IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 20-121

FAIRHOLME FUNDS, INC., et al.,

Plaintiffs-Petitioners,

v.

UNITED STATES,

Defendant-Respondent.

On Petition for Interlocutory Review from the United States Court of Federal Claims, Case No. 13-cv-00465, Judge Margaret M. Sweeney

BRIEF OF AMICI CURIAE, INTERESTED PLAINTIFFS IN DIRECTLY AFFECTED ACTIONS, IN SUPPORT OF NEITHER PARTY, URGING COORDINATION OF ACTIONS

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April 10, 2020

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for amici certifies as follows:

1. The full name of every amicus represented is:

Owl Creek Asia I, L.P.; Owl Creek Asia II, L.P.; Owl Creek I, L.P.; Owl Creek II, L.P.; Owl Creek Asia Master Fund, Ltd.; Owl Creek Credit Opportunities Master Fund, L.P.; Owl Creek Overseas Master Fund, Ltd.; Owl Creek SRI Master Fund, Ltd.; Appaloosa Investment Limited Partnership I; Palomino Fund Ltd.; Palomino Master Ltd.; Azteca Partners LLC; Akanthos Opportunity Fund, L.P.; CSS, LLC; Mason Capital L.P.; and Mason Capital Master Fund L.P.

2. The names of the real parties in interest are:

Owl Creek Asia I, L.P.; Owl Creek Asia II, L.P.; Owl Creek I, L.P.; Owl Creek II, L.P.; Owl Creek Asia Master Fund, Ltd.; Owl Creek Credit Opportunities Master Fund, L.P.; Owl Creek Overseas Master Fund, Ltd.; Owl Creek SRI Master Fund, Ltd.; Appaloosa Investment Limited Partnership I; Palomino Fund Ltd.; Palomino Master Ltd.; Azteca Partners LLC; Akanthos Opportunity Fund, L.P.; CSS, LLC; Mason Capital L.P.; and Mason Capital Master Fund L.P.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the parties being represented are:

No amicus has a parent corporation and no publicly held companies own 10 percent or more of any amicus' stock.

4. The names of all law firms and the partners or associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this court and who are not listed on the docket of the current case:

Jones Day: Bruce Bennett; Lawrence D. Rosenberg; and C. Kevin Marshall

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal are:

Owl Creek, et al., v. United States, No. 18-281 (Fed. Cl.)
Appaloosa, et al., v. United States, No. 18-370 (Fed. Cl.)
Akanthos v. United States, No. 18-369 (Fed. Cl.)
CSS v. United States, No. 18-371 (Fed. Cl.)
Mason v. United States, No. 18-529 (Fed. Cl.)
Cacciapalle v. United States, No. 13-466 (Fed. Cl.)
Fisher v. United States, No. 13-608 (Fed. Cl.)
Arrowood v. United States, No. 13-698 (Fed. Cl.)
Reid v. United States, No. 14-152 (Fed. Cl.)
Rafter v. United States, No. 14-740 (Fed. Cl.)
Washington Federal v. United States, No. 13-385 (Fed. Cl.)

Dated: April 10, 2020

/s/ Lawrence D. Rosenberg
Lawrence D. Rosenberg

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INTEREST OF *AMICUS CURIAE*[1]

Amici are plaintiffs in five actions that are related to, and in the Court of Federal Claims coordinated with, *Fairholme v. U.S.*, No. 13-465.[2] The government filed an omnibus motion to dismiss *Fairholme*, Amici's actions, and six other related actions, which were briefed on the same schedule and argued together. However, the lower court entered a decision on the government's motion only in *Fairholme* and unexpectedly stayed consideration of Amici's actions and the six related actions. On the day the parties in *Fairholme* filed their pending petitions for interlocutory appeal, the lower court granted motions to lift its stay in Amici's actions and two others (*Cacciapalle v. U.S.*, No. 13-466, a putative class action; and *Arrowood v. U.S.*, No. 13-698) and directed the parties to file supplemental briefs on the motion to dismiss.

Amici seek to ensure that this Court in considering *Fairholme* furthers judicial efficiency and does not prejudice them. Amici provide additional context regarding the petitions and urge the Court to address *Fairholme* in coordination with their actions, and with *Cacciapalle* and *Arrowood* (collectively, the Related Actions).

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[1] Consistent with Rule 29(a)(4), Amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of the brief; and no person or entity, other than Amici and their counsel, contributed money to fund its preparation or submission.

[2] *Owl Creek v. United States*, No. 18-281; *Appaloosa v. United States*, No. 18-370; *Akanthos v. United States*, No. 18-369; *CSS, LLC v. United States*, No. 18-371; and *Mason v. United States*, No. 18-529.

BACKGROUND

The general background of these cases is set out in the pending petition to this Court from Fairholme (No. 20-121) and, briefly, in Amici's motion for leave (filed simultaneously with this brief). Below, the Court of Federal Claims in 2018 coordinated Amici's actions with *Fairholme* and established the same briefing schedule for motions to dismiss the Related Actions and others.

The government filed an omnibus motion to dismiss all the Related Actions as well as four other actions. *E.g., Owl Creek* ECF 21. In response, Amici filed a Combined Opposition (*e.g.*, *Owl Creek* ECF 28), and the plaintiffs in *Cacciapalle*, *Arrowood*, and *Fairholme*, along with the plaintiffs in three of the other actions, filed an Omnibus Response (*e.g., Fairholme* ECF 428). The government, in turn, filed a single reply. *E.g., Owl Creek* ECF 33. Then the lower court, in November 2019, held a single oral argument on the government's motion, at which several plaintiffs' counsel, including counsel for Amici and *Cacciapalle*, spoke repeatedly, as did counsel for the *Fairholme* plaintiffs.

Soon thereafter, Chief Judge Sweeney entered an order, with an opinion, granting in part and denying in part the government's omnibus motion to dismiss—but only in *Fairholme*. *Fairholme* ECF 447 (original order, sealed), ECF 449 (public) (the "*Fairholme* Opinion"). While Amici and the plaintiffs in the other Related Actions (among others) were awaiting orders in their cases, the Court of

Federal Claims, *sua sponte*, unexpectedly stayed its consideration of the motion in the actions other than *Fairholme* pending the determination of further proceedings in *Fairholme*. *E.g., Owl Creek* ECF 43.

On February 19, 2020, Amici moved to lift the stay in their cases, arguing that, under *Landis v. North American Co.*, 299 U.S. 248 (1936), as well as this Court's decision in *Cherokee Nation v. United States*, 124 F.3d 1413 (Fed. Cir. 1997), they would be prejudiced if "compelled to stand aside while *Fairholme* settles law that, to one degree or another, will govern their claims." *Owl Creek* ECF 44, at 6. They explained that allowing their 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." *Id.*

The next day, Chief Judge Sweeney responded with an order acknowledging Amici's concern that they "will need to wait on the sideline while the relevant legal issues are decided" is "not an unfair concern." *E.g., Owl Creek* ECF 46. However, the court reported that it was "unlikely to issue a ruling on defendant's motion to dismiss in [the other related cases] prior to the initiation of any interlocutory appeal in *Fairholme*" and suggested that the parties stipulate to the effects of the court's ruling in *Fairholme* to "facilitate a more expeditious ruling from the court." *Id.*

Amici accordingly reached out to the government proposing to discuss the suggested stipulation, but the government was not interested in discussing what Amici understood the court to have suggested. *Owl Creek* ECF 48. At various plaintiffs' request, the court thus promptly convened a status conference.

During that conference, on March 5, there were extensive discussions regarding the pending motions to lift the stays, including that lifting the stays would better serve judicial economy and that continuing the stay could prejudice the rights of Amici, the *Cacciapalle* class-action plaintiffs, and the *Arrowood* plaintiffs. The *Fairholme* plaintiffs also appeared and spoke regarding their pending motion to certify the *Fairholme* opinion for interlocutory appeal, as did the government regarding its pending motion to certify. Soon after, the lower court granted the motions to certify. And the government, on March 18, responded to Amici's motion to lift the stay. *E.g., Owl Creek* ECF 55.

The next day, the lower court granted the motions, lifting its stays in Amici's actions and *Cacciapalle*. It directed the parties to file supplemental briefs on the government's motion to dismiss, identifying which claims should or should not be dismissed under the *Fairholme* Opinion (taking it as correct for that purpose but without forfeiting objections to its correctness) and attaching proposed summary orders. *E.g.*, *Owl Creek* ECF 56. That was the same day that the *Fairholme* plaintiffs and the government filed in this Court their petitions for permission to appeal the

interlocutory *Fairholme* Opinion (the petitions were not docketed until March 27). In response to the Court of Federal Claims' order, Amici and the *Cacciapalle* plaintiffs filed their timely supplemental briefs on March 26; the *Arrowood* plaintiffs, on April 6, filed their timely supplemental brief under an order lifting the stay in their case. The government responded in Amici's actions and *Cacciapalle* on April 9 and must respond in *Arrowood* by April 20.

Based on the status conference and Chief Judge Sweeney's recent prompt orders and abbreviated briefing schedules, Amici expect that the lower court will shortly enter orders deciding the government's motion to dismiss their actions, following its *Fairholme* Opinion to the extent it applies and addressing any extent to which, in that court's view, it does not.

The *Fairholme* plaintiffs, in their response in this Court to the government's petition, acknowledge this recent activity in the Related Cases—among those they correctly flag in their Certificate of Interest as being "directly affected" by this Court's decision. *Fairholme* Resp., No. 20-122, ECF 12, at 3 & p. 1. (The government does not.) The *Fairholme* plaintiffs also expect that "this Court may soon be presented with several appeals" in those cases. *Id.*, p. 2.

ARGUMENT

Addressing the Related Actions along with *Fairholme*, after the Court of Federal Claims enters orders on the government's motion to dismiss in Amici's cases

as well as *Cacciapalle* and *Arrowood*, will conserve judicial resources by allowing this Court to decide all related issues together, and will ensure that Amici and other plaintiffs are not prejudiced. Amici thus urge this Court either to defer a decision on the pending petitions of the *Fairholme* plaintiffs (No. 20-121) and the government (No. 20-122) or, upon granting them, to defer merits briefing until the Related Actions all have come before this Court, whether on appeal as of right (as the *Fairholme* plaintiffs expect, *Fairholme* Resp. p. 2) or on certified interlocutory orders.

Courts of course have the inherent power to control their dockets in the interest of judicial economy. *Landis*, 299 U.S. at 254 ("every court" has the inherent power to "control the disposition of the causes on its docket with economy of time and effort"). And that includes controlling when a court decides matters and when it receives briefing. *E.g.*, *Jones v. Thorne*, 132 F. App'x 150, 152 (9th Cir. 2005) (finding modified briefing schedule permissible given courts' "'inherent power' to control their dockets").

This is also true in managing related actions. A good example is *Statesman Savings Holding Corp. v. United States*, 26 Cl. Ct. 904 (1992). Among eighteen *Winstar*-related cases, three reached the liability stage about the same time. The Claims Court decided *Winstar* itself (No. 90-8) in April 1992. It then directed the parties in the other two, *Statesman* and *Glendale Federal v. United States* (No. 90-

772), to brief how its decision in *Winstar* should apply to their cases. *Id.* at 907. In July 1992, in light of that briefing, it ruled in *Statesman* and *Glendale* as well and then certified all three cases for interlocutory appeal to this Court, to "prevent the wasting of considerable resources" and because, "considered together, they present[ed] a number of different factual variations on the legal issues that must ultimately be decided." *Id.* at 924. This Court granted permission to appeal all three cases and set a coordinated briefing schedule. *Winstar Corp. v. United States*, 979 F.2d 216 (Fed. Cir. 1992). *Statesman* was a creative and appropriate adaptation of the general rule that piecemeal review is disfavored. *See United States v. Nixon*, 418 U.S. 683, 690 (1974).

Here, similarly, there are good reasons that Amici's actions and *Fairholme* are related and coordinated, as they both challenge the same government action (the Sweep Amendment) and both state claims that it was (1) a taking; (2) in the alternative, an illegal exaction; (3) a breach of fiduciary duty; and (4) a breach of an implied-in-fact contract. Thus, the Court's consideration of *Fairholme* without Amici (as well as the other Related Actions) being before it could directly prejudice the absent parties.

And, at the same time, there are also distinctions in the background alleged facts and legal arguments, such that Amici's actions and the other Related Actions, "considered together," present "a number of different factual variations on the legal

issues that must ultimately be decided." *Statesman*, 26 Cl. Ct. at 924. As the Court of Federal Claims itself noted at the March status conference, "not all the allegations are identical"; rather, "[t]here are various permutations of the facts." Status Conf. Tr. 15:5-6. That is both why the Court of Federal Claims initially ruled only in *Fairholme*, as it explained, *see id.* at 15:6-9, and why it now has (much as in *Statesman*) asked the other plaintiffs to brief how its *Fairholme* Opinion should apply to their actions. Thus, the lower court was correct in this explanation, which supports coordination of Amici's cases and *Fairholme*'s in several respects.

Most importantly, among the variations and permutations, Amici exclusively plead direct claims. Those claims also rest on allegations distinct from the *Fairholme* plaintiffs', which bears on determining their nature as direct. As Amici detailed in their (separate) Combined Opposition to the motion to dismiss: "The gravamen of the Complaint is not that the Sweep Amendment was 'unfair' or constituted 'waste or mismanagement,' but that the government as a controlling shareholder (including in collusion with itself as manager) [benefitted itself] while correspondingly reducing the rights of other shareholders," which "directly harmed th[ose] other shareholders." *Owl Creek* ECF 28, at 37 ("Opp."). The harm Amici allege in their complaints is very much, and expressly, not harm to *all* shareholders in relation to their shares. *E.g., Owl Creek* Am. Compl. ¶ 2 (ECF 16) (alleging government benefitted itself "at the expense of the Companies' other shareholders"); ¶ 107

(alleging that Treasury as shareholder "increased its rights with respect to the Companies while correspondingly reducing the rights of all other shareholders").

Moreover, given that Amici acquired their stock before the Sweep Amendment, they are differently situated to argue that their claims are direct than are the *Fairholme* plaintiffs, almost all of whom acquired their stock after the Sweep Amendment, which, in the Court of Federal Claims' view, means they lack standing to bring direct claims. *See Fairholme*, No. 13-465, ECF 449 at 37-38, 41. That difference, in turn (along with their having pleaded direct claims exclusively), presents a distinct version of the question of how to apply this Court's precedent in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999), to allow their claims (if deemed substantively derivative) either to proceed or to be amended.

The *Fairholme* plaintiffs themselves acknowledge such issues in their response to the government's petition here. (The government fails to address them.) They suggest that Amici's actions, which they note are pleaded only as direct claims, will be dismissed in their entirety under the *Fairholme* Opinion and thus appealed as of right, presenting this Court with clean questions regarding direct claims attacking the Sweep Amendment. *See Fairholme* Resp. p. 2. They offer their own cases as presenting similar questions regarding derivative claims, and thus urge this Court to grant their petition so it may "render[] a single decision on the legal merits

of both sets of claims," thereby "facilitat[ing] the correct resolution of some of the key issues in this litigation." *Id.* Amici agree that this Court should address the claims in *Fairholme* together with Amici's claims.

Finally, although the *Fairholme* plaintiffs and Amici plead the same basic claims (setting aside whether the claims are direct or derivative), their arguments are not all the same. For example, Amici argue that the Agency and Treasury, in working together to impose the Sweep Amendment, operated as a "control group" under settled corporate law. Opp. 23-24. That the Agency and Treasury formed a control group is one reason Amici's claims not only are against the United States for purposes of jurisdiction but also are substantively direct. *Id.*; *id.* at 36-39. There are other distinctions in Amici's arguments regarding jurisdiction, such as Amici's reliance on *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014), as establishing that their claims are against the United States simply because of Treasury's role, apart from its coordination with the Agency. Opp. 10-12.

Similar to the three cases in *Statesman*, all of the Related Actions are at the same procedural stage (motion to dismiss), and Amici's actions and the other two Related Actions soon will be at precisely the same stage in the Court of Federal Claims as *Fairholme.* Addressing the appeals together will enable this Court to hear all related issues and receive all relevant arguments together. It thereby will simultaneously both conserve judicial resources (its own and the Court of Federal

Claims') and ensure that Amici and their cases are not prejudiced. Accordingly, this Court should coordinate its consideration of the *Fairholme* case with Amici's actions, as well as those in *Cacciapalle* and *Arrowood*.

CONCLUSION

For the reasons detailed above, Amici urge the Court to address all of the Related Actions (*Fairholme*, Amici's actions, *Cacciapalle* and *Arrowood*) in a coordinated fashion—by deferring a decision on the petitions in *Fairholme* or (if it grants the petitions) deferring merits briefing in *Fairholme*, until the Court of Federal Claims' rulings on the government's motion to dismiss in all of those cases are before this Court.

Dated: April 10, 2020

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Lawrence D. Rosenberg, hereby certify that on April 10, 2020, I caused the foregoing brief to be filed electronically with the United States Court of Appeals for the Federal Circuit using the CM/ECF system. I certify that the following counsel of record for petitioner and respondent were via CM/ECF:

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CERTIFICATE OF COMPLIANCE

Consistent with Fed. R. App. P. 29 and 32(g), the undersigned hereby certifies that this motion complies with the type-volume limitations imposed by Fed. R. App. P. 29.

1. The brief contains 2486 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font as provided by Fed. R. App. P. 32(a)(5)-(6). As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: April 10, 2020

/s/ Lawrence D. Rosenberg
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