

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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

**DEFENDANT’S OPPOSITION TO MICHAEL SAMMONS’S MOTION FOR LEAVE TO FILE AMICUS BRIEF**

Defendant, the United States, respectfully submits this opposition to Michael Sammons’s motion for leave to file an amicus brief addressing the Court’s jurisdiction to adjudicate plaintiffs’ Fifth Amendment takings claims. The Court should deny Mr. Sammons’s motion for three reasons: (1) the motion for leave and accompanying brief prematurely raise a jurisdictional argument that the Court has not yet ordered the parties to address and the parties have not raised; (2) Mr. Sammons attempts to circumvent the Court’s denial of his motion to intervene, in which he advanced the same jurisdictional argument that he attempts to assert now as amicus; and (3) Mr. Sammons fails to demonstrate that his participation in this case as amicus will be useful to the Court, given that the parties are represented by competent counsel and are fully capable of presenting their respective arguments.

**BACKGROUND**

On September 16, 2016, Mr. Sammons filed a motion to intervene “as a matter of right for the limited purpose of challenging this Court’s jurisdiction” over plaintiffs’ Fifth Amendment takings claims. Mot. to Intervene, at 1, Sept. 16, 2016, ECF No. 337. He argued that, because the United States Court of Federal Claims is not an Article III court, it is prohibited from hearing

plaintiffs' takings claims. *See id.* at 2-5. In a September 30, 2016 order, this Court denied Mr. Sammons's motion to intervene on several grounds, including that Mr. Sammons had failed to demonstrate that denial of intervention would impair his ability to protect his own interests, because he could file a takings claim in Federal district court if he limited his damages to \$10,000. Order Denying Mot. to Intervene, at 2-3, Sept. 30, 2016, ECF No. 338. The Court rejected Mr. Sammons's jurisdictional argument, explaining that "the Court of Federal Claims has exclusive jurisdiction over Fifth Amendment takings claims against the United States for claims that exceed \$10,000 in damages, and concurrent jurisdiction with federal district courts over Fifth Amendment takings claims for less than \$10,000." Order, at 2-3, 7.<sup>1</sup>

Mr. Sammons appealed to the United States Court of Appeals for the Federal Circuit, which, in a March 14, 2017 opinion, affirmed this Court's order denying intervention. *Fairholme Funds, Inc. v. United States*, No 2017-1015, 2017 WL 991077 (Fed. Cir. Mar. 14, 2017). The Federal Circuit noted, however, that this Court's order "stated the statutory basis for its jurisdiction over takings claims . . . recognizing that jurisdiction, at least as a statutory matter. But it did not analyze Mr. Sammons's constitutional contention, which invoked *Stern v. Marshall*, 564 U.S. 462 (2011), and other decisions, that only an Article III court may hear takings claims." *Id.* at \*2.

---

<sup>1</sup> On October 21, 2016, Mr. Sammons filed a complaint and a motion for declaratory judgment, advancing the same jurisdictional argument that he attempts to assert now as amicus, in the United States District Court for the Western District of Texas. *Sammons v. United States*, No. 2016-1054, Oct. 21, 2016, ECF Nos. 1, 3. The district court denied Mr. Sammons's motion for declaratory judgment and granted the Government's motion to dismiss Mr. Sammons's complaint for lack of subject matter jurisdiction. *Id.*, Mar. 9, 2017, ECF No. 33. On March 9, 2017, Mr. Sammons filed an appeal from the district court's order in the United States Court of Appeals for the Fifth Circuit, which is currently pending. *Id.*, Mar. 9, 2017, ECF No. 35.

Mr. Sammons now seeks leave to file an amicus brief to address what he labels as the Federal Circuit's "directive" to this Court to resolve whether the United States Constitution prohibits Article I courts from hearing Fifth Amendment takings claims. Mot. for Leave, at 1 (citing *Fairholme Funds*, 2017 WL 991077, at \*2, \*3) (observing that this Court "did not analyze Mr. Sammons's constitutional contention . . . that only an Article III court may hear takings claims")). Mr. Sammons also relies upon the Federal Circuit's statement that "[Mr. Sammons's] argument, to the extent it is a jurisdictional one, must be addressed by the Court of Federal Claims and (if there is an appeal) by this court even if Mr. Sammons is not a party and even if no party makes the argument he makes." *Id.* at \*3.

#### ARGUMENT

This Court should deny Mr. Sammons's motion for leave to file an amicus brief raising the question as to whether the Court possesses jurisdiction to hear takings claims. "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 adequacy of representation, the strength of the movant's argument and information, and "whether the court is persuaded that participation by the amicus will be useful to it, as contrasted with simply strengthening the assertions of one party." *Am. Satellite Co. v. United States*, 22 Cl. Ct. 547, 549 (1991); *see also 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 Mr. Sammons's motion.

I. The Motion For Leave And Amicus Brief Prematurely Raise An Issue Not Yet Raised By The Court Or The Parties

---

Mr. Sammons's motion for leave and proposed amicus brief are premature and raise an issue not yet raised by the Court or the parties.

Mr. Sammons's jurisdictional argument is premature because this Court has not ordered the parties to address the issue of whether this Court lacks jurisdiction to consider takings claims, and the parties have not raised this issue. *See Am. Satellite Co.*, 22 Cl. Ct. at 548 (denying a motion for leave to file an amicus curiae brief in which the movant proposed to "sharpen the issues posed [by the parties] and broaden the court's understanding [of] . . . 'legal and factual issues not now being addressed by the parties'"). Absent such an order from the Court, Mr. Sammons's amicus brief is substantively equivalent to a motion to dismiss plaintiffs' complaint. Amici, however, may not initiate dispositive motions. *Anderson Columbia Envtl., Inc. v. United States*, 42 Fed. Cl. 880, 885 (1999); *In re Petition to Call Election*, 517 N.E.2d 1188, 1190 (Ill. App. 1987) ("[T]he trial court was not authorized . . . to permit amici curiae to appear and file a motion to dismiss as would a litigant before the court."); *Pennsylvania v. Cotto*, 708 A.2d 806, 808 n.2 (Pa. 1998), *aff'd*, 753 A.2d 217 (2000) ("An amicus curiae . . . has no control over the litigation and no right to institute any proceedings therein; he must accept the case before the court with the issues made by the parties."). Because Mr. Sammons may not "broaden the issue[s]" raised by the parties, his motion for leave to brief, as amicus, an issue that has not been raised by the Court or the parties is inappropriate, and should be denied. *Bing v. Roadway Exp., Inc.*, 485 F.2d 441, 452 (5th Cir. 1973).

II. The Motion For Leave Attempts To Circumvent The Court's Denial Of Mr. Sammons's Motion To Intervene

---

Mr. Sammons's motion for leave to file an amicus brief attempts to (1) circumvent the Court's denial of Mr. Sammons's motion to intervene, and (2) advance Mr. Sammons's own interests as a litigant. *Am. Satellite Co.*, 22 Cl. Ct. at 549 (“[A]lthough it is not necessary that an amicus curiae be totally disinterested . . . courts have frowned on participation which simply allows the amicus to litigate its own views . . . .” (citation omitted)). Mr. Sammons's motion for leave and amicus brief merely repeat the jurisdictional argument that he asserted in his motion to intervene: “The gravamen of Mr. Sammons's motion to intervene is that the Court of Federal Claims lacks the authority to exercise jurisdiction over and adjudicate Fifth Amendment takings claims.” Order Denying Mot. to Intervene, at 2. Indeed, Mr. Sammons filed his motion for leave after this Court denied his motion to intervene and the Federal Circuit affirmed this Court's decision. *Id.* at 10; *Fairholme Funds, Inc.*, 2017 WL 991077, at \*3 (discerning no reversible error in the Court of Federal Claims' denial of the motion to intervene).

Mr. Sammons reveals his intention to participate in this case as a litigant, rather than a “friend of the court,” by identifying himself as an “eventual class participant in these consolidated takings cases.” Mot. for Leave, at 1. In his brief accompanying the motion for leave, Mr. Sammons states that he is a “GSE preferred stock investor, holding \$1,000,000 in preferred shares”; “seeks monetary damages against the United States in the amount of \$900,000”; and, “[h]is sole cause of action is an unconstitutional takings claim against the United States brought directly under the Takings Clause of the Fifth Amendment.” Amicus Br., at 6-7, Mar. 20, 2017, ECF No. 363-1. Thus, Mr. Sammons's real interest is that of a litigant because he has a personal interest in the outcome of this litigation. *See Am. Satellite Co.*, 22 Cl. Ct. at 549 (finding that the movant's real interests were not to serve as an amicus curiae when movant

was “intimately involved in the facts and circumstances leading to the pending lawsuit, and . . . a few weeks away from being a litigant itself”). Given Mr. Sammons’s failure to achieve intervenor status, the Court should reject his attempt to use an amicus brief as a vehicle to assert arguments that he would have made had his motion to intervene been granted.

III. Mr. Sammons’s Participation As Amicus Is Neither Helpful Nor Necessary

Finally, Mr. Sammons fails to demonstrate that his participation as amicus would be helpful or “necessary in this case to get adequate representation of [the parties’] positions.” *Am. Satellite Co.*, 22 Cl. Ct. at 549. This is not a case in which any party is “not represented competently” or “not represented at all.” *Ryan v. Commodity Futures Trading Comm’s*, 125 F.3d 1062, 1063 (7th Cir. 1997). To the contrary, the plaintiffs are competently represented by the law firm Cooper & Kirk, and the United States is competently represented by the Department of Justice. Each party, through its legal counsel, is fully capable of presenting its arguments to this Court on jurisdictional issues. Moreover, Mr. Sammons has not met his burden to demonstrate that he possesses “unique information or perspective that can help the court beyond the help that the parties are able to provide.” *Id.*

For these reasons, the United States respectfully requests that the Court deny Mr. Sammons’s motion for leave to file an amicus brief.

Respectfully submitted,

CHAD A. READLER  
Acting Assistant Attorney General

s/ Robert E. Kirschman, Jr.  
ROBERT E. KIRSCHMAN, JR.  
Director

s/ Kenneth M. Dintzer  
KENNETH M. DINTZER  
Deputy Director  
Commercial Litigation Branch  
Civil Division  
U.S. Department of Justice  
P.O. Box 480  
Ben Franklin Station  
Washington, D.C. 20044  
Telephone: (202) 616-0385  
Facsimile: (202) 307-0972  
Kenneth.Dintzer@usdoj.gov

Attorneys for Defendant

April 3, 2017