

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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**FAIRHOLME FUNDS, INC., 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, THE FAIRHOLME FUND,  
ANDREW T. BARRETT,**  
*Plaintiffs-Appellants,*

v.

**UNITED STATES,**  
*Defendant-Cross-Appellant.*

2020-1912, -1914

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Appeals from the United States Court of Federal Claims in No.  
1:13-cv-00465-MMS, Chief Judge Margaret M. Sweeney.

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**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.,**  
*Plaintiffs-Appellants,*

v.

**UNITED STATES,**  
*Defendant-Appellee.*

2020-1934

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Appeal from the United States Court of Federal Claims in No.  
1:18-cv-00281-MMS, Chief Judge Margaret M. Sweeney.

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**MASON CAPITAL L.P., MASON CAPITAL MASTER FUND L.P.,**  
*Plaintiffs-Appellants,*

v.

**UNITED STATES,**  
*Defendant-Appellee.*

2020-1936

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Appeal from the United States Court of Federal Claims in No.  
1:18-cv-00529-MMS, Chief Judge Margaret M. Sweeney.

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**AKANTHOS OPPORTUNITY FUND, L.P.,**  
*Plaintiff-Appellant,*

v.

**UNITED STATES,**  
*Defendant-Appellee.*

2020-1938

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Appeal from the United States Court of Federal Claims in No.  
1:18-cv-00369-MMS, Chief Judge Margaret M. Sweeney.

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**APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, PALOMINO  
MASTER LTD., AZTECA PARTNERS LLC, PALOMINO FUND LTD.,**  
*Plaintiffs-Appellants,*

v.

**UNITED STATES,**  
*Defendant-Appellee.*

2020-1954

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Appeal from the United States Court of Federal Claims in No.  
1:18-cv-00370-MMS, Chief Judge Margaret M. Sweeney.

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**CSS, LLC,**  
*Plaintiff-Appellant,*

v.

**UNITED STATES,**  
*Defendant-Appellee.*

2020-1955

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Appeal from the United States Court of Federal Claims in No.  
1:18-cv-00371-MMS, Chief Judge Margaret M. Sweeney.

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**ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES  
INSURANCE COMPANY, FINANCIAL STRUCTURES LIMITED,**

*Plaintiffs-Appellants,*

v.

**UNITED STATES,**

*Defendant-Appellee.*

2020-2020

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Appeal from the United States Court of Federal Claims in No.  
1:13-cv-00698-MMS, Chief Judge Margaret M. Sweeney.

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**JOSEPH CACCIAPALLE,**

*Plaintiff-Appellant,*

**MELVIN BAREISS, on Behalf of Themselves and All Others**

**Similarly Situated, BRYNDON FISHER, BRUCE REID,**

**ERICK SHIPMON, AMERICAN EUROPEAN**

**INSURANCE COMPANY, FRANCIS J. DENNIS,**

*Plaintiffs,*

v.

**UNITED STATES,**

*Defendant-Appellee.*

2020-2037

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Appeal from the United States Court of Federal Claims in No.  
1:13-cv-00466-MMS, Chief Judge Margaret M. Sweeney.

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**JOINT SUPPLEMENTAL RESPONSE BRIEF OF THE PLAINTIFF-  
APPELLANT PRIVATE SHAREHOLDERS REGARDING *COLLINS***

The Plaintiff-Appellant Private Shareholders are: Fairholme Funds, Inc., 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, The Fairholme Fund, Andrew T. Barrett, 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., Mason Capital L.P., Mason Capital Master Fund L.P., Akanthos Opportunity Fund, L.P., Appaloosa Investment Limited Partnership I, Palomino Master Ltd., Azteca Partners LLC, Palomino Fund Ltd., CSS, LLC, Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, Financial Structures Limited, and Joseph Cacciapalle.

Bruce S. Bennett  
JONES DAY  
555 South Flower Street  
Fiftieth Floor  
Los Angeles, California 90071  
Telephone: (213) 489-3939  
Facsimile: (213) 243-2539  
bbennett@jonesday.com

- and -

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

*Attorneys for Plaintiffs-Appellants 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.; Mason Capital L.P., Mason Capital Master Fund L.P.; Akanthos Opportunity Fund, L.P.; Appaloosa Investment Limited Partnership I, Palomino Master Ltd., Azteca Partners LLC, Palomino Fund Ltd.; and CSS, LLC*

Hamish P.M. Hume  
Samuel C. Kaplan  
BOIES SCHILLER FLEXNER LLP  
1401 New York Ave. NW  
Washington, D.C. 20005  
Tel: (202) 237-2727  
Fax: (202) 237-6131  
hhume@bsflp.com

*Attorneys for Plaintiff-Appellant Joseph Cacciapalle*

Charles J. Cooper  
COOPER & KIRK, PLLC  
1523 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
(202) 220-9600  
(202) 220-9601 (fax)  
ccooper@cooperkirk.com

*Attorney for Plaintiff-Appellants Fairholme Funds, Inc., 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, The Fairholme Fund, Andrew T. Barrett*

Richard M. Zuckerman  
DENTONS US LLP  
1221 Avenue of the Americas  
New York, New York 10020  
Tel.: (212) 768-6700  
Fax: (212) 768-6800  
richard.zuckerman@dentons.com

*Attorney for Plaintiffs-Appellants Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, Financial Structures Limited*

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

**CERTIFICATE OF INTEREST**

**Case Number** 20-1934; 20-1936; 20-1938; 20-1954; 20-1955  
**Short Case Caption** Owl Creek Asia I, L.P., v. U.S.  
**Filing Party/Entity** Owl Creek Asia I, L.P., (see attachment A)

**Instructions:** Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 07/30/2021

Signature: /s/ Bruce S. Bennett

Name: Bruce S. Bennett

FORM 9. Certificate of Interest

Form 9 (p. 2)  
July 2020

<b>1. Represented Entities.</b> Fed. Cir. R. 47.4(a)(1).	<b>2. Real Party in Interest.</b> Fed. Cir. R. 47.4(a)(2).	<b>3. Parent Corporations and Stockholders.</b> Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.  <input type="checkbox"/> None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.  <input type="checkbox"/> None/Not Applicable
Owl Creek Asia I, L.P.	None	None
Owl Creek Asia II, L.P.	None	None
Owl Creek I, L.P.	None	None
Owl Creek II, L.P.	None	None
Owl Creek Asia Master Fund, Ltd.	None	None
Owl Creek Credit Opportunities Master Fund, L.P.	None	None
Owl Creek Overseas Master Fund, Ltd.	None	None
Owl Creek SRI Master Fund, Ltd.	None	None
Mason Capital L.P.	None	None
Mason Capital Master Fund L.P.	None	None
Akanthos Opportunity Fund, L.P.	None	None
Appaloosa Investment Limited Partnership I	None	None



Additional pages attached

**4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable  Additional pages attached


**5. Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable  Additional pages attached

Fairholme Funds, Inc., et al. v. United States, Nos. 20-1912, 1914 (Fed. Cir.); 13-465 (Fed. Cl.)	Cacciapalle v. United States, No. 20-2037 (Fed. Cir.); 13-466 (Fed. Cl.)	Arrowood Indem. Co. v. United States, No. 20-2020 (Fed. Cir.); 13-689 (Fed. Cl.)
Rafter v. United States, No. 14-740 (Fed. Cl.)	Washington Federal v. United States, No. 20-2190 (Fed. Cir.); 13-385 (Fed. Cl.)	Fisher v. United States, 13-608 (Fed. Cl.)

**6. Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable  Additional pages attached


**ATTACHMENT A**

**(Filing Party/Entity Continued)**

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.; Mason Capital L.P., Mason Capital Master Fund L.P.; Akanthos Opportunity Fund, L.P.; Appaloosa Investment Limited Partnership I, Palomino Master Ltd., Azteca Partners LLC, Palomino Fund Ltd.; and CSS, LLC



**ATTACHMENT B**

<b>1. Represented Entities.</b> Fed. Cir. R. 47.4(a)(1).	<b>2 .Real Party in Interest.</b> Fed. Cir. R. 47.4(a)(2).	<b>3. Parent Corporations and Stockholders.</b> Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.
Palomino Fund Ltd.	None	None
Palomino Master Ltd.	None	None
Azteca Partners LLC	None	Palomino Fund Ltd., not a publicly held company, owns 100% of Palomino Master Ltd.'s stock.
CSS, LLC	None	None

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

**CERTIFICATE OF INTEREST**

**Case Number** 20-2037

**Short Case Caption** Cacciapalle v. United States

**Filing Party/Entity** Joseph Cacciapalle

**Instructions:** Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 07/30/2021

Signature: /s/ Hamish P.M. Hume

Name: Hamish P.M. Hume

FORM 9. Certificate of Interest

Form 9 (p. 2)  
July 2020

<p><b>1. Represented Entities.</b> Fed. Cir. R. 47.4(a)(1).</p>	<p><b>2. Real Party in Interest.</b> Fed. Cir. R. 47.4(a)(2).</p>	<p><b>3. Parent Corporations and Stockholders.</b> Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>
<p>Joseph Cacciapalle</p>		

Additional pages attached

**4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable  Additional pages attached

Todd Thomas, Boies Schiller Flexner LLP	Grant D. Goodhart, III, Kessler Topaz Meltzer & Check, LLP	Charles J. Piven, Brower Piven
Eric L. Zagar, Kessler Topaz Meltzer & Check, LLP	Jeremy A. Lieberman, Pomerantz LLP	Michael J. Barry, Grant & Eisenhofer P.A.
Lee D. Rudy, Kessler Topaz Meltzer & Check, LLP	Patrick V. Dahlstrom, Pomerantz LLP	

**5. Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable  Additional pages attached

Fairholme Funds, Inc., et al. v. United States, No. 20-1912, 1914 (Fed. Cir.), No. 13-465C (Fed. Cl.),	Arrowood Indem. Co. v. United States, No. 20-2020 (Fed. Cir.), 13-689 (Fed. Cl.)	Washington Fed. v. United States, No. 13-385C (Fed. Cl.), No. 20-2190 (Fed. Cir.)
Rafter v. United States, No. 14-740 (Fed. Cl.)	Akanthos Opportunity Fund v. United States, No. 20-1938 (Fed. Cir.), 18-369C (Fed. Cl.),	Fisher v. United States, No. 20-138 (Fed. Cir.), No. 13-608C (Fed. Cl.)
Reid v. United States, No. 20-139 (Fed. Cir.), No. 14-152C (Fed. Cl.)	Owl Creek v. United States, No. 20-1934 (Fed. Cir.), No. 18-281C (Fed. Cl.)	Appaloosa Inv. v. United States, No. 20-1954 (Fed. Cir.), No. 18-370C (Fed. Cl.)

**6. Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable  Additional pages attached


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

**ATTACHEMENT TO CERTIFICATE OF INTEREST**

**Case Number: 20-2037**

**Short Case Caption: Cacciapalle v. United States**

**Filing Party/Entity: Joseph Cacciapalle**

5. Related Cases (continued):

*Arrowood Indemnity v. United States*, No. 20-2020 (Fed. Cir.), No. 13-698 (Fed. Cl.)

*CSS LC v. United States*, No. 20-1955 (Fed. Cir.), No. 18-371C (Fed. Cl.)

*Mason Capital LLP v. United States*, No. 20-1936 (Fed. Cir.), No. 18-529C (Fed. Cl.)

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

**CERTIFICATE OF INTEREST**

**Case Number** 20-1912 & 20-1914  
**Short Case Caption** Fairholme Funds, Inc., et al. v. The United States  
**Filing Party/Entity** Appellants, Fairholme Funds, Inc., et al. (see Attachment A)

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Date: 07/30/2021

Signature: /s/Charles J. Cooper

Name: Charles J. Cooper

FORM 9. Certificate of Interest

Form 9 (p. 2)  
July 2020

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<input type="checkbox"/> None/Not Applicable	<input type="checkbox"/> None/Not Applicable	<input type="checkbox"/> None/Not Applicable
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
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

 Additional pages attached

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None/Not Applicable  Additional pages attached

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Arrowood Indem Co v United States, No 13-698 (Fed Cl)	Reid v. United States, No. 20-139 (Fed. Cir. )	Rafter v. United States, No. 14-740 (Fed. Cl.)
Owl Creek Asia Master Fund, Ltd v United States, No 20-1934 (Fed Cir )	Akanthos Opportunity Fund, LP. v. United States, No. 20-1938 (Fed. Cir.)	Appaloosa Inv. Ltd. v. United States, No. 20-1954 (Fed. Cir.)

**6. Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable  Additional pages attached




ATTACHMENT A

List of Parties Represented by Counsel

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

ATTACHMENT B

1. Represented Entities (continued)	2. Real Party in Interest.	3. Parent Corporations and Stockholders.
Andrew T. Barrett	None	None

ATTACHMENT C

Related Cases (continued)

CSS, LLC v. United States, No. 20-1955 (Fed. Cir.); Mason Capital Master Fund  
L.P. v. United States, No. 20-1936 (Fed. Cir.)

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

**CERTIFICATE OF INTEREST**

**Case Number** 20-2020  
**Short Case Caption** Arrowood Indemnity Company v. US  
**Filing Party/Entity** Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, Financial Structures Limited

**Instructions:** Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

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Signature: /s/ Richard M. Zuckerman

Name: Richard M. Zuckerman

FORM 9. Certificate of Interest

Form 9 (p. 2)  
July 2020

<b>1. Represented Entities.</b> Fed. Cir. R. 47.4(a)(1).	<b>2. Real Party in Interest.</b> Fed. Cir. R. 47.4(a)(2).	<b>3. Parent Corporations and Stockholders.</b> Fed. Cir. R. 47.4(a)(3).
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<input type="checkbox"/> None/Not Applicable	<input type="checkbox"/> None/Not Applicable	<input type="checkbox"/> None/Not Applicable
Arrowood Indemnity Company	Not Applicable	Arrowpoint Group, Inc.
"	"	Arrowpoint Capital Corp.
Arrowood Surplus Lines Insurance Company	Arrowood Indemnity Company	Transverse Insurance Group LLC
Financial Structures Limited	Not Applicable	Arrowood Indemnity Company

Additional pages attached

**4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable  Additional pages attached

Michael H. Barr	Sandra D. Hauser	Drew W. Marrocco
Kiran Patel		

**5. Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable  Additional pages attached

Washington Fed. v. US, 13-385C (Fed. Cl.), 20-2190 (Fed.Cir.)	Fisher v. US, 13-608C (Fed. Cl.), 20-138 (Fed. Cir.)	Fairholme Funds v. US, 13-465C (Fed. Cl.), 20-1912, 1914 (Fed. Cir.)
Cacciapalle v. US, 13-466C (Fed. Cl.), 20-2037 (Fed. Cir.)	Reid v. US, 14-152C (Fed Cl.), 20-139 (Fed. Cir.)	Rafter v. US, 14-740C (Fed. Cl.)
Owl Creek v. US, 18-281C (Fed. Cl.), 20-1934 (Fed. Cir.)	Akanthos Opp. v. US, 18-369C (Fed. Cl.), 20-1938 (Fed. Cir.)	Appaloosa Inv. v. US, 18-370C (Fed. Cl.), 20-1954 (Fed. Cir.)

**6. Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable  Additional pages attached


UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

Attachment to Certificate of Interest

Case No. 20-2020

Short Case Caption: Arrowood Indemnity Company v. US

Filing Parties: Arrowood Indemnity Company, Arrowood Surplus Lines  
Insurance Company, Financial Structures Limited

5. Related Cases (cont'd)

*CSS LLC v US*, 18-371C (Fed. Cl.), 20-1955 (Fed. Cir.)

*Mason Capital LP v. US*, 18-529C (Fed. Cl.), 20-1936 (Fed. Cir.)

Instead of addressing how the holding and reasoning of *Collins v. Yellen*, 141 S. Ct. 1761 (2021), should inform this Court’s consideration of this case, the government uses its supplemental brief as an occasion to reiterate arguments that it previously made on other grounds (indeed, arguments inconsistent with *Collins* in key respects) and to advance a narrative inconsistent with the facts as alleged in the Private Shareholders’<sup>1</sup> complaints, which must be taken as true in these appeals from orders granting motions to dismiss. The government makes four fundamental errors:

- (I) The government ignores how *Collins* confirms that the Net Worth Sweep was an action of the United States, never mentioning the Supreme Court’s direct rejection of the government’s primary theory to the contrary.
- (II) The government “read[s] the succession clause too broadly.” *Id.* at 1780.
- (III) The government emphasizes the Court’s holding that the Recovery Act authorized the Net Worth Sweep, contending it warrants dismissal of the Private Shareholders’ illegal-exaction claims, but fails to recognize that that same holding lays the foundation for denying dismissal of the Private Shareholders’ takings claims.
- (IV) The government strains to invoke *Collins* against the Private Shareholders’ contract and fiduciary-duty claims when, if relevant at all, *Collins* reinforces those claims.

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<sup>1</sup> Capitalized terms not defined herein have the meaning given in the Corrected Joint Opening Brief of the Plaintiff-Appellant Private Shareholders [ECF 40].



## ARGUMENT

### I. THE GOVERNMENT IGNORES HOW *COLLINS* CONFIRMS THAT THE NET WORTH SWEEP WAS AN ACTION OF THE UNITED STATES.

The government acknowledges, based on *Collins*, that the Agency, as conservator, has authority to benefit the public and advance public interests, and in that sense is “unlike common law conservators.” Gov. Supp. Br. 9 (citing *Collins*, 141 S. Ct. at 1776); *see id.* at 5–6 (noting, based on *Collins*, the Agency’s authority to benefit itself and the public, to advance public interests, and to pursue market stability); *id.* at 8, 10, 19 (similar). Yet the government clings to its pre-*Collins* arguments that the Agency, as conservator, “sheds its government character” and becomes a private party, indeed, a simple “commercial actor,” and therefore is not the United States under the Tucker Act. *Id.* at 14, 18; *see id.* at 3, 16–18.

The government does this by ignoring what the Supreme Court held in *Collins* and why the Court so held. First, the Court there held that the decision to adopt the Net Worth Sweep was within the Agency’s authority as conservator under the Court’s construction of the Recovery Act, whether or not the Third Amendment was in the best interests of the Companies, because the Agency as conservator was authorized to act to advance the *public* interest. An agency created by the United States Congress, and authorized to act to advance the public interest, exercises a governmental, not private, power. Second, given that statutory interpretation, the Court also held that the Constitution’s separation-of-powers principles apply to the Agency-as-conservator, as it decided that the Recovery

Act assigns to the Agency as conservator “the very essence of ‘execution’ of the law”—a function of the Executive Branch of the federal government. *See Collins*, 141 S. Ct. at 1775–76, 1785–86; Jt. Supp. Br. §§ I.A & I.B, at 1–3, 6–8.

The government would disregard these portions of *Collins* on the ground—for which the government primarily relies on decisions other than *Collins*—that, for separation-of-powers purposes, a court need not differentiate among different sorts of powers an agency has, so long as it has some executive power. Gov. Supp. Br. 15–16. Whatever the merits of this abstract proposition, it ignores what the Supreme Court did in *Collins*. In holding that the Agency “clearly exercises executive power,” the Court expressly looked to the powers granted to the Agency as conservator under the Recovery Act: “[E]ven when it acts as conservator or receiver, its authority stems from a special statute, not the laws that generally govern conservators and receivers”; and, as conservator, it has a litany of statutory “powers” that “differ critically from those of most conservators and receivers.” *Collins*, 141 S. Ct. at 1785–86. The Supreme Court’s construction of the Recovery Act is conclusive.

The government fails to mention that the Supreme Court singled out *O’Melveny*—the foundation of the government’s jurisdictional argument here—as plainly irrelevant. Instead, the government invokes the supposed holdings of lower-court cases (purportedly based on *O’Melveny*) cited by two dissenting justices in *Collins* who made the same argument that the government does here—an argument the Supreme Court expressly rejected. Gov. Supp. Br. 14; *Collins*, 141 S. Ct. at 1806 (Sotomayor, J.,

dissenting); *id.* at 1786 n.20 (opinion of Court); *see also* Jt. Reply § II.D, at 26–28 (explaining irrelevance of the lower-court decisions).

The government does claim that the Supreme Court’s holding does not apply here because the Agency in imposing the Net Worth Sweep was merely acting as a “commercial actor,” “engaged in an activity typically performed by the [Companies’] private managers.” Gov. Supp. Br. 17–18. This is curious as an apparent way to distinguish the reasoning of a case that involved a challenge to the same Agency (and Treasury) action at issue here. It also ignores (a) how the Supreme Court recognized the Net Worth Sweep itself as among the executive actions that the Agency as conservator has performed, *see Collins*, 141 S. Ct. at 1779; Jt. Supp. Br. § I.A, at 3–4; (b) the purported public purposes of the Net Worth Sweep when it was initially adopted, which the Court credited as sufficient for the Agency to have acted within its statutory authority, *Collins*, 141 S. Ct. at 1777; Jt. Supp. Br. § I.B, at 6–7; (c) the essential involvement of the Treasury Department (as well as the Agency) in the Net Worth Sweep, *Collins*, 141 S. Ct. at 1789; Jt. Supp. Br. § I.A, at 4; and (d) the Agency’s insulation from the judicial remedies that any actual commercial actor would face, *Collins*, 141 S. Ct. at 1776.

The government also warns of a parade of horrors should this Court follow the Supreme Court. It appears to suggest that, to rule in the Private Shareholders’ favor on jurisdiction under the Tucker Act, this Court must conclude that the Agency “as

conservator is at all times the government,” which would wreak havoc “not only for [the Agency] but also for other government agencies.” Gov. Supp. Br. 18–19.

This is overwrought: Initially, the government ignores that the Supreme Court, in focusing its analysis on the Agency as conservator under the Recovery Act, repeatedly distinguished conservators from receivers and distinguished the Agency from other possible conservators and receivers (including the FDIC). *Collins*, 141 S. Ct. at 1776 (“An FHFA conservatorship, however, differs from a typical conservatorship in a key respect.”); *id.* at 1785 (discussing how the Agency’s statutory powers “differ critically from those of most conservators and receivers”); *id.* at 1786 n.20 (explaining that “[t]he nature of the FDIC’s authority [as a receiver] sheds no light on the nature of the [Agency’s] distinctive authority as conservator under the Recovery Act”).

In addition, there is no need or occasion for this Court to go as far as the government professes to worry, and consider whether the Agency as conservator is *always* the government. The Private Shareholders have explained this, including based on this Court’s precedents in *Slattery*, which the government does not address in its warnings. *See* Jt. Op. Br. § II.A, at 65–66; § II.B, at 69–70; Jt. Reply § II.A, at 14; § II.D, at 29–32. The Private Shareholders have further explained how an Agency (and Treasury) action as momentous as the Net Worth Sweep is, as to its governmental character, at least distinguishable from, for example, Agency oversight of the Companies’ continuing to conduct non-judicial foreclosures as any private owner of a mortgage would. *Compare* Jt. Op. Br. § II.A, at 66–67, *with* Gov. Supp. Br. 14, 19.

**II. COLLINS CONFIRMS THAT THE SUCCESSION CLAUSE DOES NOT BAR THE PRIVATE SHAREHOLDERS' CLAIMS.**

After noting the conflict of interest that the conservator would face if it were the only entity permitted to challenge the constitutionality of its own structure, the Supreme Court allowed the *Collins* plaintiffs' separation-of-powers claim to go forward. Despite the government's strained arguments to the contrary, this holding cannot be understood to have implicitly rejected the rule that shareholders may sue derivatively when the conservator is conflicted. See *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999). *Collins* did not change the law of this Circuit, and no more needs to be said to defeat the government's Succession Clause argument.

The Court in *Collins*, after finding standing, did not expressly discuss whether the plaintiffs' separation-of-powers claim was direct or derivative, and concluded that the claim could proceed because the *substantive right* the plaintiffs asserted was not "distinctive to shareholders of Fannie Mae and Freddie Mac." *Collins*, 141 S. Ct. at 1781. The same is true for the Private Shareholders' takings claims. Unlike shareholder rights to choose management, inspect books and records, and participate in annual meetings, a right in the Fifth Amendment is one shared by "everyone in this country." *Id.* The government argues that the ability to deploy the procedural device of a derivative lawsuit is a right "distinctive to shareholders" that transfers to the Agency during conservatorship. Gov. Supp. Br. 13. But that cannot be correct. Otherwise, the *Collins*

Court could not have ruled as it did without first expressly holding that the separation-of-powers claim was direct, not derivative.

Finally, the government badly misses the mark if it means to suggest that, after *Collins*, the Succession Clause extends to direct shareholder claims. *Collins* left undisturbed the uniform rule in the lower courts, which is that the “rights . . . of any stockholder . . . with respect to the regulated entity and [its] assets” do not include direct shareholder claims. 12 U.S.C. § 4617(b)(2)(A); *see, e.g., Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 624 (D.C. Cir. 2017). A contrary rule would effect a taking of the Private Shareholders’ direct claims and dramatically expand a statutory provision that the government was already reading “too broadly.” *Collins*, 141 S. Ct. at 1780.

### **III. THE GOVERNMENT’S ARGUMENT REGARDING THE PRIVATE SHAREHOLDERS’ ILLEGAL-EXACTION CLAIMS IGNORES HOW *COLLINS* CONFIRMS THAT THE PRIVATE SHAREHOLDERS STATE A TAKINGS CLAIM.**

The government argues that *Collins* eliminates the bases for the Private Shareholders’ illegal-exaction claims. Gov. Supp. Br. 8. The government overlooks that the Private Shareholders throughout these cases have contended that the Net Worth Sweep took their property—that is, it was a legally authorized action done without providing just compensation—but that, to the extent it was not legally authorized, it illegally exacted their property. *See, e.g., Owl Creek* MTD Opp. 3, 57 [ECF 28].

In *Collins*, the Court did determine that the Agency as conservator is authorized by a “special statute” (the Recovery Act) to “serve public interests,” by ensuring “a stable secondary mortgage market” for “members of the public,” an authorization that

encompassed the initial adoption of the Net Worth Sweep. *Collins*, 141 S. Ct. at 1776–77, 1785. And it further held that “the shareholders[’] claim that the [Agency] transferred the value of their property rights in Fannie Mae and Freddie Mac to Treasury . . . is a prototypical form of injury in fact.” *Id.* at 1779. Indeed, the government, at times, embraces such language. *See* Gov. Supp. Br. 9–10, 19.

Yet the government overlooks what follows: This reasoning of the Court confirms that the Private Shareholders state a takings claim. Their illegal-exaction claim was always pled in the alternative, making clear that the Private Shareholders would have a claim if it were determined that the Net Worth Sweep was unlawful.<sup>2</sup>

**IV. ALTHOUGH THE GOVERNMENT STRAINS TO ARGUE THAT *COLLINS* UNDERMINES THE PRIVATE SHAREHOLDERS’ BREACH OF FIDUCIARY DUTY AND BREACH OF IMPLIED-IN-FACT CONTRACT CLAIMS, THE DECISION, IF ANYTHING, SUPPORTS THEM.**

The government contends that *Collins* undermines the Private Shareholders’ claims for breach of implied-in-fact contract and breach of fiduciary duty. Gov. Supp. Br. 9–10. But *Collins* did not address these claims, and to the extent it might indirectly bear on them, it actually supports them.

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<sup>2</sup> The *Fairholme* Plaintiffs have alleged that a taking occurred not only when the Net Worth Sweep was signed but also that each subsequent dividend constituted another taking. *See* Jt. Reply § VI.A, at 88–89. The alternative illegal-exaction claims should be retained to the extent there remains the potential for a finding that the Agency’s actions were unauthorized in violation of the constitutional separation of powers following the appointment of a Senate-confirmed director. Also, *Collins* did not address whether the Recovery Act authorized anything after the initial adoption of the Third Amendment.

*First*, the government’s reasoning with respect to the contract claims is bizarre: It continues to assert that the Agency did not *have* to obtain the Companies’ consent to the conservatorship, while downplaying that, here, it *did* obtain their consent (as the Private Shareholders have alleged and the government does not dispute). *See id.* And even while emphasizing the Agency’s wide discretion, Gov. Supp. Br. 8, 10; *Collins*, 141 S. Ct. at 1776–77, the government implies that it somehow would have been unlawful for the Agency to *use* that discretion to agree to do less than everything it could.

The government further attempts to use *Collins* to introduce facts contrary to those the Private Shareholders pleaded. These cases, however, are appeals from the granting of a motion to dismiss, so the Court of course must take the facts alleged in the Private Shareholders’ complaints as true, and “all reasonable inferences” must be drawn in favor of the plaintiffs. *Tavory v. NTP, Inc.*, 297 F. App’x 976, 982 (Fed. Cir. 2008). Here, as the Private Shareholders detailed in their initial briefing of this appeal, they pleaded (among other things) that, about two weeks before the conservator was appointed, the Agency, in letters to the Companies, found that each Company met all relevant capital requirements, which means the Agency had affirmatively disclaimed finding anything that authorized it to compel a conservatorship. Jt. Reply § V; Appx497. The Private Shareholders further pointed out how consent would avoid any shareholder challenge to the conservatorships, such that the Agency negotiated for the Companies’ consent. They showed how the Company boards considered their fiduciary duties to shareholders. Jt. Op. Br. 9; Appx883–84; Appx886. And they showed how the Agency made public



statements—both at the time and for three years following, including under oath—assuring shareholders that it would conduct a conservatorship in a way that would not deprive them of their rights. Jt. Op. Br. 8. The Agency then broke that promise when it adopted the Net Worth Sweep. This at least plausibly establishes breach of an implied-in-fact contract (and *Collins* says nothing about any of this).

*Second*, with respect to the breach of fiduciary duty claim, the government does not even attempt to argue that *Collins* impacts this claim as to *Treasury*. Indeed, nothing in *Collins* is inconsistent with Treasury’s status as a controlling shareholder. *See* Jt. Op. Br. § I.D, at 50; *cf. Collins*, 141 S. Ct. at 1773. As to the Agency, while *Collins* did hold that the Recovery Act gave the Agency statutory authority to place its interests and the interests of the public over others, the Supreme Court did not state that the Recovery Act also displaced common law fiduciary duties to shareholders, which this Court has recognized. *See Starr Int’l Co., Inc. v. United States*, 856 F.3d 953, 968 (Fed. Cir. 2017); Jt. Op. Br. § I.D, at 50.

Date: July 30, 2021

/s/ Bruce S. Bennett

Bruce S. Bennett  
JONES DAY  
555 South Flower Street  
Fiftieth Floor  
Los Angeles, California 90071  
Telephone: (213) 489-3939  
Facsimile: (213) 243-2539  
bbennett@jonesday.com

- and -

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

*Attorneys for Plaintiffs-Appellants 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.; Mason Capital L.P., Mason Capital Master Fund L.P.; Akanthos Opportunity Fund, L.P.; Appaloosa Investment Limited Partnership I, Palomino Master Ltd., Azteca Partners LLC, Palomino Fund Ltd.; and CSS, LLC*

Respectfully submitted,

/s/ Hamish P.M. Hume

Hamish P.M. Hume  
Samuel C. Kaplan  
BOIES SCHILLER FLEXNER LLP  
1401 New York Ave. NW  
Washington, D.C. 20005  
Tel: (202) 237-2727  
Fax: (202) 237-6131  
hhume@bsflp.com

*Attorneys for Plaintiff-Appellant Joseph Cacciapalle*

/s/ Charles J. Cooper

Charles J. Cooper  
COOPER & KIRK, PLLC  
1523 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
(202) 220-9600  
(202) 220-9601 (fax)  
ccooper@cooperkirk.com

*Attorney for Plaintiff-Appellants Fairholme Funds, Inc., 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, The Fairholme Fund, Andrew T. Barrett*

/s/ Richard M. Zuckerman

Richard M. Zuckerman

DENTONS US LLP

1221 Avenue of the Americas

New York, New York 10020

Tel.: (212) 768-6700

Fax: (212) 768-6800

richard.zuckerman@dentons.com

*Attorney for Plaintiffs-Appellants Arrowood*

*Indemnity Company, Arrowood Surplus*

*Lines Insurance Company, Financial*

*Structures Limited*

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

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Name: Charles J. Cooper