IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ANTHONY PISZEL,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	2015-5100
	)	
UNITED STATES,	)	
	)	
Defendant-Appellee.	)	

DEFEENDANT-APPELLEE'S RESPONSE IN OPPOSITION
TO MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Pursuant to Rule 27(a)(3)(A) of the Federal Rules of Appellate Procedure, defendant-appellant, the United States, respectfully submits this response in opposition to the motion filed on August 25, 2015 by Louis Rafter, Josephine and Stephen Rattien, and Pershing Square Capital Management, L.P. (the *Rafter* plaintiffs), for leave to file an *amicus curiae* brief in this appeal.

In this action, Anthony Piszel, former Chief Financial Officer of the Federal Home Loan Mortgage Corporation (Freddie Mac), alleges that the United States, purportedly acting through the Federal Housing Finance Agency (FHFA), effected a Fifth Amendment taking of certain "golden parachute" severance benefits that were one component of his executive employment contract with Freddie Mac. The *Rafter* plaintiffs are parties to a case, *Louise Rafter, et al. v. United States*, No. 14-740C (Fed. Cl.), that is one of many closely-related actions brought in the United

States Court of Federal Claims by shareholders of Freddie Mac and the Federal National Mortgage Association (Fannie Mae) alleging a taking based on the "net worth sweep" provisions of the stock agreements through which the Government bailed out the companies. The *Rafter* plaintiffs assert an interest in this appeal "because its outcome may impact their pending lawsuit." Rafter Mot. 2. More specifically, the *Rafter* plaintiffs argue that, in *Piszel*, the Court of Federal Claims improperly relied upon *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014),[1] a case which, the *Rafter* plaintiffs contend, was incorrectly decided. *Id.* at 3. They claim that their participation is "desirable" to help prevent the Court from straying into issues "that need not be decided in this case." *Id.* at 2. For the reasons addressed below, the motion for leave should be denied.

ARGUMENT

I. Whether To Permit An *Amicus* Brief Is A Matter Left To The Court's Discretion

The *Rafter* plaintiffs do not have a right to submit an amicus curiae brief. This Court has the discretion to grant or deny a request to appear as *amici*

[1] The trial court's reliance on *Perry* consists of a short quote from the decision as part of a string cite, *Piszel v. United States*, 121 Fed. Cl. 793, 803 (2015), and three instances where the decision is identified in string cites without any quotes or parenthetical statements of relevance. *Id.* at 804, 806. This is insufficient to establish that the *Rafter* plaintiffs have an interest – direct or otherwise – in the *Piszel* appeal.

curiae. Fed R. App. P. 29(a); *see also In Re Opprecht*, 868 F.2d 1264, 1266 (Fed. Cir. 1989) ("The grant or denial of a request to intervene or to appear as *amicus* is discretionary within the court."). In this case, the Court should exercise its discretion to reject the *Rafter* plaintiffs' request to file an *amicus curiae* brief because their interest in this appeal is as a litigant – not as a "friend of the court" – and the proposed brief does not provide any useful guidance to the Court. *See* Fed. R. App. P. 29(b).

II. The *Rafter* Plaintiffs' Motion For Leave To File An *Amicus Curiae* Brief Should Be Denied

The *Rafter* plaintiffs seek to submit a partisan *amicus* brief in support of Mr. Piszel's position. The Court should reject such an advocatory, rather than advisory, filing because the *Rafter* plaintiffs' interest squarely aligns with that of Mr. Piszel and, to the extent relevant, it is already being addressed by Mr. Piszel's counsel.

The term "*amicus curiae*" traditionally describes one who, for the court's benefit and assistance, informs the court on some matter of law in regard to which the judge is doubtful or mistaken. *Leigh v. Engle*, 535 F. Supp. 418, 419 (N.D. Ill. 1982). Historically, the purpose of an *amicus curiae* brief was to "provide *impartial* information on matters of law about which there was doubt, especially in matters of public interest." *United States v. State of Michigan*, 940 F.2d 143, 164

(6th Cir. 1991). Therefore, "[a]n *amicus curiae*, by definition, is a friend of the court, not of the appellant." *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1377 (Fed. Cir. 2000). Although "an adversary role of an amicus curiae has become accepted, . . . there are, or at least should be, limits." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers) (citations omitted); *see also United States v. State of Michigan*, 940 F.2d at 165 ("some courts have departed from the orthodoxy of amicus curiae as an impartial friend of the court and have recognized a *very limited* adversary support of given issues").

Courts "have frowned on participation which simply allows the amicus to litigate its own views" or present "its version of the facts." *Flour Corp. v. United States*, 35 Fed. Cl. 284, 286 (1996) (quoting *American Satellite v. United States*, 22 Cl. Ct. 547, 549 (1991)). Therefore, the function of the *amicus curiae*, even in a limited adversarial role, should be to bring to the Court's attention "considerations germane to [the] decision of the appeal that the parties for one reason or another have not brought to [the Court's] attention." *Ryan*, 125 F.3d at 1064. When determining whether to permit a non-party to appear in a suit as *amicus curiae*, courts have considered several factors, including the extent to which the amicus will

be helpful to the court, "as contrasted with simply strengthening the assertions of one party." *American Satellite*, 22 Cl. Ct. at 548.

The fact that a position of *amicus curiae* on a legal issue may coincide with that of one of the parties to the litigation does not preclude it from submitting a brief. *Amoco Oil*, 234 F.3d 15 1377; *State of Michigan*, 940 F.2d at 165. When the *amicus curiae*, however, merely advocates for its own position or bolsters the position of one party to the litigation, additional briefing no longer serves the purpose for which it was intended and constitutes an abuse. *See Ryan*, 125 F.3d at 1063 (*amicus* briefs that are filed by a litigant's allies and simply duplicate the arguments made in the litigants brief are and abuse and should not be allowed).

Here, the *Rafter* plaintiffs are litigants seeking to promote their own interests – interests, however, that are aligned with Mr. Piszel and adequately protected by Mr. Piszel's representation. It is the *Rafter* plaintiffs' pecuniary interest in the outcome of their own litigation that drives their desire to file a brief, not a desire to provide "a broader perspective than the appellant, who may be solely interested in winning [his] case." *Amoco Oil*, 234 F.3d at 1377; *see also Yankee Atomic Elec. Co. v. United States*, Nos. 07-5025, 07-5031 (Fed. Cir. Aug. 3, 2014) (denying motions for leave to file an *amicus curiae* brief from similarly situated litigants).

Courts sometimes "allow[] amicus filings when the court [is] concerned that one of the parties is not interested or capable of fully presenting one side of the argument." *American Satellite*, 22 Cl. Ct. at 549 (citations omitted). Both parties to this appeal, however, are represented by well-qualified counsel and each party has an interest in vigorously presenting its side of the argument. There has been no showing that Mr. Piszel needs the assistance of *amicus curiae* on this appeal.

On one hand, the *Rafter* plaintiffs dedicate three pages of their proposed *amicus* brief to the proposition that a district court decision is not binding on this Court. *See* Tendered Rafter *Amicus* Br. at 16-18. Additional briefing is unnecessary to establish this uncontroversial proposition. On the other hand, the *Rafter* plaintiffs address the alleged "residual interest" of *shareholders* in the "liquidation surplus" of a conservatorship, *id.* at 14-16, and the "net worth sweep" conducted during "FHFA's conservatorship" of Fannie Mae and Freddie Mac, *id.* at 2-4, 15 – matters that are immaterial to the alleged taking of Mr. Piszel's severance benefits, and thus that provide no benefit to the Court.

The "filing of an amicus brief imposes a burden of study and the preparation of a possible response on the parties." *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000). This burden cannot be justified when the only purpose of the *amicus curiae* is, as it is in this case, to embellish or expand the

argument of one party to the litigation, or to present arguments that have no bearing on the matter being appealed. *See Amoco Oil*, 234 F.3d at 1378.

The *Rafter* plaintiffs have not shown that Mr. Piszel's representation of their interests is inadequate. Nor have they shown that their brief presents considerations germane to the appeal that have not already been sufficiently briefed by the parties. The Court "should be assiduous to bar the gates to *amicus curiae* briefs that fail to present convincing reasons why the parties' briefs do not give [the Court] all the help [it] need[s] for deciding the appeal." *Ryan*, 125 F.3d at 1064. Thus, the Court should deny the *Rafter* plaintiffs' motion.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny the *Rafter* plaintiffs' motion for leave to file an *amicus curiae* brief.

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant
Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

s/ Franklin E. White, Jr.

FRANKLIN E. WHITE, JR.
Assistant Director

s/ David A. Harrington

DAVID A. HARRINGTON
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
(202) 616-0465
(202) 305-7644 (fax)

September 1, 2015

Attorneys for Defendant-Appellee

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 1st day of September, 2015, a copy of the foregoing Defendant-Appellee's Response in Opposition to Motion for Leave to File an *Amicus Curiae* Brief was filed electronically.

X This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/ David A. Harrington

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To the following address: