UNITED STATES COURT OF FEDERAL CLAIMS

OWL CREEK ASIA I, L.P., *et al.*, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-281C (Chief Judge Sweeney)
APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, *et al.*, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-370C (Chief Judge Sweeney)
AKANTHOS OPPORTUNITY FUND, L.P., Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-369C (Chief Judge Sweeney)
CSS, LLC, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-371C (Chief Judge Sweeney)

MASON CAPITAL L.P., *et al.*, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-529C (Chief Judge Sweeney)

MOTION TO LIFT STAY

The plaintiffs ("Plaintiffs") in *Owl Creek Asia I, L.P. v. United States*, No. 18-281 ("*Owl Creek*,"); *Appaloosa Investment Limited Partnership I v. United States*, No. 18-370 ("*Appaloosa*"); *Akanthos Opportunity Master Fund, L.P. v. United States*, No. 18-369 ("*Akanthos*"); *CSS, LLC v. United States*, No. 18-371 ("*CSS*"); and *Mason Capital L.P. v. United States*, No. 18-529 ("*Mason*" and together with *Owl Creek*, *Appaloosa*, *Akanthos*, and *CSS*, the "Jones Day Actions"), move the Court to: (1) lift its *sua sponte* stay of considering the government's omnibus motion to dismiss as to the Jones Day Actions; (2) rule on the government's omnibus motion to dismiss as to the Jones Day Actions; and (3) set a briefing schedule for any motion to certify such ruling for interlocutory appeal, which matches the schedule the Court employs in the related *Fairholme Funds, Inc. v. United States*, No. 13-465.

Continuing to stay the Jones Day Actions, particularly as *Fairholme* proceeds, prejudices Plaintiffs and is not otherwise warranted. There is no reason why Plaintiffs should be left to languish on the side, potentially for years, while *Fairholme* determines law that will at least materially affect their actions. Moreover, allowing the Jones Day Actions to continue to proceed on the same schedule as *Fairholme* serves judicial economy by ensuring that all of the issues in these related actions are considered together, as this Court already has done in the briefing and argument of the government's omnibus motion. The government intends to oppose this motion.

BACKGROUND

This Court has designated the Jones Day Actions, among others, as related and coordinated cases along with *Fairholme*. In August 2018, the government filed one omnibus brief in moving to dismiss the twelve related actions. *E.g., Owl Creek* ECF 21. In response, the Plaintiffs in the five Jones Day Actions filed a Combined Opposition (*e.g., Owl Creek* ECF 28), and the plaintiffs in six other actions filed an Omnibus Response (*Fairholme* ECF 428). The government, in turn, filed a single reply. *E.g., Owl Creek* ECF 33. Then this Court, in November 2019, held a single oral argument, at which several plaintiffs' counsel, including counsel in the Jones Day Actions and in *Cacciapalle v. United States*, No. 13-466C, spoke repeatedly, as did counsel for the plaintiffs in *Fairholme*.

This Court, however, has so far ruled on the government's omnibus motion only as to *Fairholme*, granting it in part and denying it in part. *See Fairholme* ECF 449, at 11 & n. 11 ("*Fairholme* Order," public version); ECF 447 (original order, sealed). On January 28, the Court *sua sponte* stayed its consideration of the government's motion as to the Jones Day Actions, as well as the other related actions, "pending the determination of further proceedings in" *Fairholme*. *E.g.*, *Owl Creek* ECF 43. Per the Court's direction, the government and the *Fairholme* plaintiffs then, on February 7, filed a joint status report proposing that the "next logical step" is for them to file motions requesting that the Court certify the *Fairholme* Order for interlocutory appeal to the Federal Circuit. *Fairholme* ECF 454. The parties proposed that motions be due on February 21, 2020, and responses (if necessary) be due on March 6, 2020. *Id.* This Court on the next business day, February 10, entered a scheduling order in accordance with those parties' suggestion. *Fairholme* ECF 455. Plaintiffs sought the government's consent to the relief sought herein on February 14, 2020, and the government responded on February 19, 2020.

ARGUMENT

A court's "power to stay proceedings" is an incident of its power "to control the disposition of the causes on its docket" so as to maximize "economy of time and effort." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). As a result, a court is to exercise that power within its "sound discretion," the limits of which arise from its purpose in this context. *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997).

In particular, "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis*, 299 U.S. at 255. "[I]f there is even a fair possibility that the stay" will damage the party opposing a stay, the proponent of the stay must establish "a clear case of hardship or inequity in being required to go forward." *Id.*

In *Cherokee Nation*, for example, the Federal Circuit explained that "a trial court abuses its discretion by issuing a stay of indefinite duration in the absence of a pressing need." 124 F.3d at 1416. It accordingly instructed that a trial court's "first" question must be whether there is "a pressing need for the stay." *Id.* If (and only if) there is, the court "must then balance interests favoring a stay against interests frustrated by the action." *Id.* But "[o]verarching this balancing is the court's paramount obligation to exercise jurisdiction timely in cases properly before it." *Id.* Applying these principles, the appeals court found that "avoid[ing] duplicative litigation and conserv[ing] judicial resources" did not constitute a "pressing need" for a stay. *Id.* at 1416; *see also* CFC Rule 1 (stating that the rules "should be construed, administered, and employed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding").

Here, there is no need, much less a "pressing need," to stay the Jones Day Actions, but rather a need to allow them to proceed, consistent with the court's "paramount obligation" to

exercise jurisdiction timely in cases properly before it. *Cherokee Nation*, 124 F.3d at 1416. *First* and foremost, Plaintiffs are being "compelled to stand aside while a litigant in another [case] settles the rule of law that will define the rights of both"—at least there is "a fair possibility" of that—and these related actions involve no "rare circumstance" to justify that prejudice. *Landis*, 299 U.S. at 255. This is so regardless of the precise degree to which this Court's reasoning in *Fairholme* might control in the Jones Day Actions and the other related actions: If that reasoning controlled completely, then there would be no reason to delay entering orders as to the remainder of the government's omnibus motion to dismiss; if that reasoning controlled in some respects but not others (given differences in various plaintiffs' claims and arguments), then it would be critical to clarify that extent so that the parties know how to protect their rights.

For example, this Court held that the claims in *Fairholme* were derivative and not direct. *Fairholme* Order at 41. It also held that the plaintiffs in *Fairholme* who acquired stock after the government imposed the Sweep Amendment (that is, the Third Amendment to Amended and Restated Senior Preferred Stock Purchase Agreement), which is most of them, lack standing to assert direct claims. *Fairholme* Order at 37-38. The *Fairholme* plaintiffs therefore may prefer that the Federal Circuit affirm that the claims are derivative. *See Holland v. United States*, 59 Fed. Cl. 735, 739 (generally, damages in derivative actions go to corporation, which benefits its present stockholders), *on reconsideration*, 63 Fed. Cl. 147 (2004); *but cf.* CFC Rule 23.1(b)(1) (requiring plaintiff in derivative action to allege that it was shareholder "at the time of the transaction complained of" or that its share "later devolved on it by operation of law"). The Plaintiffs in the Jones Day Actions, however, acquired their stock before the government imposed the Sweep Amendment. *Owl Creek* Compl., ECF 16 ¶ 11; *Akanthos* Compl., ECF 14 ¶ 11; *Appaloosa* Compl., ECF 17 ¶ 11; *CSS* Compl., ECF 14 ¶ 11; *Mason* Compl., ECF 14 ¶ 11.

They also have primarily alleged direct claims (while also both pleading and arguing that, even if their claims are deemed derivative, they remain entitled to recover on them, *e.g.*, *Owl Creek* Compl. ¶ 86; Combined Opp. 39-41). Thus, on similar claims they find themselves in a different position from plaintiffs in *Fairholme*. As a further example, there are both similarities and distinctions in the various plaintiffs' background facts and arguments regarding this Court's jurisdiction. The Plaintiffs should not be compelled to stand aside while *Fairholme* settles law that, to one degree or another, will govern their claims. Under *Cherokee Nation* (assuming for the sake of argument a pressing need for a stay existed), the Plaintiffs' interests in being able to represent their own interests on appeal far outweigh any interests favoring a stay.

Second, the Jones Day Actions as well as the other related actions long have been coordinated with *Fairholme* for discovery, briefing, and argument. No reason is apparent why that coordination cannot and should not continue on a shared schedule, to conserve judicial resources at all levels. Allowing the Jones Day Actions and the other related actions—with their sometimes distinct, sometimes overlapping claims and arguments—to continue to proceed alongside *Fairholme* allows all of the issues to be briefed at the same time and, in the event of appeal, will prevent piecemeal litigation by putting all of the relevant issues together before the Federal Circuit. To the extent that a multi-action appeal might result, the Federal Circuit is fully able to consider for itself, and has the experience to address, any logistical issues that may arise.

Finally, whereas maintaining the stay will prejudice the Plaintiffs, *lifting* it will not prejudice any other party to the Jones Day Actions or, for that matter, any party to any of the related actions, including *Fairholme*. By lifting the stay, the Court will not increase litigation costs for the plaintiffs in *Fairholme* or impose any other burden on them. Nor will the Court prejudice the government; rather, lifting the stay will allow the government in further

proceedings in this Court and in any appeal to address all of the issues raised in these twelve actions at once, on the same briefing and argument schedule, as it did with its omnibus motion to dismiss. Plaintiffs initiated the Jones Day Actions to obtain just compensation for the government's taking of their property: It is to their legitimate benefit, and the government's, and works no harm on the *Fairholme* plaintiffs, for the Plaintiffs to be allowed to brief and argue any issues on appeal on the same schedule as in *Fairholme*, facilitating a fair and expeditious resolution of their claims.

CONCLUSION

There is no basis to continue to stay consideration of the Jones Day Actions. This Court should (1) lift its stay; (2) enter an order on the government's omnibus motion to dismiss as to each of the Jones Day Actions; and (3) set a briefing schedule for filing any motions to certify such orders for interlocutory appeal that matches the schedule the Court employs in *Fairholme*.

Respectfully submitted:
February 19, 2020

By: */s/ Lawrence D. Rosenberg*

Lawrence D. Rosenberg
Counsel of Record

Of Counsel
Bruce S. Bennett
C. Kevin Marshall
Michael C. Schneidereit
Chané Buck

JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Tel.: (202) 879-3939
Fax: (202) 626-1700
ldrosenberg@jonesday.com

Counsel for Plaintiffs