

No. 20-121

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**In the United States Court of Appeals  
for the Federal Circuit**

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FAIRHOLME FUNDS, INC., THE FAIRHOLME FUND, ACADIA INSURANCE COMPANY,  
ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, BERKLEY  
INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA  
CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY,  
MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE  
COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, AND ANDREW T.  
BARRETT,

*Plaintiffs-Petitioners,*

v.

THE UNITED STATES,

*Defendant-Respondent.*

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**RESPONSE TO MOTION OF AMICI CURIAE,  
INTERESTED PLAINTIFFS IN DIRECTLY AFFECTED ACTIONS,  
FOR LEAVE TO FILE BRIEF IN SUPPORT OF NEITHER PARTY,  
URGING COORDINATION OF ACTIONS**

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

**Fairholme Funds, Inc., et al. v. The United States**

Case No. 20-121

**CERTIFICATE OF INTEREST**

Counsel for the:

(petitioner)  (appellant)  (respondent)  (appellee)  (amicus)  (name of party)

**Fairholme Funds, Inc., et al. (see attachment)**

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Fairholme Funds, Inc.	None	None
The Fairholme Fund	Fairholme Funds, Inc.	None
Acadia Insurance Company	None	W.R. Berkley Corporation
Admiral Indemnity Company	None	W.R. Berkley Corporation
Admiral Insurance Company	None	W.R. Berkley Corporation
Berkley Insurance Company	None	W.R. Berkley Corporation
(see attachment for additional parties)		

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

FORM 9. Certificate of Interest

Form 9  
Rev. 10/17

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. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Washington Federal v. United States, No. 13-385 (Fed. Cl.); Cacciapalle v. United States, No. 13-466 (Fed. Cl.); Fisher v. United States, No. 13-608 (Fed. Cl.); Arrowood Indem. Co. 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.); Owl Creek Asia I, L.P. v. United States, No. 18-281 (Fed. Cl.); Akanthos Opportunity Master Fund, L.P. v. United States, No. 18-369 (Fed. Cl.); Appaloosa Inv. Ltd. P'ship I v. United States, No. 18-370 (Fed. Cl.); CSS, LLC v. United States, No. 18-371 (Fed. Cl.); Mason Capital L.P. v. United States, No. 18-529 (Fed. Cl.)

4/21/2020

Date

/s/ Charles J. Cooper

Signature of counsel

Please Note: All questions must be answered

Charles J. Cooper

Printed name of counsel

cc: \_\_\_\_\_

Reset Fields

Certificate of Interest – Additional Parties

Name of Parties, continued:

The Fairholme Fund, Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Continental Western Insurance Company, Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, Preferred Employers Insurance Company, and Andrew T. Barrett

1. Full Name of Party Represented by me	2. Name of Real Party in interest represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Berkley Regional Insurance Company	None	W.R. Berkley Corporation
Carolina Casualty Insurance Company	None	W.R. Berkley Corporation
Continental Western Insurance Company	None	W.R. Berkley Corporation
Midwest Employers Casualty Insurance Company	None	W.R. Berkley Corporation
Nautilus Insurance Company	None	W.R. Berkley Corporation
Preferred Employers Insurance Company	None	W.R. Berkley Corporation
Andrew T. Barrett	None	None

**RESPONSE TO MOTION FOR LEAVE TO FILE AMICUS BRIEF**

Plaintiffs-Petitioners Fairholme Funds, Inc., et al. (“Fairholme Petitioners” or “Fairholme”) respectfully submit this response, pursuant to this Court’s Order dated April 14, 2020, Doc. 14, to the motion<sup>1</sup> filed on April 10, 2020 by certain prospective amici (“Movants”) for leave to submit an *amici curiae* brief in connection with the pending petitions for permission to appeal in this case (No. 20-121) and in the companion case (No. 20-122). Movants are plaintiffs in five cases currently pending in the Court of Federal Claims (“CFC”) that, like Fairholme’s own action that is the subject of the pending petitions, raise claims concerning the so-called Net Worth Sweep under which Fannie Mae and Freddie Mac were required to pay the Treasury quarterly dividends effectively equal to their entire net worth.<sup>2</sup>

Movants seek leave to submit an *amici* brief that they believe will provide “important context” for the Court’s consideration of the pending petitions for interlocutory appeal and to “explain why, in light of that context, [the Court] should ensure that it is able to consider the related actions together.” Motion at 2.

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<sup>1</sup> Motion of Amici Curiae, Interested Plaintiffs in Directly Affected Actions, for Leave to File Brief in Support of Neither Party, Urging Coordination of Actions, Doc. 13-1 (Apr. 10, 2020). We refer to herein to this Motion as “Motion,” and to the proposed amici curiae brief attached to the Motion, Doc. 13-2 (Apr. 10, 2020) as “Amici Brief.”

<sup>2</sup> Movants’ pending cases are *Owl Creek v. United States*, No. 18-281 (Fed. Cl.); *Appaloosa v. United States*, No. 18-370 (Fed. Cl.); *Akanthos v. United States*, No. 18-369 (Fed. Cl.); *CSS, LLC v. United States*, No. 18-371 (Fed. Cl.); and *Mason v. United States*, No. 18-529 (Fed. Cl.).

Fairholme has no objection to this Court granting leave to file Movants' proposed brief. Nor does Fairholme object to Movants' being allowed to participate in this interlocutory appeal as *amici* should the Court grant Fairholme's and the Government's pending petitions. Indeed, if the Court agrees to hear the interlocutory appeal in this action, and an appeal as to the merits of Movants' actions challenging the Net Worth Sweep reaches this Court around the same time, Fairholme would not object to the similar actions being considered together by this Court.

Movants' proposed brief, however, goes much further. In addition to providing additional context regarding the pending CFC litigation challenging the Net Worth Sweep,<sup>3</sup> Movants also "urge" the Court to "defer[] a decision on the petitions in *Fairholme* or (if it grants the petitions) defer[] merits briefing in *Fairholme*, until the Court of Federal Claims' rulings on the government's motion to dismiss in all of [the related] cases are before this Court." Amici Brief at 11. *See also id.* at 6. Because it is far from clear when Movants' cases and other related cases<sup>4</sup> may be "before this Court," and because there is a significant possibility that it could take

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<sup>3</sup> Fairholme also discussed the broader context regarding the CFC Net Worth Sweep litigation in both its petition in No. 20-121, Doc. 2 (Mar. 27, 2020), and in its response to the Government's petition in No. 20-122, Doc. 12 (Apr. 6, 2020).

<sup>4</sup> In addition to their own five pending lawsuits, Movants include in the "related actions" that are the subject of their request two other CFC actions challenging the Net Worth Sweep: *Cacciapalle v. United States*, No. 13-466 (Fed. Cl.), and *Arrowood v. United States*, No. 13-698 (Fed. Cl.).

months (if not longer) before those cases may be before the Court, Fairholme must, with respect, oppose any suggestion that the Court indefinitely defer action on either the petitions or, if the petitions are granted, the briefing of Fairholme's and the Government's appeals.

As Movants acknowledge, Amici Brief at 4–5, the CFC ordered the parties in Movants' actions to file supplemental briefs addressing how the CFC's decision in *Fairholme* should affect the disposition of the claims raised in Movants' actions. Notably, Movants argued in their supplemental briefs that, due primarily to pleading differences in the respective complaints, the CFC's dismissal of Fairholme's direct claims does *not* require the dismissal of most of Movants' direct claims.<sup>5</sup> Thus, Movants have taken the position that the CFC's disposition of Fairholme's direct claims does not control the disposition of most of their own direct claims. More importantly for present purposes, Movants have asked the CFC to carefully consider and assess the purported differences between their direct claims and Fairholme's and to rule on which of Movants' direct claims survive under the CFC's analysis in its decision in *Fairholme*. There has been no indication from the CFC regarding how long the analysis that Movants have asked it to undertake will take.

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<sup>5</sup> See, e.g., Plaintiffs' Supplemental Briefing on Outstanding Motion to Dismiss at 1–5, *Owl Creek Asia I, L.P. v. United States*, No. 18-281C, Doc. 57 (Fed. Cl. Mar. 26, 2020) (arguing that Movants' direct takings, illegal exaction, and breach of fiduciary duty claims should not be dismissed under the CFC's decision in *Fairholme*).

Movants therefore are asking the Court to delay disposition of the pending petitions, or briefing on the petitions if they are granted, indefinitely, and possibly for months. Such an indefinite delay—in other words, an informal stay of proceedings—is, in the circumstances of this case, inconsistent with the principles and policies served by interlocutory appeals, which focus on considerations of “judicial economy” and the need to avoid, not invite, “unnecessary delay.” *Fairholme Funds v. United States*, 147 Fed. Cl. 126, 130 (2020) (citations and internal quotation marks omitted). *Cf.* 28 U.S.C. § 1292(d)(2) (authorizing certification where “an *immediate* appeal from [an interlocutory] order may materially advance the ultimate termination of the litigation”) (emphasis added). Such a delay is particularly unwarranted when one considers that Fairholme’s case has been pending since 2013, that further proceedings in Fairholme’s case have been stayed pending this Court’s disposition of the pending petitions, and that, as noted above, Movants are themselves of the view that the cases are sufficiently distinct that the CFC’s *Fairholme* decision does not require the dismissal of their own direct takings, illegal exaction, and breach of fiduciary duty claims.

Of course, should the CFC be persuaded by Movants’ argument that its decision in *Fairholme* does not require the dismissal of those claims, the parties in Movants’ actions will not soon have a final judgment that they could appeal and link up with proceedings before this Court in this case. In that situation, the only way the



CFC's ruling on those claims could be brought before this Court before final judgment would be if the parties decided to seek, and the CFC decided to grant, certification of an interlocutory appeal under 28 U.S.C. § 1292(d)(2). That certification process would likely take additional weeks, if not longer, to play out, thus further extending the informal stay of proceedings sought by Movants.

If the CFC were to decide the pending motions to dismiss in Movants' cases in the next few weeks, Movants could always seek expedition of any appeals from that decision in order to increase the chances that those appeals and any appeal in the *Fairholme* case would be considered together. And even if the CFC ends up taking a significant amount of time to consider Movants' arguments that their direct claims are sufficiently unlike Fairholme's direct claims that they should be treated differently, Movants would still have an opportunity to submit *amici* briefing in any appeal allowed by the Court in this case in order to inform the Court of its views about the proper treatment of direct claims challenging the Net Worth Sweep. What the Court should not do is indefinitely defer ruling on the current petitions, or indefinitely delay briefing in the event the petitions are granted, pending rulings in the Movants' cases before the CFC. The Court should instead decide the pending petitions in the ordinary course, and, if it grants the petitions, allow briefing to proceed

under the Court's normal rules.<sup>6</sup>

Dated: April 21, 2020

Respectfully submitted,

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<sup>6</sup> In addition to requesting that this Court defer action on the pending petitions, Movant's proposed *amici* brief also discusses some of the differences Movants perceive between their direct claims, and their arguments in support of those claims, and the claims and arguments in *Fairholme*. *Amici Brief* at 7–10. While we see no need to address all of the purported differences identified by Movants, we do wish to briefly comment on Movants' suggestion that because "almost all" of the Fairholme Petitioners purchased their stock after the Net Worth Sweep, Movants are "differently situated to argue that their claims are direct" than are the Fairholme Petitioners. *Id.* at 9. Movants never explain how the timing of the relevant stock purchases impacts the analysis of whether claims are substantively direct. More importantly, however, as Movants implicitly concede, the Fairholme Petitioners include *both* pre-Sweep and post-Sweep purchasers, and thus include plaintiffs who in fact are similarly situated to Movants.

## CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this response complies with the length limitation set forth in FED. R. APP. P. 27(d)(2) because this response contains 1,478 words, excluding those parts of the response exempted by FED. R. APP. P. 27(a)(2)(B). The undersigned attorney further certifies that the response complies with the typeface requirements of FED. R. APP. P. 32(a)(6) because this response has been prepared in a proportionally spaced typeface, Times New Roman, 14-point font, using Microsoft Word.

Dated: April 21, 2020

/s/Charles J. Cooper  
Charles J. Cooper

*Counsel for Petitioners*

**CERTIFICATE OF SERVICE**

I hereby certify that on April 21, 2020, I filed the foregoing response with the United States Court of Appeals for the Federal Circuit using the appellate CM/ECF system. I further certify that service on the following counsel will be accomplished by CM/ECF:

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