IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFFS' MOTION FOR A CONTINUANCE TO PERMIT DISCOVERY

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December 20, 2013

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Pursuant to Rule 56(d) of the Rules of the United States Court of Federal Claims, and pursuant to this Court's power to allow jurisdictional discovery, Plaintiffs Fairholme Funds, Inc. et al. ("Plaintiffs" or "Fairholme") respectfully request that the Court suspend briefing relating to the Government's motion to dismiss under RCFC 12(b)(1) and 12(b)(6) so that Plaintiffs may undertake discovery needed to present facts essential to the opposition of that motion. Plaintiffs also request that the Court suspend the briefing schedule for the motion to dismiss until the Court resolves this motion for a continuance to permit discovery. The Department of Justice has represented to Plaintiffs that it will oppose this motion, including Plaintiffs' request to suspend the briefing schedule pending the Court's resolution of this motion.

QUESTION PRESENTED

In its motion to dismiss under Rules 12(b)(1) and 12(b)(6), the Government has disputed a number of material factual assertions of Plaintiffs' complaint, and has otherwise relied upon factual assertions that are not reflected in (and are inconsistent with) Plaintiffs' complaint. Should the Court stay the time to respond to the Government's motion and afford Plaintiffs an opportunity to conduct discovery needed to present facts essential to the opposition of the Government's motion?

STATEMENT OF THE CASE

Plaintiffs are holders of non-cumulative preferred stock issued by the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie") (collectively, the "Companies" or the "Enterprises"). Compl. ¶ 1. In 2008, Fannie and Freddie owned and guaranteed trillions of dollars of assets, primarily mortgages and mortgage-backed securities. *Id.* ¶ 2. Although the companies had been profitable for decades prior to 2008, during

the mortgage-related financial crisis of 2008 they faced a steep reduction in the book value of their assets and a loss of investor confidence. *Id.* ¶ 4.

In response to the financial crisis of 2008, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"). *Id.* Only months later and pursuant to HERA, the Federal Housing Finance Administration ("FHFA") placed the Companies into conservatorship, and the Department of the Treasury exercised its temporary authority under HERA to provide them with capital, by entering into agreements with FHFA to purchase securities of Fannie and Freddie. Under those Purchase Agreements, Treasury invested a total of $187 billion in a newly created class of securities in the Companies known as Senior Preferred Stock ("Government Stock"). *Id.* ¶ 6. FHFA vowed at the time that the conservatorships were temporary and that they were to be terminated as soon as the Companies were stabilized and could be returned to normal business operations. *Id.* Treasury and FHFA did not eliminate the pre-existing preferred and common stock that was subordinate to the Government stock, and since then Fannie and Freddie have consistently filed reports for those securities with the Securities and Exchange Commission.

In return for its commitment to purchase Government Stock, Treasury received $1 billion of Government Stock in each Company as a commitment fee and warrants to acquire 79.9% of the common stock of the Companies at a nominal price. *Id.* This Government Stock ranked senior to all other preferred stock and was entitled to a cumulative annual dividend, paid quarterly, equal to 10% of the "outstanding liquidation preference," which was simply the sum of the $1 billion commitment fee plus the total amount of outstanding Government Stock. *Id.*

By the second quarter of 2012, the housing market had rebounded, and both Fannie and Freddie had returned to stable profitability. *Id.* ¶ 9. By that time, the Companies were demonstrably solvent and able to pay the 10% dividend on the Government Stock from their

available cash. *Id.* And once the 10% cumulative dividend on the Government Stock was paid in full, Treasury would also be entitled to dividends with respect to its ownership of 79.9% of the Companies' common stock (assuming exercise of Treasury's warrants), so long as dividends were also paid in full on the Preferred Stock held by private investors. *Id.*

But Treasury was not content with its 10% annual dividend plus its right to exercise warrants which entitle it (subject to the contractual rights of preferred shareholders) to 79.9% of the profits of the Companies going forward. *Id.* ¶ 10. Accordingly, FHFA and Treasury unilaterally changed the rules. On August 17, 2012, Treasury announced the "Net Worth Sweep," implemented by a "Third Amendment" to the Government Stock documents. *Id.* ¶¶ 10, 63. The Net Worth Sweep was simple: It changed the 10% coupon due on Treasury's Government Stock to a dividend, beginning January 1, 2013, of 100% of all current and future profits of the Companies (*i.e.*, their entire positive net worth, subject to a small, and declining, temporary exclusion). *Id.* ¶ 64. The profits paid to Treasury under the Net Worth Sweep have been enormous. *Id.* ¶ 12. For example, on or about June 30, 2013, Fannie and Freddie collectively paid Treasury the largest dividend in history: $66.3 billion. *Id.* By the end of 2013, Fannie and Freddie will have repaid to Treasury dividends totaling approximately $185 billion, which amounts to nearly all of the approximately $187 billion in capital provided to the Companies by Treasury. Fannie Mae, Third Quarter Report (Form 10-Q) at 2, 11 (Nov. 7, 2013); Freddie Mac, Third Quarter Report (Form 10-Q) at 10 (Nov. 7, 2013). It is anticipated that the Companies will continue to post strong financial results. *See, e.g.*, Compl. ¶¶ 12, 57, 60, 74-75.

On July 9, 2013, Plaintiffs filed their complaint in this action, alleging that the Government's imposition of the Net Worth Sweep effected a Fifth Amendment taking, without

just compensation, of Plaintiffs' vested property rights. On December 9, 2013, the Government filed a motion to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. Defendant's Motion to Dismiss, Doc. No. 20 [hereinafter "Motion to Dismiss"] (filed Dec. 9, 2013). Plaintiffs' opposition to that motion is currently due on January 6, 2014.

ARGUMENT

THE COURT SHOULD SUSPEND BRIEFING RELATING TO THE MOTION TO DISMISS SO THAT PLAINTIFFS MAY CONDUCT DISCOVERY.

In its motion to dismiss, the Government argues both that dismissal is required under RCFC 12(b)(1) because this Court lacks jurisdiction over Plaintiffs' claims and under RCFC 12(b)(6) because Plaintiffs' complaint fails to state a claim on which relief may be granted. With respect to both of these arguments, the Government's motion relies upon factual assertions that go well beyond – and indeed in many respects conflict with – the well-pleaded allegations of Plaintiffs' complaint. With respect to both its arguments on jurisdiction and its arguments on the merits, the Government's reliance on such factual assertions entitles Plaintiffs to conduct discovery.

A. The Legal Standard for Granting Jurisdictional Discovery.

When deciding a motion to dismiss for lack of subject matter jurisdiction under RCFC 12(b)(1), the Court typically assumes all factual allegations in the complaint are true and draws all reasonable inferences in the plaintiff's favor. *Eastern Trans-Waste of Maryland, Inc. v. United States*, 27 Fed. Cl. 146, 147-48 (1992). In this case, the Government's motion to dismiss disputes and goes far beyond the well-pleaded allegations of Plaintiffs' complaint. Because the Government challenges the truth of the jurisdictional facts alleged in the complaint, the Court may consider evidentiary matters outside the pleadings. *Indium Corp. of America v. Semi-*

Alloys, Inc., 781 F.2d 879, 883-84 (Fed. Cir. 1985). But this rule comes with an important caveat: the Court may consider the Government's extra-pleading material *only* if the Court affords Plaintiffs an opportunity to rebut the new evidentiary materials. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) ("[T]he party asserting jurisdiction must be given an opportunity to be heard before dismissal is ordered.").

The Supreme Court has recognized that this right to rebut the extra-pleading materials includes a right to discovery. *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."). So too has this Court. *Clear Creek Cmty. Servs. Dist. v. United States*, 100 Fed. Cl. 78, 81 (Fed. Cl. 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." (quotation marks omitted)). Indeed, the denial of jurisdictional discovery needed to resolve disputed questions of jurisdictional fact may amount to an abuse of discretion. *Reynolds*, 846 F.2d at 748 (vacating a dismissal under Rule 12(b)(1) because the record did not disclose whether the non-moving party had been afforded an opportunity to establish disputed questions of jurisdictional fact); *Patent Rights Prot. Group, LLC v. Video Gaming Techs., Inc.*, 603 F.3d 1364, 1372 (Fed. Cir. 2010) (holding that a district 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) (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);[1] 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER ET AL., FEDERAL PRACTICE & PROCEDURE § 2008.3, at n.5 & accompanying text (3d ed. 2013) (footnote omitted) ("[D]istrict courts may be found to have abused their discretion in denying discovery regarding issues of personal jurisdiction or subject matter jurisdiction.").

B. The Legal Standard for Granting Discovery Pursuant to Rule 56(d).

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 allegations in the complaint, exhibits attached to the complaint, and matters of public record. *United Pacific Ins. Co. v. United States*, 464 F.3d 1325, 1327-28 (Fed. Cir. 2006); *Love Terminal Partners v. United States*, 97 Fed. Cl. 355, 378 (2011). 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. *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);

[1] In *Patents Rights* and *DDB Technologies*, the Federal Circuit applied the similar law of the Ninth Circuit and Fifth Circuit, respectively.

Martin v. United States, 96 Fed. Cl. 627, 629 (2011). In other words, once the motion is converted into a motion for summary judgment, Plaintiffs are entitled to the full protections of RCFC 56. *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 CHARLES ALAN WRIGHT, ARTHUR R. MILLER ET AL., FEDERAL PRACTICE & PROCEDURE § 1366 (3d ed. 2013) ("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."). Indeed, it is reversible error for the Court to consider materials outside the pleadings without notifying the parties and soliciting further submissions on the disputed factual question. *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."); *Selva*, 705 F.2d at 1322.

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 56(d), which "enables a court to deny or stay a motion for summary judgment to permit additional discovery . . . ." *Clear Creek*, 100 Fed. Cl. at 82 (quoting *Theisen Vending Co. v. United States*, 58 Fed. Cl. 194, 197 (2003)). RCFC 56(d) provides as follows regarding the right to discovery:

> 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.

RCFC 56(d). This Court has often recognized that RCFC 56(d) motions "are generally favored and are liberally granted." *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).

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

Although a motion to dismiss should only challenge the legal sufficiency of the complaint, the Government's motion to dismiss amounts to a counter-statement of facts that disputes many of the material allegations of Plaintiffs' complaint. The Government then relies upon its own factual allegations to argue that the Court lacks jurisdiction over the complaint and that the complaint fails to state a claim. Specifically, the Government's counter-statements of fact are relevant to its arguments that (1) Plaintiffs' claims are not ripe, (2) this Court lacks jurisdiction over FHFA, and (3) Plaintiffs have failed to state a claim for a taking.[2] Although Plaintiffs do not concede the materiality of the Government's factual allegations, the Government relies on its factual claims to support its legal arguments. Plaintiffs therefore must be entitled to discovery to refute those factual claims.

[2] In addition to the factual assertions discussed below, the Government also cites and relies upon a comprehensive 73-page "Analysis of Options for Revising the Housing Enterprises' Long-term Structures" that is neither cited to nor relied upon in the complaint. Motion to Dismiss at 5 & n.2 (citing U.S. Government Accountability Office, *Fannie Mae and Freddie Mac: Analysis of Options for Revising the Housing Enterprises' Long-term Structures*, at 12-14 (Sept. 2009), http://www.gao.gov/new.items/d09782.pdf).

1. Plaintiffs Are Entitled to Discovery To Refute the Government's Argument that Plaintiffs' Claims Are Not Ripe.

The Government argues that Plaintiffs' claims for loss of their dividend rights and liquidation preference are not ripe for review. Motion to Dismiss at 39-41. The Government's ripeness argument rests upon factual claims about the future financial health of the Companies and the likely date on which they will exit the conservatorship. First, the Government asserts that Plaintiffs' claim for loss of priority dividend rights is not ripe because the future financial health of the Companies is unknown. The Government claims that:

> [T]he effect of the Third Amendment on plaintiffs' shares cannot be ascertained because it is purely speculative and conjectural to assume that the Enterprises will be profitable over the entire period of the conservatorships. Indeed, if one or both Enterprises were to suffer a setback, the Government would earn nothing under the Third Amendment, notwithstanding the Government's substantial investment of taxpayer dollars and the possibility that the Government will face additional outlays.

Id. at 39-40. Second, the Government argues that "the conservatorships must end before the plaintiffs' claims can ripen," and that it is unknown when the conservatorships will end. *Id.* at 40. Specifically, the Government asserts as follows about when the conservatorship will end:

> [W]hether and when Fannie Mae and/or Freddie Mac will emerge from conservatorships is unknown: additional Government action will – eventually – determine when and how the conservatorships end. Congress may take action, or FHFA may ultimately decide to end the conservatorship or place one or both Enterprises into receivership, leading to a liquidation of assets.

Id.; *see also id.* at 41.

The Government's factual claims that the future profitability of the Companies is "speculative and conjectural," and that it "is unknown" when or how the Companies will emerge from conservatorships, directly contradict the allegations of Plaintiffs' complaint. Plaintiffs have alleged that Fannie and Freddie are expected to enjoy strong profitability for years to come, and that the Government knows as much. Compl. ¶ 12 ("[I]f the Net Worth Sweep is allowed to

stand, it is anticipated that the Companies will be required to make similarly large dividend payments in subsequent quarters"); *id.* ¶ 60 (quoting the Acting Director of FHFA as stating in May 2013 that the Companies "[a]re each beginning to show regular, strong profitability"); *id.* ¶¶ 74-75. Plaintiffs have also alleged that the Government will wind down the Companies before it allows them to exit the conservatorship. *Id.* ¶ 64 (quoting a Treasury statement that the Government will "expedite the wind down of Fannie Mae and Freddie Mac" and "make sure that every dollar of earnings each firm generates is used to benefit taxpayers").

Indeed, the Government's factual claims flatly contradict not only the allegations in Plaintiffs' complaint, but also the Government's own prior public statements. Although the Government now represents to the Court that the future profitability of the Companies is "purely speculative and unknown," it neglects to point out that, as alleged in the Complaint, earlier this year it represented the *exact opposite* state of affairs to the Securities and Exchange Commission and to the public. For example, in March 2013, Fannie, under FHFA's control as conservator, announced in a 10-Q form that "we expect our annual earnings to remain strong over the next few years" and that "*[w]e expect to remain profitable for the foreseeable future*." Compl. ¶ 57 (emphasis added) (quoting Fannie Mae, First Quarter Report (Form 10-Q) at 1, 2 (March 31, 2013)). And in May 2013, the acting director of FHFA told the public that "it is clear [Fannie and Freddie] are each beginning to show *regular, strong profitability*." *Id.* ¶ 60 (emphasis added) (quoting Edward J. DeMarco, Acting Director, FHFA, Remarks as Prepared for Delivery at Federal Reserve Bank of Chicago's 49th Annual Conference on Bank Structure & Competition 2 (May 9, 2013)). Similarly, third-party observers have stated that "dividends paid by Fannie could exceed the $117 billion in senior preferred stock owned by the Treasury by late

[2013] or early 2014, based on the current earnings run rate." *Id.* ¶ 75 (quoting *Fannie's Earnings, Dividend to Complicate GSE Report*, Fitch Ratings (May 10, 2013)).

Moreover, the Government's factual claim that the future profitability of Fannie and Freddie was "speculative and conjectural" is directly contradicted by the accounting treatment of the value of Fannie and Freddie's accrued losses for tax purposes. During the financial crisis, the Companies took a valuation allowance on deferred tax assets to account for their expectation that their future income would not be large enough to take advantage of their prior losses. As Plaintiffs explain in the complaint, in light of expectations for sustained profitability, the Companies changed this view. In the first quarter of 2013 alone, Fannie released $50.6 billion of the Company's deferred tax assets valuation allowance. Compl. ¶ 58 ("The release of this valuation allowance underscores Fannie's financial strength, as it demonstrates Fannie's expectation that it will generate sizable taxable income moving forward."). Similarly, in the third quarter of 2013, Freddie released $23.9 billion in deferred tax assets. Freddie Mac, Third Quarter Report (Form 10-Q) at 50 (Nov. 7, 2013). The release of the valuation allowances contradicts the Government's assertion that the financial health of the Companies is unknown and unknowable and suggests that discovery is likely to reveal the Government anticipated Fannie and Freddie would generate tens of billions in profits.

Discovery is likely to reveal information relevant to resolving the factual dispute between Plaintiffs and the Government about the Government's assessment of the future profitability of the Companies. And it is likely to produce evidence establishing that the Government in fact believed at the time of the Net Worth Sweep, and continues to believe, that Fannie and Freddie will experience sustained profitability. The fact that the Government has made statements in press releases discussing the future profitability of the Companies and has allowed the

Companies to make similar statements to the SEC and to release some of their deferred tax allowances confirms that such evidence almost certainly does exist. The Government is almost certainly in possession of e-mails, strategy documents, internal analyses and projections, and other communications regarding the expected future profitability of Fannie and Freddie (both at the time of the Net Worth Sweep and at present) and also regarding when (if ever), and how, the conservatorship will end. Plaintiffs are entitled to discovery of those documents. This discovery should include the production of all nonprivileged documents, and appropriate depositions, relating to the Government's decision to allow Fannie to disclose in its 10-Q form that it expects "to remain profitable for the foreseeable future." Plaintiffs should also be afforded discovery about the Government's decision to allow the Companies to release billions of dollars of deferred tax asset valuation allowances. All of this information is held only in the hands of the Government and is not available to the public or Plaintiffs.

2. Plaintiffs Are Entitled to Discovery To Refute the Government's Argument that This Court Lacks Jurisdiction over FHFA.

The Government also argues in its motion to dismiss that this Court lacks jurisdiction over FHFA because FHFA is not "the United States" for purposes of the Tucker Act, 28 U.S.C. § 1491. Motion to Dismiss at 13. Whether FHFA is "the United States" or a private party not covered by the Tucker Act demands a highly context-specific inquiry that considers in part the purposes of FHFA's actions. *See Slattery v. United States* (*Slattery I*), 583 F.3d 800, 827 (Fed. Cir. 2009), *reinstated after reh'g en banc*, 635 F.3d 1298 (2011) (en banc); *Auction Co. of America v. FDIC*, 132 F.3d 746, 750 n.1 (D.C. Cir. 1997); *see also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (the same entity may be treated as the United States for certain purposes but not for others).

In support of its argument that FHFA is not the United States, the Government makes factual assertions that contradict the allegations of Plaintiffs' complaint.

a. First, the Government asserts that FHFA entered into the Third Amendment because the Companies failed to generate enough revenue to fund their 10 percent dividend obligation to Treasury. Motion to Dismiss at 9. Specifically, the Government represents to the Court that the Enterprises "found themselves in a death spiral: drawing on the Treasury commitment to pay Treasury its fixed dividend, which, in turn, increased Treasury's total investment and the next quarterly dividend." *Id.* at 9-10. In short, the Government frames its decision to unburden the Enterprises of untold billions of dollars of profits in excess of its dividend obligation to Treasury as an act of generosity, designed to *save* these institutions from their healthy balance sheets. The Government's support for this assertion includes an August 2012 press release from FHFA that Plaintiffs do not cite, quote, or reference in their complaint. *See id.* at 10 n.9 (citing Press Release, FHFA, Statement of FHFA Acting Director Edward J. DeMarco on Changes to Fannie Mae and Freddie Mac Preferred Stock Purchase Agreements (Aug. 17, 2012)). *See also* Motion to Dismiss at 10 (asserting without citation that the Third Amendment "was designed to strengthen the Enterprises, decreasing their funding costs and avoiding draws on the limited backstop provided by Treasury in the Stock Agreements").

The Government's factual claims once again flatly contradict both the allegations in Plaintiffs' complaint and the Government's own prior public statements. Plaintiffs allege that FHFA and Treasury entered into the Third Amendment not to save the Enterprises but instead to harvest their record-setting profits for the benefit of the Federal Government's urgent deficit reduction efforts. Compl. ¶¶ 62-75; *see id.* ¶ 64 (quoting a Treasury press release stating that the purpose of the Third Amendment is to "expedite the wind down of Fannie Mae and Freddie

Mac" and "make sure that every dollar of earnings each firm generates is used to benefit taxpayers"). Along these lines, Plaintiffs also allege that the Government took all the profits of the Companies not during a downturn but at the very moment when they were "experiencing a turnaround in their profitability" and the Government could "expect [them] to remain profitable for the foreseeable future." *Id.* ¶¶ 55, 57. The Government's assertion that the Companies benefited from the Net Worth Sweep effected by the Third Amendment also contradicts the allegation in the complaint that "[t]he Companies received no investment by Treasury *or other meaningful value* in return for the Net Worth Sweep." *Id.* ¶ 11 (emphasis added).[3]

The dispute over the purpose of the Third Amendment is relevant to the fact-bound inquiry of whether FHFA acted as conservator of the Enterprises. Plaintiffs allege that FHFA and Treasury acted not to benefit the Enterprises but instead to seize their record-setting profits to benefit the Federal Government. If the Plaintiffs are correct, then FHFA's actions must be attributed to the United States, even if FHFA formally acted in its capacity as conservator. *See Lebron*, 513 U.S. at 397 (the United States may not "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form"). The Government's motion contradicts Plaintiffs' factual allegations.

[3] Plaintiffs' allegations that the Government entered into the Net Worth Sweep to benefit taxpayers rather than the Companies is also supported by a document made part of the Administrative Record that the Government recently filed in a parallel case in the District Court for the District of Columbia Circuit. *See Fairholme Funds, Inc. et al. v. Federal Housing Finance Agency, et al.*, No. 13-cv-1053 (D.D.C.), Administrative Record of the Department of the Treasury, Doc. No. 23-1, at T3902 (*Treasury's Capital Support for The GSEs: Summary Review and Key Considerations* (PowerPoint) (Aug. 8, 2012)) (stating that the Net Worth Sweep will place "[t]axpayers [ ] in a stronger position as *all* future net income from the GSEs will be paid directly to Treasury"); *see also id*. at T201 (Memo from J. Goldstein, Under Secretary for Domestic Finance, to T. Geithner, Secretary of Treasury (Dec. 20, 2010)) (acknowledging "the Administration's commitment to ensure existing common equity holders will not have access to any positive earnings from the GSEs in the future").

Discovery is likely to disclose information highly relevant to the disputed question of why the Government entered into the Third Amendment. The Government is certain to be in possession of evidence – e-mails and other communications and documents – regarding the decision to enter into the Third Amendment. This evidence also includes depositions of officials involved in the decision to enter into the Third Amendment. Plaintiffs should be afforded the opportunity to serve interrogatories, take depositions, and request the production of those documents relevant to the genuine purpose of the Government in entering into the Third Amendment. This information is solely in the hands of the Government; it is not otherwise publicly available.

b. Second, the Government asserts that FHFA acted independently in entering into the Net Worth Sweep with Treasury, and that Treasury did not coerce or otherwise influence its decision to do so. The Government asserts as fact that "it was FHFA's decision to enter into the funding agreement on behalf of the Enterprises," Motion to Dismiss at 4, and that the Third Amendment was a "voluntary agreement" between Treasury and FHFA, *id.* at 13, 15. The Government tells this Court that "Treasury, alone, could not *and did not* take anything from the plaintiffs, unilaterally or otherwise." *Id.* at 15 (emphasis added).

The Government's factual assertions contradict the allegations in Plaintiffs' complaint that Treasury was a driving force behind the Net Worth Sweep effected by the Third Amendment. *See, e.g.*, Compl. ¶ 10 ("But Treasury was not content with its entitlement to 79.9% of the profits of the Companies going forward . . . . It wanted to cut out the preferred shareholders entirely, and *it wanted all of the profits*." (emphasis added).); *id.* ¶ 63 ("On August 17, 2012, Treasury announced that the Federal Government had made a new deal with itself that expropriated the property interests of the Companies' preferred shareholders, such as Plaintiff

Fairholme and the Berkley plaintiffs."). The Complaint alleges that the Net Worth Sweep was something directed by the United States and Treasury to benefit the United States. *Id.* ¶ 72 ("Nor can the Government achieve the same result . . . by having one of its agencies – Treasury – negotiate a new contract with another of its agencies – FHFA – that expropriates the value of the Preferred Stock in Fannie and Freddie."). The Government's claim that FHFA, acting as conservator of the Companies, desired the Net Worth Sweep is also inconsistent with Plaintiffs' allegation that FHFA secured no benefit whatsoever for Fannie and Freddie from the Net Worth Sweep. *Id.* ¶ 11 ("The Companies received no investment by Treasury or other meaningful value in return for the Net Worth Sweep."). The Government's factual assertion is also contradicted by a document made part of the Administrative Record that was recently filed in a parallel case in the District Court for the District of Columbia and that suggests that Treasury was a driving force behind an earlier major amendment to the Purchase Agreements. *See Fairholme Funds, Inc. et al. v. Federal Housing Finance Agency, et al.*, No. 13-cv-1053 (D.D.C.), Administrative Record of the Department of the Treasury, Doc. No. 23-1, at T3901 (*Treasury's Capital Support for The GSEs: Summary Review and Key Considerations* (PowerPoint) (Aug. 8, 2012)) (discussing the Net Worth Sweep as Treasury's "proposed solution" to the Companies' dividend requirements). At a minimum, the Government's assertion that FHFA made an independent and unilateral decision to grant the Net Worth Sweep to Treasury goes well beyond the factual allegations of Plaintiffs' complaint.

The factual dispute over whether FHFA "voluntarily" and independently entered into the Net Worth Sweep is relevant to the Government's argument that this Court lacks jurisdiction over FHFA. Whether FHFA acted as the United States or in a private capacity will turn on a context-specific inquiry that will include consideration of whether FHFA acted at the direction

and behest of the Treasury Department. If, as Plaintiffs allege, FHFA was simply an agent and arm of Treasury, then this Court certainly has jurisdiction over FHFA.

Discovery is likely to reveal evidence highly relevant to the Government's case, such as communications and documents of FHFA, Treasury, and other Government agencies that concern the agencies' analyses of the financial and other considerations implicated by entering into the Net Worth Sweep. Discovery should include production of all Government documents related to whether Treasury or other Government agencies influenced the decision of FHFA to enter into the Third Amendment. Interrogatories, depositions, and document production are likely to generate evidence that will rebut the Government's factual claims and reveal that Treasury or other Government agencies played a direct causal role in FHFA's decision to agree to the Net Worth Sweep. This information is solely in the hands of the Government and is not otherwise publicly available.

3. Plaintiffs Are Entitled to Discovery To Refute the Government's Argument that Plaintiffs Have Failed To State a Claim for a Taking.

The Government argues that Plaintiffs cannot state a claim for a regulatory taking under the three-part *Penn Central* balancing test. Motion to Dismiss at 33. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). That test requires this Court to consider the (1) nature and character of the governmental action, (2) the extent to which the regulation interferes with investment-backed expectations, and (3) the economic impact of the regulation. *Penn Central*, 438 U.S. at 124.

In support of its argument that FHFA is not the United States, the Government makes factual assertions that contradict the allegations of Plaintiffs' complaint and are highly relevant to this Court's resolution of the *Penn Central* balancing test, and in particular the factors

requiring evaluation of the character of the government action and the investment-backed expectations of the property owner.

a. First, with respect to the inquiry into the nature and character of the government action, the Government's factual assertions that contradict the allegations of the complaint include the assertions, discussed earlier, that (1) the Government entered into the Third Amendment to prevent the Companies from a death spiral, *see* Motion to Dismiss at 9-10; and (2) FHFA entered into the Net Worth Sweep "voluntarily" and not at the behest of Treasury, *see id.* at 4, 13, 15. As Plaintiffs have already discussed, these factual assertions contradict the allegations in the complaint that (1) FHFA and Treasury entered into the Third Amendment not for the benefit of the Enterprises, but instead to expropriate their huge profits for the benefits of the Federal Government's deeply indebted coffers, *see* Compl. ¶¶ 11, 55, 57, 62-75; and (2) that Treasury was the driving force behind the Net Worth Sweep and imposed the Net Worth Sweep on FHFA or otherwise influenced the decision of FHFA to enter into the Net Worth Sweep, *see id.* ¶ 11, 63, 72.

These factual disputes are highly relevant to the fact-bound inquiry into the nature and character of the Government action. Whether the Government acted to protect the interest of the Companies or to convert their record profits to Government use is highly relevant to whether the character of the governmental action weighs for or against the finding that a taking occurred. Indeed, the Government's naked expropriation of property from private persons to benefit the public is precisely the sort of government action that is the central target of the Takings Clause.

The above-mentioned materials and factual assertions of the Government are "matters outside the pleadings" within the meaning of RCFC 12(d) that convert the motion to dismiss into

a motion for summary judgment. *See* RCFC 12(d).[4] And none of the materials and assertions of the Government fall within that "narrowly defined category of materials a court can consider without converting a [ ] 12(b)(6) motion to one for summary judgment." *Love Terminal Partners*, 97 Fed. Cl. at 385; *see id.* (explaining that this "narrow category" includes only "exhibits attached to the complaint, undisputed documents relied upon by the plaintiff, other items appearing in the record of the case, and matters of public record" (quotation marks and citation omitted)).

For example, the Government's argument that it entered into the Net Worth Sweep to save the Companies from a "death spiral" is supported by a self-serving Government press release that is not cited or quoted in Plaintiffs' complaint. *See* Motion to Dismiss at 10 & n.9 (citing Press Release, FHFA, Statement of FHFA Acting Director Edward J. DeMarco on Changes to Fannie Mae and Freddie Mac Preferred Stock Purchase Agreements (Aug. 17, 2012)). This press release is undeniably "outside the pleadings" within the meaning of RCFC 12(d), and this Court cannot rely on it (or any other press release relied upon by the Government but not Plaintiffs) without converting the Government's motion to dismiss into a motion for summary judgment and affording Plaintiffs an opportunity for discovery to refute the disputed

[4] The Government's extra-pleading materials and allegations are relevant to the Government's arguments under both RCFC 12(b)(1) and 12(b)(6). Although the factual allegations made in the motion to dismiss "convert" it into a motion for summary judgment under RCFC 56, *see* RCFC 56(d), motions for lack of subject matter jurisdiction under RCFC 12(b)(1) are typically not "converted" into motions for summary judgment, *see Indium Corp.*, 781 F.2d at 883-84; *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); 5C WRIGHT & MILLER ET AL., FEDERAL PRACTICE & PROCEDURE, § 1366. 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.

factual claims asserted in the press release.[5] *See, e.g.*, *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269, 273 (1st Cir. 1993) (use of "scattered press reports" converted motion to one for summary judgment); *In re Apple iPhone Antitrust Litigation*, 2013 WL 4425720 *9 (N.D. Cal. Aug. 15, 2013) (declining to take judicial notice of press releases referenced in a complaint).

Some of the Government's other factual claims are simply assertions wholly unsupported by citation to any authority whatsoever. For example, the Government's argument that FHFA voluntarily decided to enter into the Net Worth Sweep is an assertion made without citation to anything. *See, e.g.*, Motion to Dismiss at 4, 13, 15.[6] These bald factual assertions surely cannot

[5] Even if Plaintiffs' complaint had cited to another portion of the DeMarco press release – for example, to the statement therein that FHFA agreed to the Net Worth Sweep so that the Government might "fully capture financial benefits for taxpayers" – it would still be inappropriate for the Government or the Court to rely upon a different factual claim in the press release that contradicts the allegations of Plaintiffs' complaint. The Court must either take as true the factual allegations of the complaint or grant discovery, and there is no exception in cases where the defendant can point to statements in *its own self-serving press releases* that contradict the allegations of the complaint. And by citing a press release for one proposition, Plaintiffs do not impliedly agree with all the other statements in that press release.

Accordingly, courts have recognized time and again that even if a document is not a "matter outside the pleading" because it is integral to the complaint or a document of public record, courts cannot rely on that document for purposes of rebutting or disputing a well-pleaded allegation in the complaint. *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (holding that if the plaintiff quotes one portion of a document in his complaint, the district court may rely on other portions of the document "not to prove the truth of [its] contents but only to determine what the documents stated"). *See also, e.g., Kushner v. Beverly Enterprises, Inc.*, 317 F.3d 820, 832 (8th Cir. 2003) (explaining that matters of public record may not be considered where "they are offered for the truth of the matters asserted in them, and [the non-moving party] disputes the facts and inferences that the [moving party] attempt[s] to establish through these documents"); *Gilchrist v. Citty*, 71 Fed. App'x 1, 3 (10th Cir. 2003); *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir.2001); *Jenisio v. Ozark Airlines, Inc. Ret. Plan for Agent & Clerical Employees*, 187 F.3d 970, 972 (8th Cir. 1999); *South Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426-27 (3d Cir. 1999); *Song v. City of Elyria, Ohio*, 985 F.2d 840, 842 (6th Cir. 1993).

[6] Likewise, the Government's assertion, contrary to the allegations in the complaint, that whether Fannie and Freddie will be profitable in the future "is purely speculative and conjectural" is made without any support whatever. *See id.* at 39. Of course, at an abstract level,

sustain the Government's burden at the summary judgment stage. Importantly for purposes of this motion, factual assertions made in a brief, even if unsupported by affidavits or other submissions, convert the motion to dismiss into one for summary judgment because they fail to take as true the well-pleaded allegations in the complaint. The Court must take as true all the allegations in the complaint and construe the allegations in the light most favorable to the plaintiffs, and a defendant cannot avoid this requirement simply by placing the factual assertions in the body of the brief rather than in an affidavit or other document attached to the brief. *See, e.g.*, *Kostrzewa v. City of Troy*, 247 F.3d 633, 643-44 (6th Cir. 2001) (reversing order granting Rule 12(b)(6) motion because the district court relied upon defendants' factual assertions made in the body of their motion to dismiss but did not convert the motion and afford plaintiffs discovery); *Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000) (a district court must convert a motion to dismiss for failure to state a claim into a motion for summary judgment if the court "relies on factual allegations contained in [the defendant's] legal briefs or memoranda"); *Fonte v. Board of Managers of Cont'l Towers Condo.*, 848 F.2d 24, 25 (2d Cir. 1988) ("Factual allegations contained in legal briefs or memoranda are also treated as matters outside the pleading for purposes of Rule 12(b). Thus, it would [ ] have been error for the court to consider the factual allegations contained in the plaintiffs' memorandum of law without converting the motion to one for summary judgment."); *see also* Fed. R. Evid. 201(b) (a court may not take judicial notice of a fact that is "subject to reasonable dispute"); *United Steelworkers of America, AFL-CIO v. American Int'l Aluminum Corp.*, 334 F.2d 147, 149 (5th Cir. 1964) (explaining that a motion to dismiss is converted into a motion for summary judgment if it incorporates by

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the future profitability of the Companies may be speculative. But the Government is likely to have grounds to believe that it is highly likely and not merely speculative that the Companies will be profitable, particularly where it has taken action that has resulted in billions of dollars going to the Government.

reference factual material outside the complaint); *Judge v. Johnston Warren Lines, Ltd.*, 205 F. Supp. 700, 702 (D. Mass 1962) (a court's consideration of counsel's statements at oral argument converts a motion to dismiss into a motion for summary judgment).

As Plaintiffs discussed above in the context of the jurisdictional arguments, document and deposition discovery is likely to disclose evidence highly relevant to the disputed factual issues about the purpose and driving force behind the Net Worth Sweep. 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 and other communications of Government officials relating to the Net Worth Sweep. Such discovery might also include targeted depositions of such officials with knowledge regarding the Government's decision to enter into the Third Amendment.

b. Second, with respect to the inquiry into the investment-backed expectations of the property owner, the Government makes the factual assertion in its motion to dismiss that the Companies were insolvent in 2008 and that the Plaintiffs have conceded their insolvency. The Government then argues that because the Companies were insolvent, Plaintiffs had no investment-backed expectations to any profits. Motion to Dismiss at 36 ("Moreover, in this case, because the Enterprises were insolvent in 2008, as plaintiffs acknowledge, plaintiffs could not have reasonably expected any return on their investment.").

Even if the Government were correct that the Companies were "insolvent" in the narrow sense that they were "bankrupt" or "[u]nable to meet debts or discharge liabilities" at a given point in time, THE AMERICAN HERITAGE COLLEGE DICTIONARY 665 (3d ed. 1985), this "fact" would not be dispositive of the inquiry into Plaintiffs' investment-backed expectations. Whether a property owner has reasonable investment-backed expectations is a question of fact that

requires the Court to consider all the relevant circumstances. *See Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1378 (Fed. Cir. 2008). Companies often emerge from bankruptcy or insolvency to become profitable and successful enterprises, so insolvency at one point in time cannot *per se* defeat all investment-backed expectations. Plaintiffs should be entitled to discovery to refute the Government's factual allegations about insolvency and the absence of investment-backed expectations. Indeed, in July 2008, shortly before the Government placed the Companies into conservatorship, Treasury Secretary Henry Paulson, Federal Reserve Chairman Ben Bernanke, and the Office of Federal Housing Enterprise Oversight all stated that both Fannie and Freddie were "adequately capitalized." Stephen Labaton, *Washington Struggles To Avoid a Federal Bailout of Fannie Mae and Freddie Mac*, N.Y. TIMES (July 10, 2008), *available at* http://www.nytimes.com/2008/07/10/business/worldbusiness/10iht-econ.4.14403586.html?pagewanted=all&_r=0. And Plaintiffs have already pointed to substantial evidence – including numerous statements and actions by the Government – demonstrating that the Government recognized the potential that the Companies would return to profitability and private control. These statements and actions suggest that the Government itself believed that private investors had reasonable expectations in the future profitability of the Companies. For example, as Plaintiffs allege in their complaint, the Government represented that the conservatorship was temporary and that the Companies would be returned to private control. *Id.* ¶ 4 ("FHFA vowed at the time [it placed the Companies in conservatorship] that the conservatorship was temporary; it was to be terminated as soon as the Companies were stabilized and could be returned to normal business operations."). FHFA represented as much when it declared that "Upon the Director's determination that the Conservator's plan to restore the [Companies] to a safe and solvent condition has been

completed successfully, the Director will issue an order terminating the conservatorship." *Id.* ¶ 43 (alteration in original) (quoting FHFA, Fact Sheet, *Questions and Answers on Conservatorship*). The fact that the Government allowed the Companies' pre-existing capital structure and stockholders to remain in place also suggests that the Government and Companies themselves had a reasonable expectation that the Companies would be profitable again, and that private investors would share in these profits. *See id.* ¶ 4, 43; *see also, e.g.*, *Fairholme Funds*, No. 13-cv-1053, Administrative Record, Doc. No. 23-1, at T0005 (Action Memorandum for Secretary Paulson (Sept. 7, 2008)) ("Conservatorship preserves the status and claims of the preferred and common shareholders."); Doc. No. 23-4, at T0181-88 (Action Memorandum for Secretary Geithner (Dec. 24, 2009)) (same).

Moreover, the Government is incorrect to claim that Plaintiffs have conceded that the Companies were insolvent in 2008. To be sure, the Companies were in poor financial health in 2008. Compl. at ¶ 4 (in 2008 "the Companies faced a steep reduction in the book values of their assets and a loss of investor confidence in the mortgage market broadly"). But Plaintiffs never allege insolvency, and the Government's assertion in its motion to dismiss that the Companies were insolvent and offered investors no expectations of future profits contradict the allegations in the complaint that the conservatorship was to be temporary and that the Companies were to be returned to private control. *Id.* ¶¶ 4, 43.

Document and deposition discovery is likely to disclose evidence highly relevant to disputed factual issues about the Companies' solvency and the reasonableness of expectations about their future profitability. This discovery should include the production of all nonprivileged documents, and appropriate depositions, relating to the financial condition of Fannie and Freddie at the time they were placed into conservatorship, and about the Government's own expectations

about when and how Fannie and Freddie would return to normal business operations. The discovery should also include the production of documents and depositions related to why the Government allowed the Companies' pre-existing capital structure and stockholders to remain in place, and whether this decision was made based partly on the expectation that the Companies would be profitable again the future. These documents are solely in the possession of the Government and are not otherwise publicly available.

D. Plaintiffs Have Carried Their Burden To Establish that They Are Entitled 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." *Smith v. United States*, 495 Fed. App'x 44, 49 (Fed. Cir. 2012); *see also Nuance Commc'ns, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1235 (Fed. Cir. 2010) (explaining that under Ninth Circuit law, "discovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary" (citation omitted)). A party is entitled to jurisdictional discovery so long as it can establish that the evidence sought is "relevant" to the disputed question of jurisdictional fact. *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993).

A similar standard governs discovery under RCFC 56(d). The Federal Circuit has not elaborated in great detail the test this Court should apply to motions for discovery under Rule 56(d), but it 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." *Simmons Oil Corp. v. Tesoro*

Petroleum Corp., 86 F.3d 1138, 1144 (Fed. Cir.1996) (alteration in original) (quoting *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1443 (5th Cir.1993)). Yet the Federal Circuit has 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." *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984). 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 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.

Theisen Vending Co., Inc. v. United States, 58 Fed. Cl. 194, 198 (Fed. Cl. 2003); *see also Clear Creek*, 100 Fed. Cl. at 83; *Love Terminal*, 97 Fed. Cl. at 400.

Plaintiffs have satisfied the "relevancy" standard for jurisdictional discovery. *See Burnside-Ott*, 985 F.2d at 1582. And they have satisfied their burden under RCFC 56(d) to state the materials they hope to obtain through discovery and how those materials will be helpful in opposing the Government's motion. *See Simmons Oil*, 86 F.3d at 1144. Assuming without conceding that Plaintiffs must comply with the five-part test of *Theisen*, Plaintiffs have satisfied that test too. Both this motion and the attached Declaration of Vincent J. Colatriano in Support of Plaintiffs' Motion for a Continuance to Permit Discovery explain why Plaintiffs need discovery to respond to the motion to dismiss and have satisfied all applicable requirements for discovery.

1. **Plaintiffs have specified the particular factual discovery being sought.** Both this motion and the Declaration of Vincent J. Colatriano explain in detail the factual discovery that

Plaintiffs seek. Of course, Plaintiffs are not required at this stage to provide a comprehensive discovery plan. But the Plaintiffs have identified the specific discovery sought, including discovery of information concerning such matters as: (1) internal projections and evaluations of the expected growth and profitability of the Companies, (2) internal analyses and projections concerning how long the conservatorship will last and when and how it will end, and (3) the decisions to impose the Net Worth Sweep and the role that Treasury and/or other Government agencies or officials played in FHFA's entry into the Third Amendment.

2. **Discovery is reasonably likely to engender a genuine issue of material fact.** Plaintiffs discharged this burden in the previous section of this motion, where they 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 Plaintiffs' claims. To the extent the Government's motion depends upon the factual assertions discussed above, discovery is likely to produce information that supports the allegations in Plaintiffs' complaint and disputes those in the Government's motion.

3. **There are discoverable facts that are sufficient to raise a genuine and material issue.** The Government is almost certainly in possession of non-public information concerning each of the factual disputes identified in this motion. It is a near-absolute certainty – not mere speculation – to posit that Treasury, FHFA, and perhaps other Government agencies have conducted financial analyses about the current and projected financial condition and earnings of Fannie and Freddie. Indeed, the fact that FHFA has allowed the Companies to recognize billions of dollars' worth of their deferred tax assets means that they necessarily engaged in projections about the expected profitability of the companies and determined that the Companies would be highly profitable. It is also a near-certainty that the Government has formulated nonpublic long-

term strategic plans for Fannie and Freddie, and it is highly likely as well that there exist strategy documents and communications between and among Treasury, FHFA, and other Government agencies and officials that will disclose what role Treasury played in FHFA's "decision" to enter into the Third Amendment. It is certain too that the Government is in possession of e-mails and other nonpublic documents concerning all of the topics discussed in this motion, including the Government's genuine purpose in entering into the Third Amendment and the Government's economic projections for Fannie and Freddie.

4. **Plaintiffs have not yet had an opportunity to obtain these facts.** Plaintiffs have had no prior opportunity to obtain the facts they seek. As discussed in the Declaration of Vincent J. Colatriano, Plaintiffs have expended substantial effort to comb through publicly available materials relating to the factual matters discussed above (including but not limited to the Administrative Record that was recently filed in a parallel case in the District Court for the District of Columbia), but those sources do not contain the information that Plaintiffs seek.

5. **There are good grounds for Plaintiffs' failure to discover the essential nonpublic facts sooner – namely, that Plaintiffs have had no prior opportunity to conduct discovery.** As noted, discovery has not yet begun, and the required facts are not publicly available. There was no way for Plaintiffs to obtain the facts sooner. This case therefore presents an even stronger case for discovery than in *Jade Trading, LLC v. United States*, 60 Fed. Cl. 558 (2004), where this Court granted a motion under RCFC 56(d)[7] 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." *Id.* at 566; *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

[7] At the time of the decision in *Jade Trading*, RCFC 56(d) was codified as RCFC 56(f).

Defendant could not present facts essential to its opposition to Plaintiffs' partial summary judgment motions at this juncture.").

E. With Respect to the Motion to Dismiss Under RCFC 12(b)(1), the Court Should, At a Minimum, Delay Resolution of the Motion Until the Completion of Full Discovery Because the Jurisdictional and Merits Issues Are Intertwined.

This Court should also grant the Plaintiffs 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, the Government's factual claims about jurisdiction are intertwined with its factual claims about the merits. For example, as discussed earlier, the purpose for which FHFA and Treasury entered into the Net Worth Sweep implicates both the Government's jurisdictional argument that FHFA is not "the United States" for purposes of the Tucker Act and the Government's merits argument that Plaintiffs cannot satisfy the *Penn Central* balancing test.

When the jurisdictional and merits arguments are intertwined, this Court should defer decision on the motion to dismiss for lack of jurisdiction until the completion of full discovery, and only then decide both the jurisdictional and merits arguments.[8] 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 reserving the jurisdictional issues until a hearing on the merits. By the same token, [ ], there is no objection

[8] The one exception to the rule that a motion to dismiss under Rule 12(b)(1) cannot be converted into a motion for summary judgment applies where the jurisdictional question is intertwined with the merits, in which case the Court may resolve the issue under Rule 56. *Sizova v. Nat. Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002); *Avedis v. Herman*, 25 F. Supp. 2d 256, 262 (S.D.N.Y. 1998) *aff'd*, 8 F. App'x 69 (2d Cir. 2001) (citing cases from the Fourth, Ninth, and Eleventh Circuits); 5C WRIGHT & MILLER ET AL., FEDERAL PRACTICE & PROCEDURE, § 1366 ("Although conversion of a Rule 12(b)(1) motion is usually inappropriate, there is one exception to this general rule. When the jurisdictional question is intertwined with the merits of the case, as when subject matter jurisdiction depends upon the same statute as the substantive claim, consideration of the matter under summary judgment standards is acceptable.").

> to use, in appropriate cases, of summary judgment procedure to determine whether there is a genuine issue of material fact.

Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186, 203 n.19 (1974); *see also Land v. Dollar*, 330 U.S. 731, 735, 738-39 (1947). 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. *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).[9]

CONCLUSION

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

[9] *See also, e.g., Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324-25 & n.2 (10th Cir. 2002); *Valentin v. Hospital Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001) (collecting cases); *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 734 (11th Cir. 1982); *Williamson v. Tucker*, 645 F.2d 404, 412-15 (5th Cir. 1981).

Date: December 20, 2013

Respectfully submitted,

s/ Charles J. Cooper

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EXHIBIT A

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

DECLARATION OF VINCENT J. COLATRIANO IN SUPPORT OF PLAINTIFFS' MOTION FOR A CONTINUANCE TO PERMIT DISCOVERY

Pursuant to 28 U.S.C. § 1746, I, Vincent J. Colatriano, declare and state as follows:

1. I am an attorney for the Plaintiffs in this action and make this declaration supporting Plaintiffs' motion for a continuance of the briefing schedule relating to the Government's motion to dismiss under RCFC 12(b)(1) and 12(b)(6) so that Plaintiffs may undertake discovery needed to present facts essential to the opposition of that motion.

2. Plaintiffs Fairholme Funds, Inc., et al. are holders of non-cumulative preferred stock issued by the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie") (collectively, the "Companies" or the "Enterprises"). The Defendant is the United States, including its agents the Department of Treasury and the Federal Housing Finance Administration ("FHFA").

3. The above-captioned matter was commenced on July 9, 2013, when Plaintiffs filed their complaint in this action.

4. The complaint alleges that the Government committed an uncompensated taking of Plaintiffs' property when it entered into the "Net Worth Sweep," implemented by a "Third Amendment" to the Government's stock documents in Fannie and Freddie.

5. On December 9, 2013, the Government filed a motion to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. Plaintiffs' opposition to that motion is currently due on January 6, 2014.

6. The Government argues in its motion to dismiss that this Court lacks subject matter jurisdiction over the Complaint because Plaintiffs' claims are not ripe. The Government asserts as a matter of fact that the claims are not ripe in part because it is uncertain whether the Companies will be profitable in the future or when (and how) they will exit the conservatorships. These factual assertions are contrary to Plaintiffs' allegations in the complaint that the Government expects the companies to be extremely profitable for the foreseeable future and that the Government plans to wind down the business of the Companies.

7. The Government also argues in its motion to dismiss that this Court lacks subject matter jurisdiction over the Complaint because FHFA acted as a private party and not the United States for purposes of the Tucker Act. The Government asserts in its motion several factual claims that are relevant to this argument. First, the Government asserts that FHFA and Treasury entered into the Net Worth Sweep to prevent the Companies from entering a so-called "death spiral" of debt. Second, the Government asserts that FHFA independently decided to voluntarily enter into the Third Amendment. These assertions are contrary to Plaintiffs' allegations in the complaint that the Third Amendment was enacted to benefit taxpayers rather than the Companies, and that Treasury imposed the Net Worth Sweep on FHFA or otherwise influenced the decision of FHFA to enter into the Net Worth Sweep.

8. The Government also argues in its motion to dismiss that Plaintiffs have failed to state a claim for a regulatory taking under the *Penn Central* balancing test. The Government asserts in its motion several factual claims that are relevant to this argument, including that FHFA and Treasury entered into the Net Worth Sweep to avoid a so-called "death spiral," and that FHFA voluntarily entered into the Third Amendment. These assertions are contrary to Plaintiffs' allegations in the complaint that the Third Amendment was enacted to benefit taxpayers rather than the Companies, and that Treasury imposed the Net Worth Sweep on FHFA or otherwise influenced the decision of FHFA to enter into the Net Worth Sweep. The Government also asserts that the Companies were insolvent in 2008 and that their insolvency defeats any investment-backed expectations of investors. These assertions are contrary to Plaintiffs' emphasis in the complaint that the Government initially represented that the conservatorships would be temporary and that the Companies would be returned to private control.

9. Plaintiffs cannot adequately respond to these factual allegations of the Government without the opportunity to conduct discovery. Discovery is essential in this case to establish (a) the Government's expectations (both today and at the time of the Net Worth Sweep) about the future profitability of the Companies and when (or how) they will exit the conservatorship; (b) the purpose of the Net Worth Sweep, and whether it was enacted to benefit the federal fisc or the Companies; (c) whether FHFA voluntarily entered into the Third Amendment or whether Treasury imposed the Net Worth Sweep on FHFA or otherwise influenced the decision of FHFA to enter into the Net Worth Sweep; and (d) whether investors might have had reasonable investment-backed expectations in the Companies' profitability.

10. Plaintiffs are able to identify the particular factual discovery they seek. In particular, Plaintiffs seek the following information:

a. With regard to the Government's expectations about the future profitability of the Companies and how long they will remain in the conservatorship, Plaintiffs seek discovery of e-mails, strategy documents, internal analyses and projections, and other communications regarding the expected future profitability of Fannie and Freddie (both at the time of the Net Worth Sweep and at present) and also regarding when (if ever), and how, the conservatorships will end. This discovery should include, for example, the production of all nonprivileged documents, and appropriate depositions, relating to the Government's belief that Fannie and Freddie will remain profitable for the foreseeable future. Plaintiffs also need discovery about the Government's decision to allow the Companies to recognize billions of dollars of the Companies' deferred tax asset valuation allowances. This discovery should include documents in the possession of Treasury, FHFA, and/or any other relevant Government agencies.

b. With regard to the purpose of the Net Worth Sweep, and whether it was enacted to benefit taxpayers or the Companies, Plaintiffs seek discovery of evidence – including e-mails and other communications and documents – regarding the decision to enter into the Third Amendment. Plaintiffs should also be allowed depositions of officials involved in the decision to enter into the Third Amendment. Plaintiffs also require the opportunity to serve interrogatories, take depositions, and request the production of those documents relevant to the genuine purpose of the Government in entering into the Third Amendment. This discovery should include documents in the possession of Treasury, FHFA, and/or any other relevant Government agencies.

c. With regard to whether FHFA voluntarily entered into the Third Amendment, Plaintiffs seek discovery of communications and documents of FHFA, Treasury, and other Government agencies that concern the agencies' analyses of the financial and other considerations implicated by entering into the Net Worth Sweep. Discovery should include production of all Government documents related to whether Treasury or other Government agencies influenced the decision of FHFA to enter into the Third Amendment. Interrogatories, depositions, and document productions are likely, in Plaintiffs' view, to yield information that would rebut the Government's factual claims and reveal that Treasury or other Government agencies played a causal role in FHFA's decision to agree to the Net Worth Sweep.

d. With regard to whether the Companies were insolvent in 2008 or whether shareholders in the Companies would have had reasonable investment-backed expectations about the Companies' profitability and private control, Plaintiffs seek discovery of all nonprivileged documents, and appropriate depositions, relating to the financial condition of Fannie and Freddie at the time they were placed into conservatorship, and about the Government's own expectations about when and how Fannie and Freddie would return to normal business operations. The discovery should also include the production of documents and depositions related to why the Government allowed the Companies' pre-existing capital structure and stockholders to remain in place, and whether this decision was based in part on the expectation that the Companies would be profitable again in the future.

11. The results of the discovery discussed above are reasonably expected to engender a genuine issue of material fact concerning the Government's motion to dismiss under Rules 12(b)(1) and 12(b)(6). The Government's factual claims about the profitability of the Companies, the purpose of the Net Worth Sweep, whether FHFA voluntarily entered into the

Third Amendment, and the solvency of the Companies, are all relevant to the Government's arguments in its motion to dismiss. It is highly likely that the Government is in possession of e-mails and other nonpublic documents concerning all of the topics discussed in this declaration, including the Government's genuine purpose in entering into the Third Amendment and the Government's economic projections for Fannie and Freddie.

a. According to the Government, whether the Companies will be profitable in the future and remain in the conservatorship is a question of fact that bears upon the ripeness of Plaintiffs' claims. But the premise of the Government's argument falls if there is evidence that the Government expects the Companies to be very profitable for the foreseeable future.

b. Whether the purpose of the Net Worth Sweep was to save the Companies or raid their assets for the federal fisc, and whether FHFA voluntarily entered into the Net Worth Sweep, are questions potentially relevant to the fact-bound inquiries of whether FHFA is "the United States" for purposes of the Tucker Act or acted as a private party, as well as whether Plaintiffs can state a taking under the fact-intensive *Penn Central* test and its inquiry into the nature and character of the governmental action.

c. Whether the Companies were solvent in 2008 and whether investors could have had reasonable investment-backed expectations in their future profitability are factual questions relevant to the *Penn Central* inquiry into the reasonable investment-backed expectations of the property owner.

12. There is a strong factual predicate for the belief that there are discoverable facts in the possession of the Government that are sufficient to raise a genuine issue of material fact about each of the issues identified above.

a. It is a near-absolute certainty that Treasury, FHFA, and perhaps other Government agencies have conducted financial analyses about the current and projected financial condition and earnings of Fannie and Freddie, and about how long the conservatorships will last and how they will end. Indeed, the fact that FHFA allowed the Companies to recognize billions of dollars' worth of the Companies' deferred tax assets means that they necessarily engaged in projections about the expected profitability of the companies and determined that the Companies would be highly profitable. The FHFA, as conservator for the Companies, has also made or permitted statements, including in filings with the Securities and Exchange Commission, concerning the future profitability of the Companies. The fact that the Government has made these public pronouncements about the Companies' finances strongly suggests that the Government has information regarding their future profitability and how long they will remain in conservatorship. It is also a near-certainty that the Government has formulated nonpublic long-term strategic plans for Fannie and Freddie.

b. The Government is also almost certain to have engaged in communications and created documents regarding the purposes of the Net Worth Sweep. The Government (including Treasury and FHFA) will likely have engaged in internal communications about the Third Amendment and the purposes of the Net Worth Sweep. Interrogatories, document discovery, and depositions are likely to produce discoverable material related to this disputed question of fact. Communications between Treasury and FHFA, and within those and other governmental agencies, are likely to disclose whether the parties expected any benefits to accrue to FHFA.

c. Discovery is also almost certain to reveal information about whether FHFA voluntarily entered into the Net Worth Sweep or did so only at the direction of Treasury. It is highly likely that there exist strategy documents and communications between and among

Treasury, FHFA, and other Government agencies and officials that will disclose what role Treasury played in FHFA's "decision" to enter into the Third Amendment. Communications between Treasury and FHFA, and within those and other governmental agencies, are likely to discuss the roles of those two organizations in deciding whether FHFA should enter into the Third Amendment, and will disclose whether FHFA voluntarily entered into the Third Amendment.

d. Discovery is also almost certain to reveal information relevant to the solvency of the companies in 2008 and whether investors would have had reasonable investment-backed expectations about their profitability. It is highly likely that FHFA, Treasury, and/or other Government agencies or officials are in possession of projections, strategy documents, and communications about the solvency of the companies in 2008 and about the future expected profitability of the companies.

13. Plaintiffs have made adequate previous attempts to obtain the relevant facts. But the relevant documents and information are solely in the hands of the Government and are not publicly available. Plaintiffs expended substantial time and energy combing through publicly available documents (including but not limited to press statements and financial filings with the Securities and Exchange Commission) to identify any relevant publicly available information. Plaintiffs have been unable to identify any third parties that would have the information that Plaintiffs seek and who would be able to share that information with Plaintiffs. Plaintiffs have also reviewed the Administrative Record that was recently filed in a parallel case in the District Court for the District of Columbia, but that Administrative Record has not disclosed sufficient information to address the factual allegations made in the Government's motion to dismiss in this case. *See* Administrative Record by Department of Treasury, *Fairholme Funds, Inc. et al. v.*

Federal Housing Finance Agency, et al., Doc. No. 23 (D.D.C. Dec. 17, 2013) (No. 13-cv-1053). But at least one document from the Administrative Record suggests that the discovery is likely to reveal information that supports Plaintiffs' allegations that Treasury and FHFA entered into the Net Worth Sweep to benefit taxpayers and that Treasury had influence over FHFA's decision to enter into the Net Worth Sweep. *Id.* at T3901-02 (*Treasury's Capital Support for The GSEs: Summary Review and Key Considerations* (PowerPoint) (Aug. 8, 2012)) (discussing the Net Worth Sweep as Treasury's "proposed solution" to the Companies' dividend requirements and stating that the Net Worth Sweep will place "[t]axpayers [ ] in a stronger position as *all* future net income from the GSEs will be paid directly to Treasury") (attached as Exhibit 1 to this declaration).

14. There are good grounds for Plaintiffs' failure to have discovered the essential facts sooner. Plaintiffs have had no prior opportunity for discovery and therefore cannot be expected to have obtained the relevant documents that are solely in the hands of the Government.

15. In view of the lack of any factual development in this litigation, Plaintiffs need discovery to adequately respond to the factual claims in the Government's motion to dismiss.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct. Executed on December 20, 2013, in Washington, D.C.

Vincent J. Colatriano

EXHIBIT 1

Treasury's Capital Support For The GSEs
Summary Review and Key Considerations

August 8, 2012

TREASURY-3896

Discussion Agenda

The financial support agreements that Treasury has in place with Fannie Mae and Freddie Mac (the GSEs) are unsustainable and need to be modified.

1. Review of Treasury's capital support agreements with Fannie Mae and Freddie Mac (the GSEs)
2. Overview of why Treasury needs to modify the current capital support agreements
3. Proposed modification of the agreements
4. Financial impact associated with the proposed modification
   - Taxpayers
   - The GSEs
   - The financial markets
5. Key considerations before moving forward with a modification

Treasury's Support of the GSEs

Sensitive / Pre-Decisional

- In 2008, Fannie Mae and Freddie Mac (the GSEs) were put into conservatorship

- Contemporaneous with the conservatorship, Treasury agreed to support the GSEs by providing each GSE with a $100B stand by capital commitment, the Preferred Stock Purchase Agreements (PSPAs)
  - Treasury agreed to buy *preferred stock* from each GSE any time their liabilities exceeded their assets (i.e. Treasury "backstopped" the GSE solvency so they could continue to operate)
  - Treasury earns a *10% dividend* on the preferred stock it purchases from the GSEs

- In 2009 the PSPAs were modified. The modifications allowed Treasury to provide *unlimited capital support to the GSEs through year end 2012*
  - At year end 2012, the amount of future support for the GSEs is capped ($125B to Fannie Mae, $149B to Freddie Mac)

- Treasury's support has been meaningful due to credit losses at the GSEs and the need to fund the dividends the GSEs are required to pay Treasury
  - Preferred investments to date have totaled $189B ($117B to Fannie Mae, $72B to Freddie Mac)
  - $163B has be used to fund operating losses, $26B to fund dividend payments to Treasury

TREASURY-3898

Need to Change The Preferred Stock Dividend Rate

- Treasury is owed a 10% dividend on the $189B of preferred stock it has invested in the GSEs
- The GSEs need to generate *~$19B* in yearly income in order to pay the 10% dividend *without drawing on Treasury's backstop line*
- If the enterprises are unable to generate the income necessary to meet the 10% dividend, they will draw on the PSPAs to fund dividend payments back to Treasury (i.e. *circular flows*)
- Longer term, the GSEs will not generate enough income to meet their dividend requirement *due to the enterprises being wound down*
- Absent a change, this will lead to the GSE's insolvency as they will exhaust the finite amount of capital support remaining after 2012 (see next slide for details)
- Investors are focused on this issue given the long life of the GSEs guarantees (i.e. the core function of the GSEs is to guarantee 30 year mortgage backed securities)

Illustrative Example: Fannie Mae Financial Projections

($ billions)	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Net Worth: Start of the Year	0	2	0	0	0	0	0	0	0	0	0	0	0
Projected Income	14	10	8	6	5	4	4	4	4	4	4	4	4
Dividends Paid - 10% Rate	-12	-12	-12	-12	-13	-13	-14	-15	-16	-18	-19	-21	-22
Net Worth: Year End	2	0	-3	-6	-8	-9	-10	-11	-12	-14	-15	-17	-18
Required Capital From Treasury	0	0	3	6	8	9	10	11	12	14	15	17	18
Remaining PSPA Capacity	**125**	**125**	**122**	**115**	**107**	**98**	**87**	**76**	**64**	**50**	**35**	**18**	**0**

Note: Net Worth is defined as Assets *less* Liabilities on a GAAP basis
Source: FHFA and Grant Thornton Projections, Treasury staff estimates

- As the financial projections above highlight, Fannie Mae *will be insolvent* in 2024 due to the need to pay Treasury the fixed 10% preferred stock dividend
- This will be the case despite expectations for future profitability

TREASURY-3900

Proposed Solution: Modify the Dividend Requirement

- Modify the GSEs' obligation to pay dividends to Treasury:
  - Replace the current fixed 10% dividend with a "net worth sweep" dividend
    - If quarterly net worth is positive (i.e. assets are greater than liabilities), all of that value will be paid to Treasury as a dividend
    - If quarterly net worth is negative , Treasury will make a capital injection to keep the GSE solvent
- The above will result in Treasury *receiving all future income generated by the GSEs*
- The proposal would also:
  - Eliminate the circularity of Treasury funding dividends paid to Treasury
  - Ensure that future capital draws are only used to protect the solvency of the GSEs

Economic and Market Impact of the Proposed Modifications

- Taxpayers are in a stronger position as *all* future net income from the GSEs will be paid directly to Treasury
- The GSEs will be more financially sound which should lower their funding cost and improve future profitability
- GSE based mortgage rates should benefit as investors will likely be more confident in purchasing GSE mortgaged backed securities

TREASURY-3902

Potential Criticisms

- Treasury is "bailing-out" the GSEs again, and did not obtain any help from the GSEs for struggling homeowners
- The dividend modification will allow the GSEs to exist longer in their current form
- Does not demonstrate meaningful progress on housing finance reform