

UNITED STATES COURT OF FEDERAL CLAIMS

Wazee Street Opportunities Fund IV LP,
Douglas Whitley, and Lisa Brown, On Behalf
of Themselves and All Others Similarly
Situated,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 18-1124

PLAINTIFFS' NOTICE OF FIRST AMENDED COMPLAINT

Pursuant to this Court's February 6, 2023 Order (ECF No. 22), Plaintiffs in the above-captioned case now file their First Amended Complaint ("FAC") under Fed. R. Civ. P. 15(a)(1)(B) to assert unjust enrichment claims against Defendant in addition to Plaintiffs' other claims.

Under Rule 15(a)(1), a party "may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Here, Plaintiffs filed their complaint on August 1, 2018 (ECF No. 1). Defendant has not filed a response thereto, instead filing a joint motion to stay proceedings on August 29, 2018 (ECF No. 7). Because Plaintiffs have "an unequivocal right to file one amended complaint without leave of court before defendant's filing of a responsive pleading," Plaintiffs are within their right to amend the complaint as a matter of course. *Gaming*

Mktg. Sols., Inc. v. Cross, 528 F. Supp. 2d 403, 406 (S.D.N.Y. 2007); *see also Doe #1 v. Syracuse Univ.*, 335 F.R.D. 356, 359 (N.D.N.Y. 2020) (collecting cases). Regardless, Plaintiffs also should be permitted to amend their complaint to assert unjust enrichment claims to permit an *en banc* petition to review relevant unjust enrichment precedent. Accordingly, Plaintiffs file their FAC concurrently with this Notice.

In the FAC, Plaintiffs assert additional claims for unjust enrichment against Defendant. Plaintiffs acknowledge binding Federal Circuit precedent holds that the Court lacks jurisdiction to entertain an unjust enrichment claim under the Tucker Act. *See, e.g., Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1326 (Fed. Cir. 1997). Plaintiffs, however, intend to petition for *en banc* review of that precedent. *See* Fed. R. App. P. 35(a); Fed. Cir. R. 35(a).

Plaintiffs further recognize that the decision of the Federal Circuit in *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (Fed. Cir. 2022), cert. denied, No. 22-100, 2023 WL 124023 (U.S. Jan. 9, 2023), constitutes binding precedent that requires this Court to dismiss the other claims advanced in the above-captioned case.¹ Plaintiffs intend to seek *en banc* review of any dismissal of their complaint under *Fairholme*. Further, while Plaintiffs recognize that dismissal is required, Plaintiffs do not consent to such dismissal and assert that they retained full appellate rights, including the right to appeal to the *en banc* Federal Circuit to overturn its decision in *Fairholme*.

Plaintiffs informed Defendant of their intent to amend their complaint and sought consent thereto. Defendant responded that it intends to review Plaintiff's motion and will respond as appropriate in the timeframe permitted under the rules.

¹ As Plaintiffs were not parties in any of the cases addressed in the *Fairholme* decision, that decision is not collateral estoppel or *res judicata*, but instead is merely binding precedent.

Dated: February 27, 2023

Respectfully Submitted,

/s/ Hamish P.M. Hume

Hamish P.M. Hume

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