

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 13-465C
v.	)	(Judge Sweeney)
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

**DEFENDANT’S OPPOSITION TO WASHINGTON FEDERAL’S  
MOTION FOR LEAVE TO FILE AMICUS BRIEF**

Following this Court’s order granting leave to the plaintiffs in *Rafter v. United States*, No. 14-740C, to file an amicus curiae brief regarding the Government’s pending motion to stay, plaintiffs in another related action, *Washington Federal v. United States*, No. 13-385C, now seek leave to file their own amicus brief covering substantially identical ground. The Court should deny Washington Federal’s motion for three reasons: (1) the motion is untimely and, if granted, would disrupt the now-completed briefing of the Government’s motion to stay; (2) Washington Federal does not have an important interest or valuable perspective distinct from the *Fairholme* plaintiffs who already oppose the motion to stay; and (3) a stay in *Fairholme* will not “halt progress” in Washington Federal’s case because Washington Federal has already filed a response to the Government’s motion to dismiss *without* requesting discovery.

“There is no right to file an amicus brief in this court; the decision whether to allow participation by amici curiae is left entirely to the discretion of the court.” *Fluor Corp. v. United States*, 35 Fed. Cl. 284, 285 (1996). Courts consider a number of factors in determining whether to permit the filing of an amicus brief, including the opposition of the parties, the timeliness of the motion, the adequacy of representation, the strength of the movant’s argument and information, and the usefulness of the movant’s argument to the court. *Wolfchild v. United*

*States*, 62 Fed. Cl. 521, 536 (2004), *rev'd on other grounds*, 559 F.3d 1229 (Fed. Cir. 2009).

These factors weigh against granting Washington Federal's motion.

First, Washington Federal's motion is untimely and will, if granted, disrupt the briefing of the Government's motion to stay in *Fairholme*. The Government filed its motion to stay on October 28, 2014. Washington Federal – for no valid reason – has waited nearly a month to seek leave to file an amicus brief, and has stated that it will not file its brief until December 5, 2014. This will prejudice the Government because the motion to stay is fully briefed. Therefore, we will be required to seek leave to respond to Washington Federal's brief should the Court grant its motion. This will significantly delay the disposition of the Government's motion which, as the Court is aware, seeks to stay burdensome discovery pending the resolution of the *Perry Capital* appeals. Thus, Washington Federal's motion for leave is untimely, disruptive, and prejudicial.

Indeed, it appears that the Washington Federal plaintiffs did not consider filing an amicus brief until the Court granted the *Rafter* motion, as evidenced by Washington Federal's failure to attach a proposed amicus brief to its motion. Had Washington Federal believed that an amicus brief was warranted, it would have attached a proposed brief to its motion, as Rafter did. Washington Federal's failure to do so – and its current request for an additional nine days to file its amicus brief – indicates that its decision to file an amicus brief was nothing more than an afterthought. Washington Federal's untimeliness will provide it an unfair advantage and prejudice the Government because Washington Federal, unlike the *Rafter* plaintiffs, will receive our reply brief before filing its amicus brief, and be in a position to take our reply arguments into account when drafting its brief.

Second, a brief by Washington Federal will not be useful to the Court in deciding whether to stay proceedings in *Fairholme*. Members of this Court and its predecessor court have

commented that “[p]erhaps the most important [factor] is whether . . . participation by the amicus will be useful to [the Court], as contrasted with simply strengthening the assertions of one party.” *Am. Satellite Co. v. United States*, 22 Cl. Ct. 547, 549 (1991); *see also Adv. Sys. Tech., Inc. v. United States*, 69 Fed. Cl. 355, 357 (2006); *Wolfchild*, 62 Fed. Cl. at 536. Ordinarily, a party seeking leave to file an amicus brief will attach the brief to its motion, so that the court and other parties can assess the usefulness of the potential amicus’s argument to the case. *See, e.g., Fed. R. App. P. 29(b)*. Washington Federal has not done so here. The Court could deny the motion for leave on this basis alone.

Washington Federal’s interest is that of a litigant, not a friend of the court. In fact, Washington Federal has only one interest in opposing the motion to stay in *Fairholme*: it opposes the stay because discovery in *Fairholme* might give rise to documents Washington Federal could use to supplement its opposition to the Government’s motion to dismiss. *Wash. Fed. Mot.* at 1. We explain below that this is not a valid rationale to oppose the stay; but even if it were, the Court will not benefit from allowing Washington Federal to file an amicus brief restating its limited litigation interest in *Fairholme* discovery. There are simply no new arguments Washington Federal may add to assist the Court; filing a brief here would only provide Washington Federal with an opportunity to advance its individual theory of the case for purposes of its own litigation. *See, e.g., Am. Satellite*, 22 Cl. Ct. at 549 (“[C]ourts have frowned on participation which simply allows the amicus to litigate its own views.”).

Finally, Washington Federal’s arguments against a stay in *Fairholme* fall particularly flat because Washington Federal already filed a full response to the Government’s motion to dismiss without requesting discovery. *See Pls.’ Brief in Opp. to Def’s Mot. to Dismiss*, No. 13-385C (Fed. Cl. Dec. 16, 2013), ECF No. 37; *Pls.’ Resp. to Order Regarding Jurisd. Disc.* at 2, No. 13-

385C (Fed. Cl. Feb. 7, 2014), ECF No. 42. It is difficult to understand how Washington Federal can be prejudiced by staying proceedings in *Fairholme*. Judicial efficiency will not be served by allowing discovery to continue pending the *Perry Capital* appeal simply to provide Washington Federal with the speculative opportunity to supplement its previously-filed opposition. To the extent Washington Federal believes its interests are affected by a stay in *Fairholme*, Washington Federal can adequately represent those interests in its own action.

For the foregoing reasons, the Government respectfully requests the Court deny Washington Federal's motion for leave to file an amicus brief.

Respectfully submitted,

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