

---

---

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, Chief Judge Margaret M. Sweeney

---

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

---

Lawrence D. Rosenberg  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001  
Telephone: (202) 879-3939  
Facsimile: (202) 626-1700  
ldrosenberg@jonesday.com

*Counsel for Amici Curiae*

April 24, 2020

## CERTIFICATE OF INTEREST

Pursuant to Fed. Cir. R. 47.4, counsel for *Amici Curiae* 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



## REPLY IN SUPPORT OF MOTION FOR LEAVE

Neither the government nor the *Fairholme* plaintiffs dispute that it would be appropriate for Amici's cases and the other Related Actions to be considered alongside any appeal in *Fairholme*, but for timing concerns. And neither disputes that, since Amici and others asked the Court of Federal Claims to lift its *sua sponte* stays of their actions, that court has been moving swiftly. Yet the parties warn that Amici seek an "indefinite" delay that "could take months (if not longer)." *Fairholme* Opp. 2-3; Gov. Opp. 2, 8. As detailed below, that is neither likely nor necessary. Nor would Amici's participation in a *Fairholme* appeal as amici on the merits be an adequate substitute for being parties.

### **I. Neither Party Disputes That The Related Actions Should Ideally Be Heard All Together.**

As Amici explain in their proposed amicus brief, their actions are similar to *Fairholme*'s in several respects but also have distinctions in their alleged facts and legal arguments. Amici's actions and *Fairholme* thus present "a number of different factual variations on the legal issues that must ultimately be decided," from which it follows that considering them together would conserve judicial resources. *See Statesman Savings Holding Corp. v. United States*, 26 Cl. Ct. 904, 924 (1992).

Neither the government nor *Fairholme* seriously disputes either this premise or this conclusion. Rather, the government acknowledges that (if the lower court acts expeditiously) the plaintiffs in the Related Actions other than *Fairholme* could "seek to consolidate their appeal with the *Fairholme* appeal." Gov. Opp. 9. And the *Fairholme*

plaintiffs offer that they “would not object to the similar actions being considered together.” *Fairholme* Opp. 2. Thus, they agree that, all else being equal, the Court should consider all of the Related Actions together.

## **II. The Parties’ Fears Of Delay Do Not Warrant Proceeding Immediately.**

The parties nevertheless urge the Court to proceed immediately because, they say they fear, it could be “months” or longer before the other Related Actions arrive in this Court, which makes Amici’s position amount to seeking an “indefinite” stay. *Fairholme* Opp. 2-3; Gov. Opp. 2, 8. Their position is flawed for several reasons.

*First*, it disregards the direction and state of proceedings below.<sup>1</sup> It has been barely two months since Amici and others moved to lift the Court of Federal Claims’ stays pending the determination of further proceedings in *Fairholme*. In that time, the court has received briefing, held a status conference, granted the motions, and as of April 20 received all of the (short) supplemental briefing it requested (as the government now recognizes, Gov. Opp. 5). Similarly, the lower court granted the government and *Fairholme*’s motions to certify five days after they finished briefing. Nothing about this suggests “indefinite” delay.

The government nevertheless argues that there is “no basis for second-guessing”

---

<sup>1</sup> The government’s concern for delay (Gov. Opp. 2, 8) has not been uniform. In the lower court, it requested two 14-day extensions in *Fairholme* to file a status report on whether the parties intended to seek an interlocutory appeal. *Fairholme* ECF 450 & 452. And while these petitions were pending, the government requested a 14-day extension to respond to Amici’s motions to lift the stays. *Owl Creek* ECF 52.

the lower court's conclusion "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 . . . for interlocutory appeal." Gov. Opp. 6. This ignores what the lower court did just ten days after certifying: It lifted the stays in Amici's five actions and *Cacciapalle*; ordered the plaintiffs, within a week, to submit five-page briefs, with proposed orders, explaining how its *Fairholme* opinion applied to their cases; and ordered the government to submit six-page responses two weeks after that, with no replies. It soon after issued a similar order in *Arrowood*.

*Second*, this full picture confirms how *Statesman* (which *Fairholme* does not address) supports giving the lower court time to enter orders in the Related Actions other than *Fairholme*. In *Statesman*, the Court of Federal Claims first decided *Winstar*; then sought briefing on how its decision applied to *Statesman* and *Glendale*; then decided *Statesman* and *Glendale* and certified all three for appeal (without any evident harm to *Winstar* from having waited three months). Here, the lower court first decided *Fairholme*; then certified it for appeal; and then, soon after, sought briefing on how its decision in *Fairholme* applied to the other Related Actions. So the only difference is that some of the task of coordinating the timing of the appeals now falls to this Court.

*Third*, although a truly "indefinite" and long-lasting delay in resolving the *Fairholme* appeals would of course be cause for concern, it hardly follows that this Court should proceed immediately to resolve these appeals. Particularly given the indications from the Court of Federal Claims noted above, this Court could address

*Fairholme*'s and the government's stated concerns—while also acknowledging the considerations of judicial efficiency and prejudice that Amici raise—simply by reserving consideration of the petitions (or, upon granting the petitions, deferring the setting of a briefing schedule) until the summer and then re-evaluating in light of whatever has or has not happened by then in the Court of Federal Claims.

### **III. Amicus Participation At The Merits Stage Will Not Protect Amici's Interests.**

The government argues that, if this Court grants the petitions for interlocutory appeal, Amici could simply participate at the merits stage as amici curiae, to which it would not object. Gov. Opp. 8; *see also Fairholme* Opp. 5 (“[Amici] would still have an opportunity to submit amici briefing in any appeal”). But that would be an appeal only in *Fairholme*, not in Amici's actions, and this Court ordinarily requires amici to take a case as they find it, without expanding on the issues. *See Christian v. United States*, 337 F.3d 1338, 1345 (Fed. Cir. 2003) (“Since none of the parties has made or adopted [amici's] argument[s], we decline to consider them”), *modified and remanded*, 60 Fed. Cl. 550 (2004); *Clark v. Sandusky*, 205 F.2d 915, 917 (7th Cir. 1953) (“An amicus curiae is ‘not a party to the action, but is merely a friend of the court whose sole function is to advise, or make suggestions to, the court.’”).

As Amici explain in their proposed brief, while their claims and arguments overlap with those in *Fairholme*, there are also certain distinctions, which they set out on pages 7-10 and with which the parties fail to seriously grapple. Because of these

circumstances and distinctions, including the legal significance of Treasury's central role in the relevant actions, this case is unlike others where an earlier-decided case simply provides precedent that affects a later litigant. Here, full consideration of those issues and how they affect Amici's cases is necessary and appropriate. Thus, an amicus brief will not sufficiently protect Amici's interests.

### CONCLUSION

This Court should grant Amici's motion for leave, accept its proposed brief, and proceed in accordance with the brief's arguments.

Dated: April 24, 2020

Respectfully submitted:

/s/ Lawrence D. Rosenberg

Lawrence D. Rosenberg  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001  
Telephone: (202) 879-3939  
Facsimile: (202) 626-1700  
ldrosenberg@jonesday.com

*Counsel for Amici Curiae*

**CERTIFICATE OF SERVICE**

I, Lawrence D. Rosenberg, hereby certify that on April 24, 2020, I caused the foregoing reply 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 petitioners and respondent were via CM/ECF:

*Counsel for Respondent*

Kenneth M. Dintzer  
Elizabeth Hosford  
  
U.S. DEPT. OF JUSTICE

*Counsel for Petitioners*

Charles J. Cooper  
David H. Thompson  
Peter A. Patterson  
Brian W. Barnes  
Vincent J. Colatrisano  
  
COOPER & KIRK, PLLC

Dated: April 24, 2020

/s/ Lawrence D. Rosenberg  
Lawrence D. Rosenberg

## CERTIFICATE OF COMPLIANCE

Consistent with to Fed. R. App. P. 27(d) and 32(g), the undersigned hereby certifies that this Reply complies with the type-volume limitation of Circuit Rule 27(d).

1. Exclusive of the exempted portions of the Reply as provided by Fed. R. App. P. 27(d)(2) and 32(f), the reply contains 1,173 words.

2. The reply 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 24, 2020

/s/ Lawrence D. Rosenberg  
Lawrence D. Rosenberg