

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

FAIRHOLME FUNDS, INC., et al.,
Plaintiffs-Petitioners,

v.

UNITED STATES,
Defendant-Respondent.

No. 20-121

FAIRHOLME FUNDS, INC., et al.,
Plaintiffs-Respondents,

v.

UNITED STATES,
Defendant-Petitioner.

No. 20-122

OPPOSITION TO MOTION TO FILE AMICUS CURIAE BRIEF

On December 6, 2019, the Court of Federal Claims issued an order granting in part and denying in part the government's motion to dismiss the complaint in *Fairholme Funds, Inc. v. United States*, No. 13-465C, which challenges the Third Amendment to the 2008 financing agreement through which the Treasury Department rescued the mortgage giants Fannie Mae and Freddie Mac. *See* Pet. Appx. 35-84. The Court of Federal Claims certified that order for interlocutory appeal, and both the government and the *Fairholme* plaintiffs have petitioned this Court to grant interlocutory review. *See Fairholme Funds, Inc. v. United States*, No. 20-

122 (United States petition); *Fairholme Funds, Inc. v. United States*, No. 20-121 (Fairholme petition).

Now before this Court is a motion, styled as a request to participate as amicus curiae, filed by plaintiffs in related cases challenging the Third Amendment (collectively, the *Owl Creek* plaintiffs). The motion and attached brief request that this Court hold the pending *Fairholme* petitions or briefing schedule in abeyance until the Court of Federal Claims decides the remaining related cases, so that those cases can be heard by this Court in tandem with the *Fairholme* case. The *Owl Creek* plaintiffs' extraordinary request should be denied.

Holding the pending petitions in abeyance for an indefinite period until the Court of Federal Claims decides other related cases is neither necessary nor appropriate. The *Owl Creek* plaintiffs contend that holding the *Fairholme* petitions until their cases are decided would promote judicial economy. But the Court of Federal Claims reasonably concluded that it could most efficiently resolve the eighteen related cases pending before it by deciding the legal issues presented in the *Fairholme* case first. The *Owl Creek* plaintiffs provide no basis for second-guessing that pragmatic conclusion.

The *Owl Creek* plaintiffs also wrongly assert that they will be prejudiced if this Court decides the *Fairholme* case before their cases are heard on appeal, because their cases present the same legal issues that are presented in *Fairholme*. This Court regularly issues precedential decisions that are binding in later-decided cases.

Plaintiffs in those later cases are not unfairly prejudiced by that routine feature of our judicial system.

In any event, the *Owl Creek* plaintiffs will have an opportunity to be heard. In the event this Court grants the government's petition seeking interlocutory review in *Fairholme*, the government would not object to the *Owl Creek* plaintiffs' participation as an amicus curiae to address the substance of the Court of Federal Claims' order. Moreover, if the Court of Federal Claims issues an appealable order in *Owl Creek* or the other related cases (or certifies an order for interlocutory appeal), plaintiffs in those cases can ask this Court to consider consolidating their appeal with the *Fairholme* appeal at that time. In the meantime, there is no sound reason for this Court to delay resolution of the government's petition.

STATEMENT

1. A more complete statement of the facts and procedural background in this case is set forth in the government's petition for interlocutory review. *See* Pet. 5-12. As relevant here, the *Fairholme* plaintiffs are shareholders in the mortgage giants Fannie Mae and Freddie Mac. They filed suit against the United States, challenging the Third Amendment to the financing agreement between the Treasury Department and the Federal Housing and Finance Agency (acting as conservator for Fannie and Freddie) through which the federal government rescued Fannie and Freddie during the 2008 financial crisis. The *Fairholme* plaintiffs allege that the Third Amendment to that agreement constituted an uncompensated taking of property, an illegal exaction,

and breaches of contractual obligations and fiduciary duties FHFA and Treasury allegedly owed the enterprises and their shareholders. Pet. 8. The *Fairholme* suit is one of eighteen shareholder cases challenging the Third Amendment that are currently pending in the Court of Federal Claims, all of which generally rely on the same factual allegations and legal arguments. The Court of Federal Claims coordinated the cases for pretrial proceedings.

The government filed an omnibus motion to dismiss the complaints, and the Court of Federal Claims consolidated the cases for argument. On December 6, 2019, the court then issued an order granting in part and denying in part the government's motion to dismiss the plaintiffs' complaint in the *Fairholme* case. Pet. Appx. 35-88. The court resolved the *Fairholme* case first based on its view that resolution of the legal issues in *Fairholme* would "offer clear guidance on the materially similar claims in [the] seventeen related cases pending" before it. Pet. Appx. 88. The court stayed the remaining cases pending resolution of further proceedings in *Fairholme*.

At the request of the government and the *Fairholme* plaintiffs, the Court of Federal Claims certified its order for interlocutory review. *See* Pet. Appx. 85-89. The government and the *Fairholme* plaintiffs both subsequently petitioned this Court to review the Court of Federal Claims' interlocutory order.

In the meantime, the *Owl Creek* plaintiffs, along with several other plaintiffs requested that the Court of Federal Claims lift the stays in their cases and issue case-specific decisions on the government's omnibus motion to dismiss. In response, the

Court of Federal Claims asked the parties in those cases to stipulate to “the effects of th[e] court’s motion-to-dismiss ruling in *Fairholme* on plaintiffs’ similar claims.” *See* Order, Feb. 20, 2020 (ECF No. 46). The parties declined to do so. *See* Joint Status Report, Feb. 25, 2020 (ECF No. 48). The court then lifted the stays in those cases and asked the parties in each case to file supplemental briefs addressing the applicability of its rulings in the *Fairholme* decision on the plaintiffs’ complaints. Order, Mar. 19, 2020 (ECF No. 56). Briefing is complete in all of those cases.

2. On April 10, 2020, plaintiffs in five of the related cases (collectively, the *Owl Creek* plaintiffs) filed a motion to participate as amici curiae with respect to this Court’s resolution of the government’s and the *Fairholme* plaintiffs’ petitions for interlocutory review. *See* Mot. In their motion and the attached brief, the *Owl Creek* plaintiffs ask this Court to hold the *Fairholme* petitions in abeyance until they obtain an appealable order from the Court of Federal Claims, so that their appeals can then be coordinated with the *Fairholme* appeal. Mot. 2; Mot. Br. 1.

ARGUMENT

The *Owl Creek* plaintiffs’ motion to participate as amicus curiae should be denied, at least insofar as they request that this Court hold the *Fairholme* petitions or briefing schedule in abeyance until they obtain an appealable order from the Court of Federal Claims in their and other cases. The *Owl Creek* plaintiffs cite no case in which a court has agreed to hold an appeal in abeyance at the request of a third-party amicus,

without the consent of the parties to the appeal. Nor do the *Owl Creek* plaintiffs provide any sound reason for this Court to take that unprecedented step here.

1. The *Owl Creek* plaintiffs argue that coordinating the *Fairholme* petitions with their eventual (hypothetical) appeals will promote judicial economy. Mot. Br. 5-6. That argument is mistaken. The Court of Federal Claims concluded that the most efficient way to resolve the eighteen related cases pending before it was to decide the legal issues in the *Fairholme* case first and to certify its order addressing those issues for interlocutory appeal. The court did so on the understanding that the resolution of those issues in *Fairholme* would provide “clear guidance on the materially similar claims in [the] seventeen related cases pending” before it. Pet. Appx. 88.

The *Owl Creek* plaintiffs provide no basis for second-guessing the court’s reasonable approach. Indeed, the *Owl Creek* plaintiffs’ proposed amicus brief underscores the wisdom of the court’s decision. In their brief, the *Owl Creek* plaintiffs concede that their complaint raises the same claims as those asserted by the *Fairholme* plaintiffs. Mot. Br. 7. The *Owl Creek* plaintiffs’ appeal will thus add little, if anything, to this Court’s consideration of the relevant claims. The *Owl Creek* plaintiffs disagree, contending that, despite the significant overlap in the claims presented, they uniquely assert that Treasury was a controlling shareholder in the enterprises, and that Treasury and FHFA worked together as a “control group,” at the expense of shareholders. Mot. Br. 8-10. But the Court of Federal Claims’ order in *Fairholme* expressly addressed the question whether Treasury was a “controlling shareholder” who

“owe[d] a fiduciary duty to minority shareholders.” Pet. Appx. 65. The court’s order also addressed several issues related to Treasury’s relationship with FHFA, including whether FHFA acted as Treasury’s agent and whether Treasury coerced FHFA into agreeing to the Third Amendment. Pet. Appx. 48-53. The issues identified by the *Owl Creek* plaintiffs are thus already encompassed by the Court of Federal Claims’ order in *Fairholme*.

The *Owl Creek* plaintiffs’ citation to *Statesman Sav. Holding Corp. v. United States*, 26 Cl. Ct. 904, (Cl. Ct. 1992), only underscores the inappropriateness of their request. Mot. Br. 6-7. *Statesman* was one of eighteen related cases. *Statesman*, 26 Cl. Ct. at 906 & n.2. The Claims Court issued summary judgment orders, which it certified for interlocutory appeal, in three of those cases, after concluding that the three cases, “considered together,” presented the gamut of legal and factual issues the court would need to resolve in deciding the remaining fifteen related cases. *Id.* at 924. Neither the Claims Court nor this Court waited for the Claims Court to resolve the remaining fifteen cases before proceeding.

Here, the Court of Federal Claims determined that the *Fairholme* case provided the appropriate vehicle for resolving the key legal issues presented in the eighteen related cases before it. That conclusion was reasonable because *Fairholme* encompassed the broadest range of legal issues raised in those cases, including all of the legal issues presented in the *Owl Creek* cases, and there is no reason for this Court to wait until the Court of Federal Claims to resolve the remaining cases before

proceeding. Indeed, that other cases remain pending is all the more reason for this Court to resolve the *Fairholme* petitions promptly.

Waiting on an appealable decision in the remaining related cases would be inefficient for an additional reason. It is unclear when, if ever, the *Owl Creek* plaintiffs will obtain an appealable order. See *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (noting that stays of indefinite length run counter to a “court’s paramount obligation to exercise jurisdiction timely in cases properly before it”). The Court of Federal Claims has not indicated when it will issue an order addressing the government’s motion to dismiss the *Owl Creek* complaints. There is no compelling reason to delay resolution of the *Fairholme* petitions for the considerable time that the court’s decision might take.

2. The *Owl Creek* plaintiffs further assert that they will be prejudiced if this Court resolves controlling questions of law in the *Fairholme* appeal without their participation. But the *Owl Creek* plaintiffs are no differently situated from the plaintiffs in any later-decided case. When a court of appeals issues a precedential decision, the court’s resolution of any legal issues is, of course, binding on plaintiffs in later-decided cases. That routine and necessary feature of our judicial system does not mean that plaintiffs in those later cases were unfairly prejudiced.

In any event, the *Owl Creek* plaintiffs will have ample opportunity to be heard. The government has no objection to their participating as *amicus curiae* in the *Fairholme* appeal (assuming this Court grants the pending petitions). As *amicus*, the

Owl Creek plaintiffs would be free to present whatever substantive arguments they deem necessary. Moreover, if the Court of Federal Claims expeditiously issues an appealable order (or certifies an order for interlocutory appeal) in any or all of the *Owl Creek* cases, the relevant plaintiffs could at that time seek to consolidate their appeal with the *Fairholme* appeal. There is no need for this Court to delay resolution of the *Fairholme* appeal so that it can coordinate the *Fairholme* case with an indefinite collection of hypothetical future appeals.

CONCLUSION

The motion to participate as amicus curiae should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 2,009 words, according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2020, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

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