and that, upon the conclusion of the conservatorship, Treasury will pay those funds to Junior Preferred Shareholders. *See supra*, n. 4. In doing so, Defendant subtly argues that Plaintiff's actual contention, that the Implicit Guaranty requires that *after a dividend is declared* the Government guarantees its payment, is false, and that there is no Implicit Guaranty.

In light of the above purported facts upon which Defendant's motion is based, Plaintiff has a legal right to discovery that is likely to disclose information highly relevant to the disputed questions of: (i) whether Treasury gave quarterly directions to the GSEs' respective directors not to seek its consent to declare dividends; and (ii) whether there is an Implicit Guaranty and, if so, what it is. This information is not publicly available, but rather is solely in the possession of the Defendant.

Plaintiff's opposition to the Motion to Dismiss is due on September 30, 2020. As a result, it is impossible for Plaintiff to obtain the necessary discovery it is entitled to (and which Defendant has refused to provide) in order to oppose Defendant's Motion to Dismiss. Thus, as explained more fully below, Plaintiff respectfully requests that: (i) during the pendency of the present motion, the briefing schedule for the Motion to Dismiss be suspended until the Court resolves the present motion; and (ii) the Court grant a continuance so that Plaintiff may undertake discovery needed to present facts essential to the opposition of the Motion to Dismiss.

FACTUAL BACKGROUND

A. Government Sponsored Entities and the Implicit Guaranty

From the 1938 to 1970 Fannie Mae, a then government-owned institution was the sole institution that bought mortgages and effectively insured their value.[5] In 1968, Fannie Mae split into a private corporation and a publicly financed institution.[6] The private corporation retained the name Fannie Mae, and its charter continued to support the purchase of mortgages from savings and loan associations and other depository institutions, but without an explicit insurance policy that guaranteed the value of the mortgages.[7] The publicly financed institution was named Government National Mortgage Association ("Ginnie Mae"), and it explicitly guaranteed the repayment of securities backed by mortgages made to government employees or veterans.[8]

In 1970, to provide competition for the newly privatized Fannie Mae, and to further increase the availability of funds to finance mortgages and home ownership, Congress, established

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[5] Timothy Howard, *The Mortgage Wars: Inside Fannie Mae, Big Money Politics, and the Collapse of the American Dream* (2014) ("Howard") at p. 21.

[6] *Id.* at 21-22.

[7] *Id.* at 22.

[8] *Id.*

Freddie Mac as a second private corporation whose charter was essentially the same as Fannie Mae's.[9] Beginning in 1992, the Companies public benefit mandate was expanded to meet yearly government fixed affordable housing goals.[10]

Pre-conservatorship the GSEs received no direct federal government aid, however, the Companies and the Securities they issued benefited enormously from government subsidies, particularly in the form of; (a) lower interest rates on GSE direct debt, and (b) the Implicit Guaranty (*i.e.*, guaranteed payment of principal and interest in the case of debt securities, principal and accrued dividends in the case of cumulative preferred shares, and principal and declared dividends in the case of non-cumulative preferred shares, *i.e.*, Junior Preferred Shares).

From late 2007 through May 2008, in the lead up to the September 6, 2008 Government-directed conservatorship, the Companies issued approximately $22 billion of the $33 billion (65%) in outstanding Junior Preferred Shares.[11] It is true that every GSE prospectus for the issuance of Junior Preferred Shares contained the statement that "The certificates and payments of principal and interest on the certificates are not guaranteed by the United States, and do not constitute a debt or obligation of the United States or any of its agencies or instrumentalities other than [Fannie Mae/Freddie Mac]."[12] However, it is also true that conflicting Government enactments and actions intentionally created the general consensus, among the financial markets, investors, rating

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[9] *Id.*

[10] *Id.* at p. 58.

[11] ECF # 1 at p. 10, n.12.

[12] W. Scott Frame, *The 2008 Federal Intervention to Stabilize Fannie Mae and Freddie Mac, (April 2009).*, Federal Reserve Bank of Atlanta, *Working Paper* 2009-13 ("Frame") at pp. 3, n. 4, 6, n. 15.

agencies, and government agencies, that a contractually, binding Government Implicit Guaranty of payment on GSEs' Securities existed.[13]

Specifically, this general consensus emanated from the fact that the GSEs' charters granted them unequaled privileges by: (a) creating the GSEs to achieve a public purpose, (b) granting the GSEs an exemption from '33 and '34 Securities Act Regulation, (c) granting the GSEs an exemption from most state and local taxes (*i.e.*, other than real estate taxes), (d) granting the GSEs an exemption from certain state laws (*e.g.*, state laws that become effective after a GSE acquires subject properties), and (e) treating the GSEs as extensions of the Government.[14]

In treating the GSEs as "Government Extensions," the Government, among other things:

(i) allowed (per Plaintiff estimate) approximately $60 billion of HARP and HAMP expenses to be off-loaded on the GSEs without Government reimbursement;[15]

(ii) permitted fiduciaries to invest in GSEs' Securities *as if they were Government Securities* (Securities sold by Freddie pursuant to its enabling statute are "lawful investments, and may be accepted as security for all fiduciary, trust, and public funds, the investment or deposits of which shall be under the authority and control of the United States or any officers thereof."[16] Fannie has a comparable

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[13] *See* David Reiss, *The Federal Governments Implied Guarantee of Fannie Mae and Freddie Mac's Obligations: Uncle Sam Will Pick Up The Tab (August 27, 2007)*; Georgia Law Review Vol. 42 at 1019 (2008). *See also*, Frame at p. 6.

[14] Frame pp. 1-7.

[15] The Home Affordable Modification Program ("HAMP"), and the Home Affordable Refinance Program ("HARP") emanated from the political bargain which joined housing relief with the Housing and Economic Recovery Act ("HERA"). Stated broadly the programs were intended to provide relief from foreclosure via rate, and in some instances principal, reduction. The HAMP program rate and principal adjustment costs were fully government reimbursed while the programs' administrative costs were borne by the GSEs without government reimbursement. In addition the GSEs were required to bear, without reimbursement, the total expense for both the program's mortgage adjustment and administrative costs. Each year, beginning in 2008, the GSEs' 10K filings contain a section on the HARP program's restructure (but not administrative) costs for the year in question. *See* https://fanniemae.gcs-web.com/annual-filings; http://www.freddiemac.com/investors/financials/sec-filings.html.

[16] 12 U.S.C. § 1452(g); *see also id.* 1455(e)(1) (stating that Freddie's enabling statute authorizes any person, trust, or organization is authorized under any applicable law to purchase, hold, or invest in obligations issued by or guaranteed as to principal and interest by the United States or

provision.[17] Federal law also preempts state law so that Fannie and Freddie securities are eligible for investment to the same extent as "obligations issued by or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof."[18] Thus, the Government explicitly compared the GSEs' obligations to those of the United States and its agencies like Ginnie Mae, thereby signaling that they are equally safe);

(iii) made the GSEs' Securities *eligible for unlimited investment by federally regulated lenders* (*i.e.*, national banks, federal savings associations, and federal credit unions, were permitted to make unlimited investments in the GSEs' obligations, in contrast to the more restricted ability of those entities to invest in the obligations of other publicly traded corporations);[19] and

(iv) permitted the GSEs to maintain *significantly weaker capital requirements* than those imposed on other financial institutions.[20]

Indeed, according to Timothy Howard, who served as Fannie Mae's Vice Chairman and Chief Financial Officer until 2004, by the time of the Government's March 2008 rescue of Bear Sterns, Treasury had solidified its thinking "of the GSEs as instrumentalities of the Government."[21]

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any agency or instrumentality thereof). Moreover, where "State law limits the purchase, holding, or investment in obligations issued by the United States by such a person, trust, or organization, such Corporation mortgages, obligations, and other securities shall be considered to be obligations issued by the United States for purposes of the limitation." *Id.* § 1455(e)(1).

[17] *See id.* 12 U.S.C. § 1723c ("All obligations, participations, or other instruments issued by either [Fannie Mae and Ginnie Mae] shall be lawful investments, and may be accepted as security for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority and control of the United States or any officer or officers thereof. All stock, obligations, securities, participations, or other instruments issued pursuant to this subchapter shall, to the same extent as securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, be deemed to be exempt securities within the meaning of laws administered by the Securities and Exchange Commission.").

[18] 15 U.S.C. § 1455(e)(1).

[19] Frame at p. 6.

[20] *Id.* at 11 (noting that the GSEs "operated with a high degree of leverage, owing to a statutory minimum capital requirement of only 2.5 percent for on-balance-sheet assets and 0.45 percent for net off-balance sheet credit guarantees").

[21] Howard at p. 250.

In addition, not only were the GSEs treated as instrumentalities of the Government, there was near universal recognition of the Implicit Guaranty. As noted by Jonathan Rose and Tara Rice of the Board of Governors of the Federal Reserve System: "We estimate that more than 600 depository institutions in the United States were exposed to at least $8 billion [i.e., 25%] from those [Junior Preferred Shares]."[22] Those "depository institutions" clearly understood that the Implicit Guaranty protected such enormous investments. And they were not alone, as the credit rating agencies' dogmatic acceptance of the Implicit Guaranty also was well known:

> These preferred securities were assigned an Aa3 credit rating and were widely held by banks. Given the advantages of holding these securities, including the relatively high yields and the low perceived risks, investments in the preferred shares were extensive across banks, particularly community banks, and at other financial institutions. Banks were able to hold considerable amounts GSE preferred shares because, even though banks are normally restricted from investing substantially in equity securities, an exemption to the standard limits on permissible equity securities was established for the GSE investments.
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> The rating for Moody's, whose highest rating is Aaa, followed by Aa1, Aa2, and Aa3. Moody's judges obligations rated Aa to be high quality, with 'very low credit risk,' but 'their susceptibility to long-term risks appear somewhat greater.'[23]

Based, at least in part, on the near universal understanding of the Implicit Guaranty, in a four month period spanning September/December 2007 Fannie Mae, with Government aid and assistance, raised nearly $9 billion through Junior Preferred Share sales by exploiting banks and

[22] Tara Rice and Jonathan Rose, *When Good Investments Go Bad: The Contraction in Community Bank Lending After the 2008 GSE Takeover, Board of Governors of the Fed. Res. Sys., Int'l Fin. Discussion Papers IFDP 1045,* (March 2012) ("Rose/Rice") at 1.

[23] *Id.* at 1-2.

other financial institutions desperate, as a result of the financial crisis, to find risk free returns for their "Tier One" capital.[24] [25] [26]

During the spring and summer of 2008 investors became increasingly concerned about the financial condition of both GSEs.[27] Nevertheless Fannie Mae, between May 14-19, 2008, was able to sell $4.8 billion of its Junior Preferred shares in two underwritings subscribed to, in main and once again, by banks and other financial institutions.[28] In August 2008, Fannie Mae's board of directors declared a $413 million dividend, payable September 30, 2008 (the "May 2008 Preferred Share Dividend").[29]

On September 6, 2008, the Federal Housing Finance Agency ("FHFA") placed the GSEs into conservatorship and appointed itself as the GSEs' conservator (the "Conservator"). On September 7, 2008, FHFA Director Lockhart, in a joint statement with Treasury Secretary Paulson, announced, agreements between Treasury and the Conservator on behalf of the GSEs (the "SPSPAs") pursuant to which Treasury purchased GSEs' cumulative 10% senior preferred shares ("Senior Preferred Shares"). The SPSPA provided for the suspension of all Junior Preferred Share dividend declarations and payments *absent prior Treasury written consent*.[30]

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[24] *See* Howard at pp. 247-258; and Henry M. Paulson, Jr., *On the Brink: Inside the Race to Stop the Collapse of the Financial System* (2d ed. 2013) ("Brink") at pp. xvii, xx, xxvii, xxx, xivi, xivii, 13, 150, 397-98, 406.

[25] *See* Rose/Rice at p. 34, Table 1.

[26] Fannie Mae total preferred share issuance, in the nine year period preceding 2007 was slightly less than 1998-2006 issuance of approximately $8 billion. *Id.* at n. 11.

[27] *See* Frame 14.

[28] *Id.* at n. 10.

[29] Complaint ¶ 33.

[30] Complaint ¶ 34.

On September 7, 2008 Secretary Paulson on behalf of the Government explicitly acknowledged the existence of the Implicit Guaranty stating:

> These Preferred Stock Purchase Agreements were made necessary by the ambiguities in the GSE Congressional charters, ***which have been perceived to indicate government support for agency debt and guaranteed MBS***. Our nation has tolerated these ambiguities for too long, and as a result ***GSE debt and MBS are held by central banks and investors*** throughout the United States and around the world ***who believe them to be virtually risk-free***. Because ***the US Government created these ambiguities***, we have a responsibility to both avert and ultimately address the systemic risk now posed by the scale and breadth of the holdings of GSE debt and MBS.[31]

On September 11, 2008, Treasury, alerted to the existence of the Fannie Mae $413 million declared but yet unpaid May 2008 Preferred Share Dividend, reaffirmed the Government's Implicit Guaranty by commanding that the May 2008 Preferred Share Dividend's be reinstated, and that payment thereunder be made, recognizing that, "The U.S. Government stands behind the preferred

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[31] Statement by Secretary Henry M. Paulson, Jr.: *Treasury and Federal Housing Finance Agency Action to Protect Financial Markets, and Taxpayers* (September 7, 2008) (emphasis added).

stock purchase agreements and will honor its commitments," and that, "[c]ontracts are respected in this country as a fundamental part of rule of law."[32] [33]

B. Senior Preferred Stock Purchase Agreement And The Third Amendment

Between September 2008, and year-end 2012, Treasury made combined purchases of $189 Billion of the GSEs' Senior Preferred Shares.[34] Pursuant to the SPSPAs, the GSEs were required to make certain covenants including that, without the prior consent of the Treasury, the GSEs shall not make any payment to purchase or redeem its capital stock, or pay any dividends, including preferred dividends (other than dividends on the Senior Preferred Shares).[35]

> Under the SPSPAs, Treasury's financial support is in the form of an equity investment in the Enterprises. The investment is not in common stock, but rather in senior preferred stock. Preferred stock

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[32] Complaint ¶¶ 35-36. *See also* Fannie Mae 10k year-end 2008, Part II, p. 76; Treasury September 11, 2008 announcement (available at https://www.treasury.gov/press-center/press-releases/Pages/hp1131.aspx); Department of the Treasury and Department of Housing and Urban Development White Paper, *Reforming America's Housing Finance Market A Report to Congress* (Feb. 2011) at p. 8 ("Fannie Mae and Freddie Mac's perceived government backing conferred unfair advantages. Fannie Mae and Freddie Mac benefited from preferential tax treatment, far lower capital requirements, and a widely perceived government guarantee – the commonly held assumption that large losses would be backstopped by the taxpayer. These advantages gave them substantial pricing power that helped them dominate segments of the market in which they participated, build up large investment portfolios at a cost far lower than their competitors, and take on irresponsible risks through their guarantee business that ultimately resulted in their failure.") (available at https://www.treasury.gov/initiatives/Documents/Reforming%20America%27s%20Housing%20Finance%20Market.pdf).

[33] The Government's apparent contention in its Motion to Dismiss that the Implicit Guaranty does not exist is contradicted by the statements of the aforementioned prior Treasury officials and numerous articles addressing the well-recognized Implicit Guaranty. *See e.g.,* Carol J. Perry, *Rethinking Fannie and Freddie's New Insolvency Regime*, 109 Columbia L. Rev. 1752, 1754-55, 1769-74, 1779 (2009); Cheryl D. Block, *Measuring the True Cost of Government Bailout*, 88 Wash. U. L. Rev. 149, 167, 224-25 (2010); Marc Allen Eisner, *Before the Third Act: Crony Capitalism and the Origins of the Financial Crisis*, 11 Geo. J. L. & Pub. Pol'y 391, 402-03, 406. (2013).

[34] ECF # 1 ¶ 31.

[35] *Id.* ¶¶ 6, 34, 37.

> is typically regarded as a hybrid instrument in that it has some features like bonds and others like common stock. Preferred stock is an equity interest, like common stock. However, like a bond, it usually does not confer voting rights, and offers a liquidation preference. A liquidation preference gives the preferred shareholder the right, in the event that the company is dissolved, to receive compensation for its preferred stock typically before common stockholders (but not before bondholders). Senior preferred stock has priority in payment order over other preferred stock. A dividend, should one be paid under the terms of preferred stock, is typically a quarterly payment based on a specified rate applied to the par amount of preferred stock held.[36]

The third amendment to the SPSPAs (the "Third Amendment") revised the Senior Preferred Shares' dividend entitlement from 10% payable annually, to a quarterly sweep of all of the GSEs' respective profits (the "Net Worth Sweep").[37] In accordance with the Third Amendment, beginning January 1, 2013, all quarterly profits of the GSEs' were to be paid to Treasury as Senior Preferred Share dividends through the Net Worth Sweep rather than being retained by the GSEs as surplus.[38]

Critically, the Third Amendment, neither altered nor otherwise eliminated Junior Preferred Shares' economic covenants contained in their CODs, and did not alter or eliminate the GSEs' respective directors' duties regarding the declaration and payment of dividends.[39] And while Section 5.1 of the SPSPAs require the GSEs' respective boards to obtain Treasury's "prior written consent" before the GSEs' could "declare or pay any dividend" (other than the Senior Preferred Shares dividend or Net Worth Sweep), neither the SPSPA nor the Third Amendment prohibited

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[36] ECF # 1 ¶ 6, n. 5; s*ee* White Paper: FHFA-OIG's analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements (Mar 20, 2013) at p. 7 (emphasis added) (available at www.fhfaoig.gov/ContentFiles/WPR-2013).

[37] ECF # 1 ¶ 13.

[38] *Id.*

[39] *Id.* at ¶¶ 11-12.

the GSE's respective boards from considering whether to seek Treasury's prior written consent to the declaration and payment of dividends to Junior Preferred Shareholders. In short, the Third Amendment is not the basis for any of Plaintiff's claims.

Instead, the Complaint alleges that, ***each and every quarter***, beginning on or about January 1, 2013, Treasury and/or others acting on behalf of the Government, directed the GSEs' respective directors to refrain from considering the Junior Preferred Shareholders' contractual dividend entitlements under the CODs, and not to seek Treasury's prior written consent to declare any dividends.[40] In issuing these quarterly directives to the GSEs' respective boards, Treasury circuitously avoided the Government's Implicit Guaranty.

GAAP rules mandate that non-cumulative, declared, preferred dividends are immediately reflected as liabilities on a company's balance sheet, (*e.g.*, preferred dividend payable), and as an expense on a company's income statement (*e.g.*, preferred dividend expense).[41] Thus, GSE Junior Preferred Share dividend declarations, even without actual payment thereof, would serve to reduce the GSEs' respective profits and, after January 1, 2013, would have reduced the profit amount required to be paid to Treasury under the Net Worth Sweep.

Thus, just as it would have been a breach of the Junior Preferred Shares' CODs for Treasury to have eliminated the GSEs' respective boards responsibilities regarding the quarterly dividend function (*i.e.*, bilateral contracts cannot be amended unilaterally), so too was it equally unlawful for Treasury to direct, each quarter, the GSEs' respective boards not to seek Treasury's consent to declare dividends to Junior Preferred Shareholders.[42]

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[40] *Id.* at ¶¶ 2-3, 6, n.5, 15-17, 37, 40(a), 40(b), 50, 55.

[41] ECF # 1 ¶¶ 28-29.

[42] ECF # 1 ¶ 7, n. 6. Notably, Defendant asserts in its Motion to Dismiss that "Mr. Angel cannot possibly allege that the United States is a party to the COD under the theory that the United States

Moreover, the SPSPA agreement, while conditioning dividend declarations and payment on prior Treasury written consent, did not preclude GSE directors from declaring dividends on the GSEs' Junior Preferred Shares. The sole SPSPA prohibition with regard to GSE Junior Preferred Share dividend declarations is categorically limited to seeking and obtaining Treasury's prior written consent with regard thereto.[43] Treasury, however, saw to it each quarter that the directors did not even consider seeking such request for Treasury's prior written consent.

C. The Motion to Dismiss

On August 18, 2020, Defendant filed its Motion to Dismiss on various grounds, including, (a) lack of subject matter jurisdiction (*i.e.*, Tucker Act and the statute of limitations contained therein), and (b) failure to state a claim upon which relief may be granted. The Government flippantly contends that Plaintiff's claims "are not new [as]; other Enterprises [GSEs] stockholders have been litigating similar claims in this Court, for seven years" (the "Other Litigations").[44]

Defendant's misstatement aside, Plaintiff's claims are, in fact, *very different* from those brought in other actions relating to the conservatorship of the GSEs. To wit: ***Plaintiff is the only Plaintiff not challenging the legality of the Third Amendment itself***, including the concept of the Net Worth Sweep.[45] Unlike other plaintiffs' claims, the claims here are totally unrelated to the legality or effects of the Third Amendment. Plaintiff's claim is based solely on Treasury's conduct

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implicitly or explicitly guaranteed dividends on Mr. Angel's stock, because the U.S. Code expressly disclaims such a guaranty." ECF # 7 at p. 15. However, Defendant's assertion completely ignores Secretary Paulson and Treasury's aforementioned statements. *See supra* at 11. These admissions strongly support Plaintiff's right to discovery in advance of responding to Defendant's Motion to Dismiss.

[43] ECF # 1 ¶¶ 6, 34, 37.

[44] *See* ECF # 7 at 1.

[45] ECF # 1 at ¶ 49.

each quarter after January 1, 2013, which was designed to avoid the Government's Implicit Guaranty.[46]

Plaintiff's opposition to the Motion to Dismiss currently is due on September 30, 2020. For the reasons set forth below, Plaintiff respectfully requests that: (i) during the pendency of the present motion, the briefing schedule for the Government's Motion to Dismiss be suspended until the Court resolves the present motion; and (ii) the Court grant a continuance so that Plaintiff may undertake discovery needed to present facts essential to the opposition of the Government's Motion to Dismiss.

ARGUMENT

I. THE COURT SHOULD SUSPEND BRIEFING RELATING TO THE MOTION TO DISMISS TO ALLOW PLAINTIFF TO CONDUCT DISCOVERY

The Government contends that dismissal is required under RCFC 12(b)(1) because this Court lacks subject matter jurisdiction over Plaintiff's claims, and under RCFC 12(b)(6) because the Complaint fails to state a claim on which relief may be granted. In doing so, the Government relies on factual assertions that conflict with the well-pleaded allegations of the Complaint, thereby entitling Plaintiff to conduct discovery.

A. Standard for Granting Jurisdictional Discovery

When deciding a motion to dismiss for lack of subject matter jurisdiction under RCFC 12(b)(1), the Court must assume all factual allegations are true and draw all reasonable inferences in the plaintiff's favor.[47] Here, however, the Motion to Dismiss implicitly disputes the Complaint's central allegation regarding Treasury's ***quarterly*** (*i.e.*, every quarter beginning on January 1, 2013) direction to the respective directors of the GSEs not to request Treasury's consent to declare

[46] *Id.* at ¶¶ 2-3, 6, n.5, 15-17, 37, 40(a), 40(b), 50, 55.

[47] *Eastern Trans-Waste of Maryland, Inc. v. United States*, 27 Fed. Cl. 146, 147-48 (1992).

dividend payments on Junior Preferred Shares prior to each Net Worth Sweep. While extremely careful not to outright deny this allegation, the Government argues that Plaintiff's claims instead are fundamentally based on a single event that occurred many years ago – the Third Amendment – and that therefore the claims fail to meet the jurisdictional requirement that such claims be brought within six years.[48]

Because the Government implicitly challenges the truth of the jurisdictional facts alleged in the Complaint (*i.e.*, Treasury's quarterly direction to the GSE's respective directors), the Court should afford Plaintiff the opportunity for discovery in order to refute the Government's jurisdictional challenge.[49] Indeed, the denial of such jurisdictional discovery may be an abuse of discretion.[50]

B. <u>Standard for Granting Discovery Pursuant to Rule 56(d)</u>

When deciding a motion to dismiss for failure to state a claim under RCFC 12(b)(6), the Court must accept as true the factual allegations in the complaint and may consider only the

[48] ECF # 7 at p. 9. As noted above, however, Plaintiff contends that the Third Amendment was and is perfectly legal, including the concept of the Net Worth Sweep.

[49] *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) ("[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues."); *Clear Creek Cmty. Servs. Dist. v. United States*, 100 Fed. Cl. 78, 81 (2011) ("It is well established that when a motion to dismiss challenges a jurisdictional fact alleged in a complaint, a court may allow discovery in order to resolve the factual dispute." (internal quotations omitted)).

[50] *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) (vacating Rule 12(b)(1) dismissal because the record did not reveal whether the non-moving party was afforded an opportunity to establish disputed questions of jurisdictional fact); *Patent Rights Prot. Grp., LLC v. Video Gaming Techs., Inc.*, 603 F.3d 1364, 1372 (Fed. Cir. 2010) (applying 9th Cir. law and holding that the trial court abused its discretion when it denied jurisdictional discovery because the "request for jurisdictional discovery is not based on a mere hunch"); *DDB Techs., L.L.C. v. MLB Advanced Media, L.P.*, 517 F.3d 1284, 1294 (Fed. Cir. 2008) (applying 5th Cir. law holding that a district court abused its discretion when it denied jurisdictional discovery because the requested discovery was "relevant" to the existence of subject matter jurisdiction).

allegations in the complaint, exhibits attached to the complaint, and matters of public record.[51] The Rules of this Court provide that, if on a motion under RCFC 12(b)(6), "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under RCFC 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." RCFC 12(d).

RCFC 12(d) further provides that if the Court considers the extra-pleading material of the Government, the motion to dismiss is *automatically* converted into a motion for summary judgment, and Plaintiffs are entitled to a reasonable opportunity to present material pertinent to the motion.[52] In other words, Plaintiffs are entitled to the full protections of RCFC 56.[53] Failure to do so is reversible error.[54]

A nonmoving party may respond to a motion for summary judgment (or a motion to dismiss that has been converted into a motion for summary judgment) by filing a motion under RCFC

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[51] *United Pacific Ins. Co. v. United States*, 464 F.3d 1325, 1327-28 (Fed. Cir. 2006).

[52] *Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys., Inc.*, 988 F.2d 1157, 1164 (Fed. Cir. 1993) ("[O]n motion to dismiss on the complainant's pleading it is improper for the court to decide the case on facts not pleaded by the complainant, unless the complainant had notice thereof and the opportunity to proceed in accordance with the rules of summary judgment."); *Selva & Sons, Inc. v. Nina Footwear, Inc.*, 705 F.2d 1316, 1322 (Fed. Cir. 1983); *Martin v. United States*, 96 Fed. Cl. 627, 629 (2011).

[53] *Selva & Sons*, 705 F.2d at 1322 (when a motion to dismiss is converted into one for summary judgment, "the Rule 56 strictures of notice, hearing and admissibility into evidence are *strictly required*") (quoting *Davis v. Howard*, 561 F.2d 565, 571 (5th Cir. 1977) (emphasis added)); 5C C. Wright, A. Miller et al., Federal Practice & Procedure § 1366 (3d ed. 2020) ("As soon as a motion to dismiss under Rule 12(b)(6) is converted into a motion for summary judgment by the district judge, the requirements of Rule 56 become operable and the matter proceeds as would any motion made directly under that rule.").

[54] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986) (summary judgment must "be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition"); *Advanced Cardiovascular*, 988 F.2d at 1164-65; *Dunkin' Donuts of America, Inc. v. Metallurgical Exoproducts Co.*, 840 F.2d 917, 919 (Fed. Cir. 1988) ("[S]ummary judgment is inappropriate unless a tribunal permits the parties adequate time for discovery.").

56(d), which "enables a court to deny or stay a motion for summary judgment to permit additional discovery …."[55] RCFC 56(d) provides, in relevant part:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

Motions pursuant to RCFC 56(d) "are generally favored and are liberally granted."[56]

C. Plaintiffs Are Entitled to Discovery To Refute Factual Claims Made In The Government's Motion To Dismiss

The Government's motion to dismiss relies upon its own factual allegations: (i) that there is no Implicit Guaranty – although, as noted above, the Government redefines "Implicit Guaranty" in order to claim it does not exist; and implicitly (ii) that each quarter the Treasury did not instruct the GSEs' respective directors to refrain from seeking Treasury's consent to declare dividends.[57] The Government does so in order to argue that the Court lacks jurisdiction over Plaintiff's claims because the claims were not brought within three years of the Third Amendment, and that the Complaint fails to state a claim, because there is no "Implicit Guaranty" as redefined by the Government. Although Plaintiff does not concede the materiality of the Government's factual allegations, the Government relies on its factual allegations to support its legal arguments. Plaintiff therefore is entitled to limited discovery to refute those factual claims.

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[55] *Clear Creek*, 100 Fed. Cl. at 82 (quoting *Theisen Vending Co. v. United States*, 58 Fed. Cl. 194, 197 (2003)).

[56] *Clear Creek*, 100 Fed. Cl. at 83 (quoting *Chevron USA, Inc. v. United States*, 72 Fed. Cl. 817, 819 (2006)); *see also Flowers v. United States*, 75 Fed. Cl. 615, 626 (2007) (same).

[57] *See* generally, ECF # 7.

1. Plaintiffs Are Entitled to Discovery To Refute the Government's Argument That This Court Lacks Subject Matter Jurisdiction

The Government argues that this Court lacks subject matter jurisdiction over the Complaint because Plaintiff's claims are time-barred as they were not brought within six years of the Third Amendment.[58] In doing so, the Government implicitly argues that Plaintiff's allegation that Treasury gave quarterly direction to the GSEs' respective directors not to seek Treasury's consent to declare dividends prior to each Net Worth Sweep, is false (otherwise, the Government would have to concede that Plaintiff's claims are not time-barred).

Discovery is likely to disclose information highly relevant to the disputed question of whether the Treasury gave quarterly directions to the GSEs' respective directors not to seek its consent to declare dividends prior to each Net Worth Sweep. The Government is certain to be in possession of evidence – e-mails and other communications and documents – regarding Treasury gave quarterly direction to the GSEs' respective directors not to seek Treasury's consent to declare dividends prior to each Net Worth Sweep. This evidence also includes depositions of officials involved in or recipients of the Treasury's quarterly direction. Plaintiff should be afforded the opportunity to serve interrogatories, take depositions, and request the production of those documents relevant to this issue. This information is solely in the hands of the Government, and it is not otherwise publicly available.

2. Plaintiff Is Entitled to Discovery To Refute the Government's Argument that Plaintiff Has Failed To State a Claim

The Government argues that Plaintiffs cannot state a claim for breach of the CODs and breach of the covenant of good faith and fair dealing contained in the Implicit Guaranty. In support

[58] ECF # 7 at pp. 2, 9, 11-12.

of its argument, the Government makes purported factual assertions that contradict the allegations of the Complaint and are highly relevant to this Court's resolution of the Motion to Dismiss.

Specifically, in its Motion to Dismiss, the Government artfully redefines the Implicit Guaranty to create the impression that the Implicit Guaranty has something to do with guaranteeing that quarterly dividends *will be declared and paid*.[59] But, Plaintiff contends that the Implicit Guaranty is that *after a dividend is declared*, the Government guarantees its payment.

Thus, the Government's purported factual assertion constitutes "matters outside the pleadings" within the meaning of RCFC 12(d), which convert the motion to dismiss into a motion for summary judgment. *See* RCFC 12(d).[60] And the assertion of the Government does not fall within the narrowly defined category of materials a court can consider without converting a … 12(b)(6) motion to one for summary judgment. As discussed above in the context of its argument for jurisdictional discovery, document and deposition discovery is likely to disclose evidence highly relevant to the disputed factual issues about what the Implicit Guaranty is and the disputed factual issues about what Treasury instructed directors to do (or not to do) each quarter. This information is not publicly available, but rather is solely in the possession of the Government. Such discovery should include not only interrogatories but also the production of relevant e-mails

[59] ECF # 7 at pp. 8, 12.

[60] The Government's extra allegations (implicit and express) are relevant to the Government's arguments under both RCFC 12(b)(1) and 12(b)(6). While factual allegations made in a motion to dismiss "convert" it into a motion for summary judgment under RCFC 56(d), motions for lack of subject matter jurisdiction under RCFC 12 (b)(1) typically are not "converted" into motions for summary judgment, *see Indium Corp. of Am. V. Semi-Alloys, Inc*, 781 F.2d 879, 883-84 (Fed Cir. 1985); *Cupey Bajo Nursing Home, Inc. v. United States*, 23 Cl. Ct. 406, 412 (1991); *Lambropoulos v. United States*, 18 Cl. Ct. 235, 235 n.1 (1989). Nonetheless, the discussion concerning "matters outside the pleadings" within the meaning of RCFC 12(b) is relevant to Plaintiffs' argument for jurisdictional discovery, because Plaintiffs are entitled to such discovery once the Government challenges the factual basis for the Court's jurisdiction (*i.e.*, the Treasury's quarterly direction to GSEs' respective directors).

and other communications of Government officials relating to the Implicit Guaranty and to Treasury's quarterly actions. Such discovery might also include targeted depositions of officials with knowledge regarding the Implicit Guaranty and/or the Treasury's quarterly directions to directors.

D. Plaintiff Has Establish Entitlement To Discovery

To warrant jurisdictional discovery, a party must "explain with sufficient specificity how discovery would help him overcome the various jurisdictional bars to his suit," and must "identify facts that would support his claims for jurisdiction or explain how the documents he requested would show that the Court had jurisdiction."[61]

A similar standard governs discovery under RCFC 56(d). The Federal Circuit has required that the party moving for discovery must "state with some precision the materials he hope[s] to obtain with further discovery, and exactly how he expect[s] those materials would help him in opposing summary judgment."[62] Yet the Federal Circuit emphasized that "[t]he rule does not require clairvoyance on the part of the moving party." *Id.* The party requesting discovery need only "set out, usually in an affidavit by one with knowledge of specific facts, what specific evidence could be offered at trial."[63] This Court has sometimes applied a five-part test that requires the non-movant to: (1) specify the particular factual discovery being sought, (2) explain how the results of the discovery are reasonably expected to engender a genuine issue of material fact, (3) provide an adequate factual predicate for the belief that there are discoverable facts sufficient to

[61] *Smith v. United States*, 495 Fed. App'x 44, 49 (Fed. Cir. 2012).

[62] *Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F.3d 1138, 1144 (Fed. Cir.1996) (quoting *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1443 (5th Cir.1993)).

[63] *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984).

raise a genuine and material issue, (4) recite the efforts previously made to obtain those facts, and (5) show good grounds for the failure to have discovered the essential facts sooner.[64]

Plaintiff has satisfied the "relevancy" standard for jurisdictional discovery, and has satisfied RCFC 56(d)'s requirement to state the materials he hopes to obtain through discovery and how those materials will be helpful in opposing the Government's motion.[65] Assuming without conceding that Plaintiff must comply with the five-part test of *Theisen*, Plaintiff has satisfied that test too.

1. The Particular Factual Discovery Sought Has Been Specified

Plaintiff has identified the specific discovery sought with respect to its opposition to the Motion to Dismiss. Specifically, Plaintiff seeks documents and communications: (i) relating to the Implicit Guaranty, including but not limited to the existence of the Implicit Guaranty, the Government's recognition or denial of the Implicit Guaranty, the meaning and/or purpose of the Implicit Guaranty; and (ii) relating to Treasury's (or those acting on behalf of or for the benefit of the Government) directions to the GSEs and/or its respective boards and/or board members not to seek Treasury's prior written consent to declare dividends. In addition, Plaintiff seeks to depose current and former Treasury and/or FHFA officials and the GSEs' board members regarding their knowledge of the Implicit Guaranty and any directions not to seek Treasury's prior written consent to declare dividends.

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[64] *Theisen Vending Co., Inc. v. United States*, 58 Fed. Cl. 194, 198 (Fed. Cl. 2003); *see also Clear Creek*, 100 Fed. Cl. at 83.

[65] *See Simmons Oil*, 86 F.3d at 1144.

2. Discovery Is Reasonably Likely To Engender A Genuine Issue Of Material Fact

Plaintiff met this burden having explained why discovery is necessary to dispute the factual contentions of the Government and create a genuine issue of material fact to dispute the Government's arguments about Plaintiff's. To the extent the Government's Motion to Dismiss depends upon the factual assertions discussed above, discovery is likely to produce information that supports Plaintiff's allegations and disputes those in the Government's Motion to Dismiss.

3. There Are Discoverable Facts That Are Sufficient To Raise A Genuine And Material Issue

The Government is likely in possession of non-public information concerning each of the factual disputes identified in this motion. It is reasonable – not mere speculation – to expect that Treasury, FHFA, and perhaps other Government agencies have discussed the quarterly directions to the GSEs' respective directors, the Implicit Guaranty and its impact on the CODs. It is also reasonable to expect that the Government is in possession of emails and other nonpublic documents concerning all of the topics discussed in this motion, including the Government's Implicit Guaranty and the directions to GSEs' respective directors.

4. Plaintiff Has Had No Opportunity To Obtain These Facts

Plaintiff has not had any prior opportunity to obtain the facts he seeks. Plaintiff has expended substantial effort to comb through publicly available materials relating to the factual matters discussed above, but those sources do not contain the information that Plaintiff seeks.

5. **Plaintiff's Failure To Discover The Essential Nonpublic Facts Sooner Is Explained By The Lack Of Opportunity To Conduct Discovery**

As noted, discovery has not yet begun, and the required facts are not publicly available. There is no way for Plaintiff to discover the facts, which are all in the Government's possession, without discovery.[66]

E. **With Respect To The RCFC 12(b)(1) Motion to Dismiss, The Court Should, Delay Resolution Of The Motion Until The Completion of Full Discovery As Jurisdictional And Merits Issues Are Intertwined**

This Court should also grant Plaintiff an opportunity for jurisdictional discovery because, to the extent the Court believes that the Government's factual assertions are relevant to the Government's Motion to Dismiss, the Government's factual contentions about jurisdiction are intertwined with its factual contentions about the merits of Plaintiff's claims. For example, the quarterly directions to the GSEs' respective directors (or lack thereof, as implied by the Government), and the existence, meaning and applicability of the Implicit Guaranty to the CODs, implicate both the Government's jurisdictional argument (that Plaintiff's claims are time-barred under the Tucker Act), and the Government's merits argument (that Plaintiff has failed to state a claim).

When jurisdictional and merits arguments are intertwined, courts should defer decision on a motion to dismiss for lack of jurisdiction until the completion of full discovery, and only then decide both the jurisdictional and merits arguments. As the Supreme Court has explained:

> [When there exists] an identity between the "jurisdictional" issues and certain issues on the merits, . . . [there is] no objection to

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[66] *See Jade Trading, LLC v. United States*, 60 Fed. Cl. 558, 566 (2004) (granting RCFC 56(d) motion because "only preliminary discovery has been had, and there was no failure on Defendant's part to have discovered these facts any sooner in this litigation"); *see also id.* ("The as yet unprobed nature of the transactions and intent of the parties which are at the heart of this case satisfy [RCFC 56(d)'s] requirement that Defendant could not present facts essential to its opposition to Plaintiffs' partial summary judgment motions at this juncture.").

> reserving the jurisdictional issues until a hearing on the merits. By the same token, [ ], there is no objection to use, in appropriate cases, of summary judgment procedure to determine whether there is a genuine issue of material fact.[67]

The Federal Circuit and this Court regularly apply this rule and require that intertwined jurisdictional and merits arguments should only be decided after the completion of full discovery.[68]

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court suspend briefing relating to the Government's Motion to Dismiss under RCFC 12(b)(1) and 12(b)(6) so that Plaintiff may undertake discovery needed to present facts essential to the opposition of the Motion to Dismiss. Plaintiff also respectfully requests that the Court suspend the briefing schedule for the Motion to Dismiss until the Court resolves the present motion for a continuance to permit discovery.

Date: September 17, 2020

Respectfully submitted,

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Plaintiff

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[67] *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 203 n.19 (1974).

[68] *See, e.g.*, *DDB Technologies*, 517 F.3d at 1291 ("[T]he degree of intertwinement of jurisdictional facts and facts underlying the substantive claim should determine the appropriate procedure for resolution of those facts."); *Oswalt v. United States*, 41 Fed. App'x 471, 473 (Fed. Cir. 2002); *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 688-89 & n.12 (Fed. Cir. 1992); *Metzger, Shadyac & Schwartz v. United States*, 10 Cl. Ct. 107, 110 (1986) (declining to rule on a motion under Rule 12(b)(1) until the completion of a full trial on the merits because the jurisdictional argument was "so entwined with the facts on the merits that the jurisdictional determination must be delayed" so that "[t]he responding party [may] be given an opportunity to develop the facts" in opposition to the motion).