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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

VIRGINIA MILTON, and, ARNOLD MILTON, on Behalf of Themselves and All
Other Similarly Situated Persons, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

*Appeals from the United States Court of Federal Claims in Nos. 1:17-cv-01189-LAS,
(continued inside), Senior Judge Loren A. Smith.*

**BRIEF OF AMICI CURIAE, 205 STAYED NON-TEST PLAINTIFFS,¹
IN SUPPORT OF NEITHER AFFIRMANCE NOR REVERSAL**

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¹ Amici Curiae, 205 stayed non-test Plaintiffs, are listed in the certificate of interest.

Appeals from Continued

1:17-cv-01195-LAS, 1:17-cv-01206-LAS, 1:17-cv-01215-LAS, 1:17-cv-01216-LAS,
 1:17-cv-01232-LAS, 1:17-cv-01235-LAS, 1:17-cv-01300-LAS, 1:17-cv-01303-LAS,
 1:17-cv-01332-LAS, 1:17-cv-01391-LAS, 1:17-cv-01394-LAS, 1:17-cv-01395-LAS,
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 1:19-cv-01207-LAS, 1:19-cv-01208-LAS, 1:19-cv-01278-LAS, 1:19-cv-01908-LAS,
 1:20-cv-00115-LAS, and 1:20-cv-00147-LAS

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2021-1131
Short Case Caption Milton et al. v. United States
Filing Party/Entity Abed-Stephen et al.

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: March 15, 2021

Signature: s/ Nancie G Marzulla

Name: Nancie G. Marzulla

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).	3. Parent Corporations and Stockholders. 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 checked="" 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 checked="" type="checkbox"/> None/Not Applicable
Hulak and Zavik Abed-Stephen		
Joan C. Alford		
Albert and Debra Allen		
Melissa Almario		
Ana Alvarez		
Rosalie Brandino Aquilina		
Alex Abdollah Arjomand		
Cinda S. and Fred R. Armstrong		
Fatemah Asghari and Alireza Safar		
Lynn Ashby		
Barrette and Julie Banner		
Michael Barry, II		

☒ Additional pages attached

1. Represented Entities [continued]. Fed. Cir. R. 47.4(a)(1).	2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).	3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).
Charles E. and Diana V. Barton		
Laura and Chaunce A. Beane		
Marcheta and John Beasley		
William and Margo Begman		
Jennifer R. and Ryan L. Bickley		
Dorothy Blodgett		
Joe and Brenda Bono		
Raymond and Elizabeth G. Bossotti		
Joseph and Susan Braden		
Tom and Kathy Brackin		
Tracy Burger, Individually and as Executrix for the Estate of Richard Burger		
Nancy N. Burger		
Kevin and Kristen Burke		
Patricia Busmire		
Albert and Judy Butler		
Olivia and Michael T. Green Caballero		
Sharon Callison		
Omar and Olsa Cano		
Neal D and Kristen T. Carlson		
Victor and Jenny Chao		
Alison Chen		
Imiao Joanna Chen		
Theresa Chen		
Dan Cho		
Sungjin and Elain Yang Choi		
Richard and Stacy Clark		

Randy Clevenger		
Andrew W. and Courtney L. Coolidge		
John C. and Mary L. Crawford		
Weiye Zheng and Wayne R. Dalcin		
Alfred and Carlota Danforth		
Keith Darby		
Eric and Katherine Hope Davis		
Nadia Deans		
John H. and Marisol Denson		
Damien and Josephine Derby		
Robert and Marilyn Dillard		
Rafik and Maria Boutros Dimian		
Karen and Jason Dixon		
Alain and Sylvie Dorel		
Peter Douglas, Independent Executor of the Estate of Virginia W. Douglas		
Mario G. Duenas		
Robert Duff		
Charlotte Eftekhar		
Enex, Inc.		
Robert and Millicent Erwin		
Ethan's Glen Community Assoc., Inc. and William Bedman as Trustee of the Ethan's Glen Community Trust		
Buckminster and Suzanne Farrow		
Martha McManus Fluker		
Todd Forester		

Ingrid Forrest		
Praneet Franklin		
Jean A. Sargent Gaines		
Roland and Karen H. Garcia		
Xiaobin Ge		
Andrei S. and Antonella V. Georgescu		
Sylvia H. Gex		
Rae Goodwin		
Patrick T. and Judith J. Gordon c/o Gordon Family Trust		
Patty Gray		
Kenneth and Elizabeth Green		
E.J. Grivetti		
Randall W. and Michelle Habel		
Diane Hackem		
Janna and Jack R. Hamilton		
Billy Q. Harris		
Aracely Harris		
Tracy and Christine Lockstedt Hatz		
Robert Brady & Linda Hetherwick (Brady)		
Lawrence and June Hibbard		
Anna Belle Hicks		
Nhut and Ha Phan Ho		
Wing and Qiao Ye Ho		
Bonnie A. and Henry E. Hood		
Robert and Sherry Hooper		
Ernest Roy and Mary Elizabeth Hunt		
James R. and Martha Hunt		

Ingrid Jensen		
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Mark H. and Laura Johnson		
Kit and Ann Kampschmidt		
Mary Karges		
Mark Cargill Keener		
Lawrence and Lorraine Kelly		
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Kelli Kickerillo		
Vincent D. and Mary F. Kickerillo		
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Shirley Koralewski		
Claudia K. Langerud		
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Paula M. and Eric C. Lauritzen		
Manuel D. and Beatrice M. Leal		
Jonathan and Emma Lean		
Whan and Kyongsook Yun Lee		
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Joan Lotz		
Lisa and Eric Lundquist, Jr.		
Bryan and Angela Lynch		
Carol A. Mahoney		
Patricia Malone		
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Wilton Ray and Kathie Marshall		
Rose Mary Martinez		

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Robert Elton, Jr. and Mary R. Maxwell		
David and Ann May		
Roya McArthur		
Patricia Ann McDonald		
Don Hunter and Michelle Holick McGuirt		
William and Linda McIlwain		
Brooke Medina		
Memorial Bend Place Owner's Association		
Mark and Marcia Menard		
Gordon and Sherra Miller		
Stephen and Pamela Moore		
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Charles and Kim Mueller		
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Mike Nematpour		
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Bruce Nguyen		
Bruce and Nancy Olsen		
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Brian and Katherine Reed		
Brian and Deborah Reese		
Jeffrey D. and Chriseda C. Reuben		
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Miguel and Hailey San Juan		
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Bobken and Huleh Simonians		
Karen Smith		
Natasha and Matthew Stearns		
Jerome and Patricia Stefaniak		

Tomasz and Christina Stenzel		
Tamberli Weitkunat, Executrix of the Estate of Margaret Stratton		
William & Sarna S. Sunshine		
Mason and Amanda Thilman		
Dan Tinkler		
James and Charlotte Tribble		
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Woodstone Section Three HOA		
Chunxia and Yongjun Yue Xu		
Tong Sop Yi		
Donna and David Yi		
Qindong and Ping Wan Zhang		
Carol Zieben		
Michael and Kryn Zimmermann		

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

Nancie G. Marzulla; Roger J. Marzulla Marzulla Law, LLC	John Clinton Schumacher Dawson & Sodd, LLP	Daniel Barton Barton Law Group
William Fred Hagans; Stephanie M. Taylor Hagans Montgomery Hagans	Derrick Carson Locke Lord LLP	
Dennis C. Reich Reich & Binstock	Michael C. Falick, I Rothfelder & Falick, L.L.P.	

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

Abed-Stephen, et al. v. United States, No 19-782L	Ashby, et al. v. United States, No. 19-1266L	Asghari, et al. v. United States, No. 19-698L
Alford, et al. v. United States, No. 19-807L	Darby, et al. v. United States, No. 19-1063L	Olsen, et al. v. United States, No. 18-123L
Allen, et al. v. United States, No. 19-1924L	Kickerillo, et al. v. United States, No. 18-345L	Salo v. United States, No. 17-1456L

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

5. Related Cases [continued].		
Kickerillo v. United States, No. 18-345L	Ray v. United States, No. 20-686L	In re Addicks and Barker (Texas) Flood-Control Reservoirs, No. 17-9002L

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<i>Milliken v. Meyer</i> , 311 U.S. 457 (1940).....	5
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Statement of identity, interest, and source of authority

Amici Curiae are Plaintiffs in 205 cases now pending before the Court of Federal Claims.² Appellants have identified Amici Curiae's cases as related cases in this appeal.³ Yet, unlike Appellants, Amici Curiae have never had their day in court. Under the trial court's case management orders, Amici Curiae were prohibited from participating in the cases now before this Court, and all proceedings in Amici Curiae's cases have been administratively stayed since January 2018.⁴ In this brief Amici Curiae do not make arguments in support of either side, but merely ask this Court to preserve their due process rights by declaring that the decision of this appeal does not adversely affect Amici Curiae, and does not limit the legal arguments and evidence they will be allowed to present when their cases are allowed to move forward—including arguments and evidence dramatically different from the appellate record in this case.⁵

Amici Curiae's interests in this appeal are the preservation of their Fifth Amendment taking claims against the Government and their Fifth Amendment due process right to have those claims impartially decided. No party's counsel authored

² A list of the 205 cases is attached as Exhibit 1.

³ See Appellants' Opening Briefs, ECF Nos. 30-34.

⁴ See attached as Exhibit 2 Case Management Order 3 (Dec. 5, 2017) and attached as Exhibit 3 Case Management Order 5 (Feb. 18, 2020).

⁵ If asked, however, Amici Curiae would submit that they believe Appellants' cases should not have been dismissed.

any portion of this brief. No party, party's counsel, or any other person or entity besides the Amici Curiae contributed money to fund preparation or submission of this brief. All Appellants and Appellee have consented to the filing of this Brief as Amici Curiae.

Background

As set forth in a series of case management orders, the trial court divided the Harvey flooding cases into an Upstream group (still pending in the U.S. Court of Federal Claims) and a Downstream group (including Amici Curiae and Appellants in this appeal).⁶ The Downstream trial court then chose thirteen test cases and, following briefing and argument, entered summary judgment for the Defendant-Appellee, the United States, in the Downstream test cases.⁷

The trial court then issued an Order to Show Cause why the non-test Downstream cases also should not be dismissed, and subsequently dismissed all who had not filed a response—Appellants in this case. Amici Curiae, all of whom filed responses to the Order to Show Cause, were not dismissed; their cases remain pending in the trial court.

Amici Curiae and their counsel had no role in the preparation and presentation of the cases now on appeal. The trial court's case management orders

⁶ See Ex. 2.

⁷ See *supra* note 3, for a more complete discussion of the procedural background in this case.

for the Downstream cases required that the test cases be prepared and presented solely by counsel selected and appointed by the Court.⁸ The trial court stayed the claims of Amici Curiae until entry of judgment on the test cases.⁹ Counsel for Amici Curiae were not allowed to make any filing, participate in any proceeding, or even to listen to telephonic oral arguments or status conferences. The appellate record now before this Court contains no evidence or legal arguments relating to Amici Curiae.

Summary of argument

Amici Curiae have never had an opportunity to present their different evidence and legal arguments on which they base their claims, and also do not believe their claims are susceptible to summary disposition as were the test Plaintiffs' claims. Treating this Court's decision in the test cases as binding on Amici Curiae would therefore be unjust and a denial of due process because they would be deprived of their day in court.¹⁰ Amici Curiae note that while designating the decision "non-precedential" may be helpful, it is insufficient because, as the

⁸ Ex. 2 at 2-3.

⁹ See Ex. 3 at 2.

¹⁰ See *Taylor v. Sturgel*, 553 U.S. 880, 893 (2008) (noting the "deep-rooted historic tradition that everyone should have his own day in court").

Court is aware, non-precedential decisions still serve as guidance to the trial court.¹¹

Appellants' opening briefs identify Amici Curiae's cases, which are still pending in the trial court and have never been heard, as related cases under Rule 47.5. And that is precisely Amici Curiae's concern: that their cases will be resolved—or at least significantly affected—by the resolution of this appeal—even though they have been stayed and have been prohibited by court order from preparing and presenting their cases. Amici Curiae therefore ask this Court to include language in any opinion it issues in this appeal stating that nothing in its decision should be interpreted to bar Amici Curiae from presenting evidence and legal arguments, including evidence and legal arguments different from those presented by Appellants and that nothing in this Court's decision should be construed to bind or influence the trial court's decision in Amici Curiae's cases.¹²

Argument

1. Amici Curiae are entitled to present evidence and arguments different from Appellants

¹¹ See *Burke, Inc. v. Bruno Indep. Living Aids, Inc.*, 183 F.3d 1334, 1338 (Fed. Cir. 1999) (affirming a lower court's reliance on a nonprecedential decision for its persuasiveness).

¹² *Cienega Gardens v. United States (Cienega X)*, 503 F.3d 1266, 1276 (Fed. Cir. 2007) (emphasizing that its holdings were unique to the four model plaintiffs and based off the arguments made).

The most fundamental precept of constitutional due process is that a party is entitled to notice and hearing before the court enters judgment.¹³ Amici Curiae, all of whom have brought separate claims against the United States, have never had their day in court. The procedure the trial court adopted was to stay all claims except for those of the test Plaintiffs, with the explicit understanding that the decision of those test cases would have no preclusive effect on non-test Plaintiffs, such as Amici Curiae. The trial court carefully chose to enter judgment against Appellants and not to enter judgment in Amici Curiae's cases precisely because Appellants had been given an opportunity for hearing—while the Amici Curiae have not. For the same reason, Amici Curiae ask this Court to not render an opinion in this appeal that would suggest to the trial court how it should decide Amici Curiae's unheard claims.

The Supreme Court might have been describing this case when, in *Taylor v. Sturges*,¹⁴ it stated:

A person who was not a party to a suit generally has not had a “full and fair opportunity to litigate” the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the “deep-rooted historic tradition that everyone should have his own day in court.”¹⁵

¹³ See *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); *Pennoy v. Neff*, 95 U.S. 714 (1877).

¹⁴ 553 U.S. 880 (2008).

¹⁵ *Id.* at 892-93 (quoting *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 798 (1996)).

Similarly, this Court has consistently held that a decision in a prior case is not binding on a subsequent litigant (here, Amici) unless the second litigant controlled the litigation or was in privity with the first litigant:

We have never applied issue preclusion against a non-party to the first action. In fact, the Supreme Court has specifically held that “litigants . . . who never appeared in a prior action[] may not be collaterally estopped without litigating the issue. . . . Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.” *Blonder–Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329; *see also Parklane Hosiery, Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) (“It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.”); Restatement (Second) of Judgments § 29 Reporter’s Note (“The proposition that a non-party cannot be bound by a judgment, unless he is represented by a party or has interests that are derivative from a party, is a rule of Constitutional law.”).¹⁶

Here, the trial court might have managed this case as a class action (as the Government initially proposed). Or the Court might have managed these related cases under consented-to pretrial orders, as it did with more than 100 *Winstar*-related cases.¹⁷ This would have allowed all Plaintiffs to participate, under reasonable discovery, motion, and trial procedures agreed to by the parties and approved by the trial court. But that is not the procedure the trial court adopted in its several case management orders either.

¹⁶ *In re Trans Tex. Holdings Corp.*, 498 F.3d 1290, 1297 (Fed. Cir. 2007).

¹⁷ *Plaintiffs in Winstar-Related Cases v. United States*, 37 Fed. Cl. 174 (1997).

To the contrary, in issuing its case management orders, the trial court explained its understanding that any decision in the test cases would not bind other plaintiffs:

THE COURT: In this connection, let's talk a little bit about issue preclusion, because the Court has [the] view that any identification of test plaintiffs and identification of issues related to those test plaintiffs—and I'm talking about facts basically—would bind those particular test plaintiffs but not others.¹⁸

Amici Curiae therefore ask this Court, in issuing its decision in this appeal, not to prejudice the due process rights of Amici Curiae who, over their objection, have been frozen in place from shortly after filing their cases. That the trial court burdened Amici Curiae with a stay order, issued over their objection, should not prejudice their fundamental right to present evidence and legal arguments, through counsel of their choosing, including evidence and legal arguments, different from those presented by Appellants with whom they were not in privity, in proceedings in which they were precluded from participating.¹⁹

2. Amici Curiae will present fundamentally different evidence and legal arguments in support of their takings claims

In ruling on Appellants' cases, the trial court held that, under Texas law, Appellants lack a property right to perfect flood control in the “‘bundle of sticks’

¹⁸ Attached as Exhibit 4, Tr. 14:24-15:5, No. 17-9001L (Jan. 30, 2018).

¹⁹ Some Appellants refer to these cases as multi-district litigation (MDL). But the Court of Federal Claims (unlike the district courts) does not have districts and does not have any rule similar to the MDL Manual.

afforded property owners downstream of water control structures.”²⁰ But that is not the property right Amici Curiae will assert when they are allowed to present their cases.

Amici Curiae assert constitutionally protected property rights, under Texas law, in the use and enjoyment of their homes, businesses, and personal properties.²¹ This property right is enforceable under Texas Water Code Section 11.086, which the trial court did not consider in Appellants’ cases, and provides that property owners can seek relief against any governmental entity or person from diverting or impounding the natural flow of surface water in a manner that injures another’s property and for its violation “creates a cause of action against both governmental and nongovernmental entities[,]”²² including the right to recover damages, caused by the diversion or impounding of surface waters.

Nor did the trial court consider that Texas courts have held that releasing water from a reservoir with intent to flood property downstream, or where the release is substantially certain to flood downstream property, constitutes a physical taking.²³ Amici Curiae will argue at trial that the taking of their property rights by

²⁰ *In re Downstream Addicks & Barker (Tex.) Flood-Control Reservoirs*, 147 Fed. Cl. 566, 577 (2020).

²¹ *Texas v. Moore Outdoor Props., L.P.*, 416 S.W.3d 237, 242-43 (Tex. App. 2013).

²² *Konark Ltd. P’ship v. BTX Sch., Inc.*, 580 S.W.3d 194, 201 (Tex. App. 2018).

²³ *See Tarrant Reg’l Water District v. Gragg*, 151 S.W.3d 546, 555 (Tex. 2004).

the Corps in 2017 falls squarely under what the Texas Supreme Court in *Harris County Flood Control District v. Kerr*²⁴ described as a compensable taking, an instance “where the government made a conscious decision to subject particular properties to inundation so that other properties would be spared, as happens when a government builds a flood-control dam knowing that certain properties will be flooded by the resulting reservoir.”²⁵

As the *Kerr* court explained, in instances where the government knew property would be flooded because of the way it planned, designed, and operated the facilities, as is the case here with the Corps’ design and operation of the Addicks and Barker facilities, “of course the government must compensate the owners who lose their land to the reservoir.”²⁶

In addition, Amici Curiae will present an evidentiary case that is fundamentally different from the test Plaintiffs’ cases, now on appeal, in which the trial court decided on summary judgment that the Corps had not caused the loss of property—rather, the losses were caused by an act of God. Amici Curiae, in contrast, will prove that increased flooding of their homes and businesses was not due exclusively to an act of God; that there was human intervention by the Corps’

²⁴ 499 S.W.3d 793 (Tex. 2016).

²⁵ *Id.* at 807.

²⁶ *Id.*; see also *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 105 (Tex. 1961) (stating that a “decent regard for private property rights” requires compensation for flooding caused by “flood control and improvement agencies”).

design, construction, and operation of the Addicks and Barker facilities, and the occurrence of a storm with Harvey's intensity was completely foreseeable.

As Texas courts have held, an act of God defense allows no human intervention: "[T]o be insulated from liability, it must be shown that 1) the loss was due directly and exclusively to an act of nature and without human intervention, and 2) no amount of foresight or care which could have been reasonably required of the defendant could have prevented the injury."²⁷

The act of God defense applies only where the defendant does not contribute at all to the loss. The occurrence of an unprecedented flood alone is insufficient to prove an act of God defense to liability: "[N]egligence in constructing and maintaining a structure, concurring with an extraordinary and unprecedented flood and causing damage to another, makes the railway company or person liable for damages, notwithstanding the fact that the flood was extraordinary and unprecedented."²⁸ Similarly, "[i]n order, however, for unprecedented rains to relieve a warehouseman from resultant damages, the evidence must preclude the fact that the damages could be attributable in any degree to the conduct of the warehouseman."²⁹

²⁷ *McWilliams v. Masterson*, 112 S.W.3d 314, 320 (Tex. App. 2003).

²⁸ *Fort Worth & D.C. Ry. Co. v. Kiel*, 187 S.W.2d 371, 373 (Tex. 1945).

²⁹ *Nat'l Compress Co. v. Hamlin*, 264 S.W. 488, 490 (Tex. App. 1924).

Amici Curiae will also argue that, although the Court of Federal Claims does not employ the act of God defense recognized by Texas courts, it reaches a similar result by applying the *Ridge Line, Inc. v. United States*³⁰ test that “a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the ‘direct, natural, or probable result of an authorized activity’”³¹ Amici Curiae will present evidence that satisfies the *Ridge Line* test—thereby refuting the act of God defense on which the trial court dismissed the test Plaintiffs’ claims.

In addition, at trial, Amici Curiae would prove, among other facts, that: (1) the Corps designed the Addicks and Barker facilities to protect downtown Houston and the Houston Ship Channel, not to protect Plaintiffs (who did not have homes there in the 1940s when the Addicks and Barker facilities were designed and constructed); (2) storms with rainfall amounts similar to Harvey had occurred in the past. In fact, the Corps designed the facilities to manage storms dropping up to 44 inches of rainfall.

In short, Amici Curiae will present the case that Harvey was neither unique nor unprecedented—Harvey was exactly what the Corps designed the facilities to handle to protect downtown Houston and the ship channel. And the Corps

³⁰ 346 F.3d 1346 (Fed. Cir. 2003).

³¹ *Id.* at 1355.

intentionally released the facilities' water just as it had planned to in its operations manual prepared years earlier.

Finally, Amici Curiae, who are represented by different counsel from the test Plaintiffs, do not anticipate that resolution of their cases on uncontested facts via summary judgment is possible. They believe trial of the contested facts, including different expert and fact testimony never presented to the trial court in Appellants' cases, will be necessary.

3. The claims of Amici Curiae should not be affected by the Court's decision in this appeal

In *Cienega Gardens v. United States (Cienega X)*,³² this Court held that its decision in the earlier appeal of four model Plaintiffs, *Cienega VIII*,³³ did not bind the parties in subsequent trial of the 38 non-model cases—which reached the opposite result:

[T]he holdings of *Cienega VIII* were unique to the four model plaintiffs and based on the particular arguments that the government made. . . . The court in *Cienega VIII* did not resolve the takings issue with respect to the non-model Cienega Gardens plaintiffs, and we remanded for consideration of the other plaintiffs' takings claims. We expressly stated that the resolution of these aspects of the model plaintiffs' case did not preclude a different result for the non-model plaintiffs based on different arguments and a different record.³⁴

³² 503 F.3d 1266 (Fed. Cir. 2007).

³³ 331 F.3d 1319 (Fed. Cir. 2003).

³⁴ *Cienega X*, 503 F.3d at 1276.

Here Amici Curiae, 205 non-test Plaintiffs who stand in the same shoes as the non-model *Cienega* plaintiffs, request that the Court include similar language in its opinion, to the effect that the ruling in this appeal is unique to Appellants, based on the evidence and arguments they presented in their cases. This Court's ruling should not be understood to preclude Amici Curiae from presenting different evidence and arguments from Appellants nor should it bind the trial court in Amici Curiae's cases.

Conclusion

For all of these reasons, Amici Curiae ask this Court to include language in its opinion that makes clear its opinion is not binding on Amici Curiae and should not be interpreted by the trial court to influence the outcome of Amici Curiae's cases—as they are based on different evidence and legal arguments from those of Appellants.

Respectfully submitted,

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Exhibit 2 – Case Management Order No. 3, filed December 5, 2017

Exhibit 3 – Case Management Order No. 5, filed January 29, 2018

Exhibit 4 – Excerpt of Transcript, In re Addicks and Barker Flood Control Reservoirs, dated January 30, 2018

Exhibit 1

EXHIBIT 1

Plaintiffs	Case No.
Hulak and Zavik Abed-Stephen	19-782L
Joan C. Alford	19-807L
Albert and Debra Allen	19-807L
Melissa Almario	19-1924L
Ana Alvarez	19-807L
Rosalie Brandino Aquilina	19-807L
Alex Abdollah Arjomand	19-782 L
Cinda S. and Fred R. Armstrong	19-1924L
Fatemah Asghari and Alireza Safar	19-782 L
Lynn Ashby	19-1266 L
Barrette and Julie Banner	19-1063L
Michael Barry, II	19-1924L
Charles E. and Diana V. Barton	17-9002L
Laura and Chaunce A. Beane	19-807L
Marcheta and John Beasley	19-807L
William and Margo Begman	19-1924L
Jennifer R. and Ryan L. Bickley	19-698 L
Dorothy Blodgett	19-807L
Joe and Brenda Bono	18-123L
Raymond and Elizabeth G. Bossotti	19-782 L
Joseph and Susan Braden	19-807L
Tom and Kathy Brackin	18-123
Tracy Burger, Individually and as Executrix for the Estate of Richard Burger	19-807L
Nancy N. Burger	19-782 L
Kevin and Kristen Burke	19-782 L

Patricia Busmire	19-1063L
Albert and Judy Butler	19-1924L
Olivia and Michael T. Green Caballero	19-1266L
Sharon Callison	18-123L
Omar and Olsa Cano	18-123L
Neal D and Kristen T. Carlson	19-782L
Victor and Jenny Chao	19-1266L
Alison Chen	19-807L
Imiao Joanna Chen	19-807L
Theresa Chen	19-1266 L
Dan Cho	19-807L
Sungjin and Elain Yang Choi	19-807L
Richard and Stacy Clark	19-807L
Randy Clevenger	19-807L
Andrew W. and Courtney L. Coolidge	19-807L
John C. and Mary L. Crawford	19-782L
Weiye Zheng and Wayne R. Dalcin	19-807L
Alfred and Carlota Danforth	19-782 L
Keith Darby	19-1063L
Eric and Katherine Hope Davis	18-123L
Nadia Deans	19-807L
John H. and Marisol Denson	19-782 L
Damien and Josephine Derby	19-807L
Robert and Marilyn Dillard	19-807L
Rafik and Maria Boutros Dimian	19-1266L
Karen and Jason Dixon	19-807L
Alain and Sylvie Dorel	19-807L

Peter Douglas, Independent Executor of the Estate of Virginia W. Douglas	19-1063L
Mario G. Duenas	18-123L
Robert Duff	19-1266 L
Charlotte Eftekhari	19-1063L
Enex, Inc.	19-807L
Robert and Millicent Erwin	19-698L
Ethan's Glen Community Assoc., Inc. and William Bedman as Trustee of the Ethan's Glen Community Trust	19-698L
Buckminster and Suzanne Farrow	19-807L
Martha McManus Fluker	19-1063L
Todd Forester	18-123L
Ingrid Forrest	19-1266L
Praneet Franklin	19-1266 L
Jean A. Sargent Gaines	19-782 L
Roland and Karen H. Garcia	19-1063L
Xiaobin Ge	19-1266L
Andrei S. and Antonella V. Georgescu	19-807L
Sylvia H. Gex	19-782L
Rae Goodwin	19-807L
Patrick T. and Judith J. Gordon c/o Gordon Family Trust	19-782 L
Patty Gray	19-1063L
Kenneth and Elizabeth Green	19-782 L
E.J. Grivetti	19-1266 L
Randall W. and Michelle Habel	19-782 L
Diane Hackem	19-807L
Janna and Jack R. Hamilton	19-782 L

Billy Q. Harris	19-1924L
Aracely Harris	19-1924L
Tracy and Christine Lockstedt Hatz	19-782L
Robert Brady & Linda Hetherwick (Brady)	19-1266L
Lawrence and June Hibbard	19-807L
Anna Belle Hicks	19-1063L
Nhut and Ha Phan Ho	19-807L
Wing and Qiao Ye Ho	19-1266 L
Bonnie A. and Henry E. Hood	19-782L
Robert and Sherry Hooper	19-807L
Ernest Roy and Mary Elizabeth Hunt	19-807L
James R. and Martha Hunt	19-782 L
Ingrid Jensen	19-807L
Douglas F. and Julie A. Jewett	19-782 L
Mark H. and Laura Johnson	19-782L
Kit and Ann Kampschmidt	19-782 L
Mary Karges	19-807L
Mark Cargill Keener	19-782 L
Lawrence and Lorraine Kelly	19-698L
Billie J. Kerns	19-782L
Kelli Kickerillo	18-123L
Vincent D. and Mary F. Kickerillo	18-345L
Tae Jin Kim	19-807L
Shirley Koralewski	19-1924L
Claudia K. Langerud	19-782L
Lorna Lataquin	19-1266L
Paula M. and Eric C. Lauritzen	19-782L
Manuel D. and Beatrice M. Leal	19-782L

Jonathan and Emma Lean	19-698L
Whan and Kyongsook Yun Lee	19-807L
James Edward Leehey	19-782L
Raymond and Holly Little	19-1063L
Carla Lorentz	19-807L
Joan Lotz	19-807L
Lisa and Eric Lundquist, Jr.	19-1924L
Bryan and Angela Lynch	19-807L
Carol A. Mahoney	19-782L
Patricia Malone	19-807L
Joe and Kathy Mancuso	19-807L
Wilton Ray and Kathie Marshall	19-807L
Rose Mary Martinez	19-698L
Marywood Homeowner's Association, Inc.	18-123L
Robert Elton, Jr. and Mary R. Maxwell	19-782L
David and Ann May	19-1266L
Roya McArthur	19-1924L
Patricia Ann McDonald	19-782L
Don Hunter and Michelle Holick McGuirt	19-1266L
William and Linda McIlwain	19-782L
Brooke Medina	19-1063L
Memorial Bend Place Owner's Association	19-1924L
Mark and Marcia Menard	19-698L
Gordon and Sherra Miller	18-123L
Stephen and Pamela Moore	19-807L
Denby and Nicolette Morrison	19-807L
Charles and Kim Mueller	19-807L
B.N. and Jamuna Murali	19-782 L
Jennifer T. and Mark Murdock	19-782 L

Jonathan T. and Suzann K. Muska	19-1266L
Vickram Nath	19-807L
Mike Nematpour	19-782 L
DeEtte Nesbitt	19-807L
Krystal Lee and Chad Nguyen	19-807L
Trung and Thu Phan Nguyen	19-807L
Bruce Nguyen	19-1266 L
Bruce and Nancy Olsen	18-123L
Ana and Shelby Oostwouder	19-807L
Katherine T. Otte	19-698L
Donald, II and Brandi Paullo	19-1924L
James and Patricia Perryman	19-807L
James and Elizabeth H. Pirotte	19-782 L
Kathryn S. Rageot	19-807L
Donald R. and Judy Ray	20-686L
Brian and Katherine Reed	19-807L
Brian and Deborah Reese	19-1924L
Jeffrey D. and Chriseda C. Reuben	19-782 L
Brian and Amber Reynolds	19-807L
Daniel and Janice Richardson	18-123L
Todd Arlis and Michelle M. Riddle	19-782 L
Daniel and Laura Leal Romo	19-782 L
Gary and Terrie M. Roth	19-1063L
Robert and Penny Rozelle	19-1266 L
Areg and Eliane Sahakian	19-1266 L
Steven and Angel Sahinen	18-123L
Matthew and Gabriela Salo	19-807L

Elizabeth and Taraneh Saghafian Samet	19-698L
Miguel and Hailey San Juan	19-698L
Roger and Debra Schultz	18-123L
Phyllis M. Sefeldt	19-782 L
Melanie and Harvey Seigle	19-1266 L
Erica and David Shaw	19-807L
Carol (aka Carol B. Leggett) Simmons	19-782L
Bobken and Huleh Simonians	19-782L
Karen Smith	19-782L
Natasha and Matthew Stearns	19-698L
Jerome and Patricia Stefaniak	19-807L
Tomasz and Christina Stenzel	19-698L
Tamberli Weitkumat, Executrix of the Estate of Margaret Stratton	19-1063L
William & Sarna S. Sunshine	19-1266L
Mason and Amanda Thilman	19-1063L
Dan Tinkler	19-1063L
James and Charlotte Tribble	19-1266L
Barbara Troner	19-1924L
Hsin-Tien Tsai	19-807L
Michael and Katharina Upchurch	19-1266L
Craig and Jennifer Vanderschoor	19-782L
Igor Velasco-Sanchez	19-1266L
Peter and Rebecca Vescovo	19-782L
Per and Maria Ines Voie	19-807L

Brian and Katia Waguespack	19-1924L
Richard Wainerdi	19-1924L
Joseph W. and Susan W. Warren	19-782L
Herbert D. and Arlyne L. Weiss	19-782L
Dr. Preston West	19-1063L
Steven Wilkerson	19-782L
John and Stephanie Wilkinson	19-782L
Jacqueline M. and Kirk E. Williamson, II	17-1456L
Betty Wilturner-Zenon	19-807L
James M., Jr. and Lela L. Windham	19-782 L
Scott Winter	19-1924L
Beverly Winter Donaho	19-1063L
Mary E. Woodman	19-807L
Woodstone Section Three HOA	19-807L
Chunxia and Yongjun Yue Xu	19-807L
Tong Sop Yi	19-807L
Donna and David Yi	19-807L
Qindong and Ping Wan Zhang	19-807L
Carol Zieben	19-807L
Michael and Kryn Zimmermann	19-807L

Exhibit 2

In the United States Court of Federal Claims

Filed: December 5, 2017

In re ADDICKS AND BARKER
(TEXAS) FLOOD-CONTROL
RESERVOIRS

Master Docket No. 17-3000L

THIS DOCUMENT APPLIES TO:

17-1189L, 17-1191L, 17-1194L,
17-1195L, 17-1206L, 17-1215L,
17-1216L, 17-1232L, 17-1235L,
17-1300L, 17-1303L, 17-1332L,
17-1390L, 17-1391L, 17-1393L,
17-1394L, 17-1395L, 17-1396L,
17-1397L, 17-1398L, 17-1399L,
17-1408L, 17-1423L, 17-1427L,
17-1428L, 17-1430L, 17-1433L,
17-1434L, 17-1435L, 17-1436L,
17-1437L, 17-1438L, 17-1439L,
17-1450L, 17-1451L, 17-1453L,
17-1454L, 17-1456L, 17-1457L,
17-1458L, 17-1461L, 17-1512L,
17-1514L, 17-1515L, 17-1516L,
17-1517L, 17-1518L, 17-1519L,
17-1520L, 17-1521L, 17-1522L,
17-1523L, 17-1524L, 17-1525L,
17-1545L, 17-1555L, 17-1564L,
17-1565L, 17-1566L, 17-1567L,
17-1577L, 17-1578L, 17-1588L,
17-1625L, 17-1645L, 17-1646L,
17-1647L, 17-1652-2L, 17-1653L,
17-1679L, 17-1680L, 17-1681L,
17-1682L, 17-1683L, 17-1684L,
17-1685L, 17-1686L, 17-1687L,
17-1688L, 17-1689L, 17-1748L,
17-1814L, 17-1822L, 17-1828L,
17-1833L, 17-1834L

MANAGEMENT ORDER NO. 3
(ORDER ESTABLISHING SUB-MASTER DOCKET FOR DOWNSTREAM CLAIMS)

To promote the efficient administration of justice, it is hereby ORDERED:

1. **Consolidation Of Downstream Cases.** The above-identified cases, and any subsequently filed directly or indirectly related cases, as defined in Rule 40.2 of the Rules of the United States Court of Federal Claims (“RCFC”), that are identified as downstream cases, are hereby consolidated for pretrial management. Management Order No. 3 does not address whether these actions are or will be consolidated for trial, nor does it have the effect of making any entity a party to an action in which it has not been joined and served in accordance with the RCFC.
 - (a) **Sub-Master Docket.** The Clerk of Court will create a Sub-Master Docket, *In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs*, Sub-Master Docket No. 17-9002L.
 - (b) **Assigned United States Court Of Federal Claims Judges.** Pursuant to the court’s November 20, 2017 Orders, the following United States Court of Federal Claims judges have been assigned in *In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs*, Sub-Master Docket No. 17-9002L:
 - i. The Honorable Susan G. Braden has been assigned to this Sub-Master Docket to manage jurisdictional discovery and adjudicate issues presented by any motion filed, pursuant to RCFC 12(b)(1)–(7). *See In re Addicks and Barker (Texas) Flood-Control Reservoirs*, Master Docket No. 17-3000L, Dkt. 67 (Fed. Cl. Nov. 20, 2017) (Court Attachment A).
 - ii. The Honorable Marian Blank Horn has been assigned to this Sub-Master Docket to manage pre-trial discovery and adjudicate all pre-trial dispositive motions. *See In re Addicks and Barker (Texas) Flood-Control Reservoirs*, Master Docket No. 17-3000L, Dkt. 69 (Fed. Cl. Nov. 20, 2017) (Court Attachment B).
 - (c) **Appointed Counsel.** Pursuant to the court’s November 20, 2017 Orders, the following counsel have been appointed in *In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs*, Sub-Master Docket No. 17-9001L:
 - i. The following counsel have been appointed For Jurisdictional Discovery: Mr. William S. Consovoy, Co-Lead Counsel; Mr. David C. Frederick, Co-Lead Counsel; Mr. Jack E. McGehee, Of Counsel. *See In re Addicks and Barker (Texas) Flood-Control Reservoirs*, Master Docket No. 17-3000L, Dkt. 67 (Fed. Cl. Nov. 20, 2017) (Court Attachment A).
 - ii. The following counsel have been appointed For Pre-Trial Discovery And Dispositive Motions: Mr. Rand P. Nolen, Co-Lead Counsel; Mr. Derek Potts, Co-Lead Counsel; Mr. Richard W. Mithoff, Co-Lead Counsel. *See In re Addicks and*

Barker (Texas) Flood-Control Reservoirs, Master Docket No. 17-3000L, Dkt. 69 (Fed. Cl. Nov. 20, 2017) (Court Attachment B).

- (d) **Notice.** The Clerk of Court will docket this Order and the following Notice in each of the above-referenced consolidated downstream cases as well as in *In re Addicks and Barker (Texas) Flood-Control Reservoirs*, Master Docket 17-3000L:

NOTICE: Sub-Master Docket, *In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs*, Sub-Docket No. 17-9002L, has been opened and assigned to the **Honorable Susan G. Braden** for the management of jurisdictional discovery and the adjudication of issues presented by any motion filed, pursuant to RCFC 12(b)(1)–(7), and to the **Honorable Marian Blank Horn** for the management of pre-trial discovery and the adjudication of all pre-trial dispositive motions. From this date and until further order, all filings in these consolidated downstream cases will be filed in this Sub-Master Docket.

- (e) **Future Filings; Case Caption.** From this date and until further order, all future filings in these consolidated downstream cases will be made in this Sub-Master Docket and will bear the following caption:

In the United States Court of Federal Claims

In re DOWNSTREAM ADDICKS
AND BARKER (TEXAS) FLOOD-
CONTROL RESERVOIRS

Sub-Master Docket No. 17-9001L

THIS DOCUMENT APPLIES TO:

- i. A filing that is applicable to all of these consolidated downstream cases will state in the caption that it applies to “ALL DOWNSTREAM CASES.” Such filing will be made in this Sub-Master Docket only but will be deemed filed and docketed in each individual case to the extent applicable.
- ii. Except as provided in paragraph 1(e)(iii) below, a filing that applies only to a particular case(s) will state in the caption the applicable case number(s) and the last name(s) of the named plaintiff(s). The filing will be made in this Sub-Master Docket and the Clerk of Court will docket the filing in each applicable case.

iii. Motions to substitute counsel in individual cases and notices of appearance by the government will be filed in the individual case dockets only.

2. ***Newly Filed Cases.*** When a directly or indirectly related case that is identified as an downstream case subsequently is filed, the Clerk of Court will:
 - (a) make an appropriate entry in this Sub-Master Docket;
 - (b) docket a copy of this Order in the newly filed case; and
 - (c) docket a copy of the Notice, identified in paragraph 1(d) above, in the newly filed case.
3. This Order will apply to all subsequently filed or transferred cases that are directly or indirectly related and identified as downstream cases.

IT IS SO ORDERED.

s/ Susan G. Braden
SUSAN G. BRADEN
Chief Judge

COURT ATTACHMENT A

In the United States Court of Federal Claims

Filed: November 20, 2017

IN RE ADDICKS AND BARKER
(TEXAS) FLOOD-CONTROL
RESERVOIRS

Master Docket No. 17-3000L

THIS DOCUMENT APPLIES TO:

ALL CASES

ORDER REGARDING JUDICIAL ASSIGNMENT, APPOINTMENT OF PLAINTIFFS' COUNSEL FOR THE PURPOSE OF PRE-TRIAL JURISDICTIONAL DISCOVERY, THE GOVERNMENT'S MOTION TO DISMISS PURSUANT TO RULE OF THE UNITED STATES COURT OF FEDERAL CLAIMS 12(b)(1)–(7), AND SCHEDULING.

(DOWNSTREAM CLAIMS)

During the October 6, 2017 and November 1, 2017 hearings convened in Houston, the court was advised that putative class action complaints and individual complaints with downstream claims affecting approximately 4,000 private property interests are or will be filed in the United States Court of Federal Claims. *See, e.g., In re Addicks and Barker (Texas) Flood-Control Reservoirs*, Master Docket No. 17-3000L, Dkt. 7 (Fed. Cl. Nov. 3, 2017).

I. Assignment Of A United States Court Of Federal Claims Judge.

The undersigned judge, the Honorable Susan G. Braden, of the United States Court of Federal Claims is hereby assigned to manage jurisdictional discovery and adjudicate issues presented by any motion filed, pursuant to Rule of the United States Court of Federal Claims (“RCFC”) 12(b)(1)–(7).¹

II. Appointment Of Co-Counsel For Jurisdictional Discovery (In Alphabetical Order).

On October 11, 2017, the court issued an Order requesting “all counsel of record that wish to be considered as class counsel(s) and/or lead class counsel(s)” to file a Statement of Interest addressing the factors set forth in RCFC 23(g)(1). *See, e.g., Y And J Properties, Ltd.*, No. 17-1189, Dkt. 12 at 6 (Fed. Cl. Oct. 11, 2017).

¹ On December 4, 2017, the Clerk of Court will effectuate this assignment when Master Docket, *In re Addicks and Barker (Texas) Flood-Control Reservoirs*, Master Docket No. 17-3000L is divided into Sub-Master Dockets. *See In re Addicks and Barker (Texas) Flood-Control Reservoirs*, Master Docket No. 17-3000L, Dkt. 10 (Fed. Cl. Nov. 13, 2017).

After considering the views of all counsel, the court makes the following appointments of Plaintiffs' Counsel for the purpose set forth herein.

Mr. William S. Consovoy received his Juris Doctor, *magna cum laude*, from George Mason University School of Law (now the Antonin Scalia Law School) and has served as a Law Clerk to Judge Edith H. Jones of the United States Court of Appeals for the Fifth Circuit and Justice Clarence Thomas of the United States Supreme Court. Mr. Consovoy is a Founding Partner of the Washington, D.C. and New York firm of Consovoy, McCarthy, Park, PLLC. In addition, Mr. Consovoy is the Co-Director of the Supreme Court clinic at the Antonin Scalia Law School. Mr. Consovoy is admitted to the bar of the United States Court of Federal Claims. The court appoints Mr. Consovoy as Co-Lead Counsel for the purposes set forth herein.²

Mr. David C. Frederick graduated from the University of Texas School of Law, with honors, and served as a Law Clerk to Judge Joseph Sneed of the United States Court of Appeals for the Ninth Circuit and Justice Bryon White of the United States Supreme Court. From 1996-2001, Mr. Frederick was an Assistant Solicitor to the Solicitor General of the United States. Mr. Frederick is admitted to the bar of the United States Court of Federal Claims, the United States Court of Appeals for the Federal Circuit, and the United States Supreme Court. In addition, Mr. Frederick is an Adjunct Professor of Law at the University of Texas Law School, where he teaches a Supreme Court clinic. The court appoints Mr. Frederick as Co-Lead Counsel for the purposes set forth herein.

Where "diverse interests exist among the parties, the court may designate . . . counsel representing different interests." MANUAL FOR COMPLEX LITIGATION § 10.224 (4th ed. 2004). Mr. Frederick and Mr. Edelson have filed complaints they contend should be certified as class actions. The court has determined the issue of class certification is premature at this juncture. The court is concerned that the interests of property owners who ultimately may decide to opt-in to a certified class, may be different from those who may decide to pursue claims as individuals. *See* RCFC 23 Rules Committee Notes (Rule 23 "only contemplates opt-in class certifications"). For this reason, the court also has appointed Mr. Jack E. McGehee to serve as Of Counsel for the purposes set forth herein to ensure the interests of individual plaintiffs are represented, since McGehee, Chang, Barnes, Landgraf represents only individual plaintiffs who, at this point, do not seek class certification.

Mr. McGehee is a graduate of the United States Military Academy at West Point and St. Mary's University School of Law. Mr. McGehee is the Founding Partner of the Houston firm McGehee, Change, Barnes, Landraf. Mr. McGehee has served as President and Director of the Texas Trial Lawyers Association and has taught Civil Trial Advocacy at the University of Houston Law School and at the Trial Techniques Institute at Emory Law School. Mr. McGehee is admitted to practice before the United States Court of Federal Claims and the United States Supreme Court.

All of the above-referenced appointed counsel satisfy the criteria for selection, set out in the MANUAL FOR COMPLEX LITIGATION (4th ed. 2004) and *MDL Standards and Best Practices*, DUKE LAW SCHOOL CENTER FOR JUDICIAL STUDIES (Sept. 11, 2014), https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf.

² Mr. Jay Edelson of Edelson PC recommended Consovoy, McCarthy, Park, PLLC to the court.

All appointed counsel will be compensated, pursuant to 42 U.S.C. § 4654(c), for their representation of Plaintiffs, as set forth herein, including any subsequent appeals. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *see also Hubbard v. United States*, 480 F.3d 1327 (Fed. Cir. 2007). In that regard, appointed counsel are expected to keep and maintain detailed time records from the date of this Order, take care to limit the use of law firm personnel (partners, associates, and paralegals) only to the extent absolutely necessary to meet professional standards of due diligence and care and minimize ancillary expenses.

III. Schedule.

To ensure the expeditious and orderly management of jurisdictional discovery, the court establishes the following schedule.

On or before December 8, 2017, the Government will file any Motion For A More Definite Statement, pursuant to RCFC 12(e).

On or before December 15, 2017, the parties will exchange Mandatory Initial Disclosures, including lists of documents and tangible items.

On or before December 29, 2017, the parties will exchange electronically stored information and hard-copy documents.

On or before January 15, 2018, Plaintiffs may file an Amended Complaint, consolidated or otherwise, in response to any motion filed on December 8, 2017, pursuant to RCFC 12(e).

On or before February 15, 2018, the Government will file any Motion To Dismiss, pursuant to RCFC 12(b)(1)–(7).

On or before March 15, 2018, Plaintiffs will file any Response to the Government’s February 15, 2018 Motion To Dismiss.

On or before April 2, 2018, the Government will file any Reply to the March 15, 2018 Plaintiffs’ Response.

On or before July 14, 2018, the court will convene an oral argument in the United States District Court for the Southern District of Texas, 515 Rusk Street, Houston, Texas on the Government’s February 15, 2018 Motion To Dismiss.

Page limitations for briefs and court filings, set forth in RCFC, are suspended. No extensions of time will be granted, but for extraordinary circumstances.

IT IS SO ORDERED.

s/ Susan G. Braden
SUSAN G. BRADEN
Chief Judge

COURT ATTACHMENT B

In the United States Court of Federal Claims

Filed: November 20, 2017

IN RE ADDICKS AND BARKER
(TEXAS) FLOOD-CONTROL
RESERVOIRS

Master Docket No. 17-3000L

THIS DOCUMENT APPLIES TO:

ALL CASES

ORDER REGARDING JUDICIAL ASSIGNMENT, APPOINTMENT OF PLAINTIFFS' COUNSEL FOR THE PURPOSE OF PRE-TRIAL DISCOVERY, DISPOSITIVE MOTIONS FOR PARTIAL OR SUMMARY JUDGMENT AND/OR CROSS-MOTIONS PURSUANT TO RULE OF THE UNITED STATES COURT OF FEDERAL CLAIMS 56 AND/OR A TRIAL ON LIABILITY, AND SCHEDULING.

(DOWNSTREAM CLAIMS)

During the October 6, 2017 and November 1, 2017 hearings convened in Houston, the court was advised that putative class action complaints and individual complaints with downstream claims affecting approximately 4,000 private property interests are or will be filed in the United States Court of Federal Claims. *See, e.g., In re Addicks and Barker (Texas) Flood-Control Reservoirs*, Master Docket No. 17-3000L, Dkt. 7 (Fed. Cl. Nov. 3, 2017).

I. Assignment Of A United States Court Of Federal Claims Judge.

The Honorable Marian Blank Horn of the United States Court of Federal Claims is hereby assigned to manage pre-trial discovery and adjudicate all pre-trial dispositive motions.¹

II. Appointment Of Co-Counsel For Pre-Trial Discovery And Dispositive Motions (In Alphabetical Order).

On October 11, 2017, the court issued an Order requesting “all counsel of record that wish to be considered as class counsel(s) and/or lead class counsel(s)” to file a Statement of Interest

¹ On December 4, 2017, the Clerk of Court will effectuate this assignment when Master Docket, *In re Addicks and Barker (Texas) Flood-Control Reservoirs*, Master Docket No. 17-3000L is divided into Sub-Master Dockets. *See In re Addicks and Barker (Texas) Flood-Control Reservoirs*, Master Docket No. 17-3000L, Dkt. 10 (Fed. Cl. Nov. 13, 2017).

addressing the factors set forth in Rule of the United States Court of Federal Claims (“RCFC”) 23(g)(1). *See, e.g., Y And J Properties, Ltd.*, No. 17-1189, Dkt. 12 at 6 (Fed. Cl. Oct.11, 2017).

After considering the views of all counsel, the court makes the following appointments of Plaintiffs’ Counsel for the purpose set forth herein.

Mr. Rand P. Nolen is a graduate of the South Texas College of Law. Mr. Nolen is a Founding Partner of the Houston law firm of Fleming, Nolen, Jez, LLP, where he specializes in complex civil litigation. Mr. Nolen is admitted to the bar of the United States Court of Federal Claims and the United States Supreme Court. The court appoints Mr. Nolen as Co-Lead Counsel for the purposes set forth herein.

Mr. Derek Potts is a graduate of the University of Missouri-Kansas City School of Law. Mr. Potts is the Founder and Managing Partner of the Potts Law Firm, based in Houston, Texas. Mr. Potts specializes in complex litigation and multi-district litigation matters. Mr. Potts is admitted to the bar of the United States Court of Federal Claims. The court appoints Mr. Potts as Co-Lead Counsel for the purposes set forth herein.

Where “diverse interests exist among the parties, the court may designate . . . counsel representing different interests.” MANUAL FOR COMPLEX LITIGATION § 10.224 (4th ed. 2004). Mr. Nolen and Mr. Potts have filed complaints that they contend should be certified as class actions. The court has determined that the issue of class certification is premature at this juncture. The court is concerned that the interests of property owners who ultimately may decide to opt-in to a certified class, may be different than those who may decide to pursue claims as individuals. *See* RCFC 23 Rules Committee Notes (Rule 23 “only contemplates opt-in class certifications”). For this reason, the court also has appointed Mr. Richard W. Mithoff to serve as a Co-Lead Counsel for the purposes set forth herein to ensure that the interests of individual plaintiffs are represented, since Mithoff Law represent only individual plaintiffs who, at this point, do not seek class treatment.

Mr. Mithoff is a graduate of the University of Texas School of Law. Mr. Mithoff was a Law Clerk for Judge William Wayne Justice of the United States District Court for the Eastern District of Texas and is a Founding Partner of the Houston law firm of Mithoff Law. Mr. Mithoff is admitted to the bar of the United States Court of Federal Claims and the United States Supreme Court. The court appoints Mr. Mithoff as Co-Counsel for the purposes set forth herein.²

Each of the above-referenced appointed counsel satisfy the criteria for selection, set out in the MANUAL FOR COMPLEX LITIGATION (4th ed. 2004) and *MDL Standards and Best Practices*, DUKE LAW SCHOOL CENTER FOR JUDICIAL STUDIES (Sept. 11, 2014), https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf.

All appointed counsel will be compensated, pursuant to 42 U.S.C. § 4654(c), for work on pre-trial discovery issues and dispositive motions, including any subsequent appeals. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *see also Hubbard v. United States*, 480 F.3d 1327 (Fed. Cir. 2007). In that regard, appointed counsel are expected to keep and maintain detailed time records from the date of this Order, take care to limit the use of law firm personnel (partners,

² Mr. Phillip B. Dye, Jr. of Vinson & Elkins LLP recommended Mithoff Law to the court.

associates, and paralegals), only to the extent absolutely necessary to meet professional standards of due diligence and care and minimize ancillary expenses.

III. Schedule.

To ensure the expeditious and orderly management of pre-trial jurisdictional discovery, dispositive motions, and/or a trial on liability, the court establishes the following schedule.

On or before January 30, 2018, all initial disclosures and electronically stored information and hard copy documents filed in the pre-trial phase of this case, will be provided to opposing counsel.

On or before February 28, 2018, the Government will file an Answer, pursuant to RCFC 7(a)(2), in response to any Amended Complaint filed on or before January 15, 2018. Thereafter, the parties may conduct discovery, subject to court Order, including any expert discovery, to conclude no later than May 31, 2018.

On or before June 15, 2018, the parties will file any dispositive motion(s), pursuant to RCFC 56.

On or before July 16, 2018, the parties may file any Responses and/or Cross-Motions to the June 15, 2018 dispositive motion(s).

On or before July 31, 2018, the parties simultaneously may file any Replies.

On or before October 29, 2018, the court will convene an oral argument in the United States District Court for the Southern District of Texas, 515 Rusk Street, Houston, Texas on any dispositive motions.

If contested facts preclude disposition of this case on partial or summary judgment, pursuant to RCFC 56, this case will be set for a trial on liability by the assigned judge, at the earliest date available.

Page limitations for briefs and court filings, set forth in RCFC, are suspended. No extensions of time will be granted, but for extraordinary circumstances.

IT IS SO ORDERED.

s/ Susan G. Braden
SUSAN G. BRADEN
Chief Judge

Exhibit 3

In the United States Court of Federal Claims

Filed: January 29, 2018

IN RE DOWNSTREAM ADDICKS
AND BARKER (TEXAS) FLOOD-
CONTROL RESERVOIRS

Sub-Master Docket No. 17-9002L

THIS DOCUMENT APPLIES TO:

ALL DOWNSTREAM CASES

CASE MANAGEMENT ORDER NO. 5

On January 26, 2018, the parties filed a Joint Motion For Entry Of Case Management Order No. 5, together with a proposed Order. ECF No. 25. To promote the efficient administration of justice, the January 26, 2018 Joint Motion is granted in part.¹ Accordingly, it is hereby ORDERED:

1. This Order applies to all cases presently and subsequently filed in this court that, pursuant to Management Orders 1, 2, 3, and 4,² are identified as downstream cases in *In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs*, Sub-Master Docket No. 17-9002L (the “Downstream Sub-Master Docket”). This Order is intended to supplement, and not to replace, the court’s prior Orders.

¹ The court made the following changes to the January 26, 2018 proposed Order: (1) Paragraph 5: a plaintiff may amend his or her Initial Fact Sheet, pursuant to Rule of the United States Court of Federal Claims (“RCFC”) 26(e); (2) Paragraph 8: the parties are directed to file a Joint Proposed Short Form Complaint; (3) Paragraph 9: the court will approve the Short Form Complaint procedure agreed to by the parties; and (4) Paragraph 11: the Government must comply with the deadlines set forth in Case Management Order No. 3 (ECF No. 2).

² See *In re Addicks and Barker (Texas) Flood-Control Reservoirs*, Master Docket No. 17-3000L, ECF No. 1 (October 31, 2017 Management Order 1); ECF No. 103 (December 5, 2017 Management Order 2 (Order Establishing Sub-Master Docket for Upstream Claims)); ECF No. 104 (December 5, 2017 Management Order 3 (Order Establishing Sub-Master Docket for Downstream Claims)); ECF No. 120 (December 21, 2017 Management Order 4).

2. Downstream Co-Lead Counsel³ advised the court that they would file a consolidated and amended complaint in the Downstream Sub-Master Docket by January 16, 2018. One downstream Master Complaint was filed.
3. On or before January 30, 2018, all plaintiffs named in the Master Complaint will serve on the Government, through Downstream Co-Lead Counsel, a completed Initial Fact Sheet (the “Initial Fact Sheet”).
4. On January 30, 2018, all plaintiffs not named in the Master Complaint will serve on the Government, through Downstream Co-Lead Counsel, a completed Initial Fact Sheet in the form of the exemplar Initial Fact Sheet attached as Attachment A.
5. Each plaintiff, whether named in the Master Complaint or not named in the Master Complaint, will provide a signed version of their Initial Fact Sheet, consistent with the requirements of RCFC 33(b)(5), within 30 days of submission of the Initial Fact Sheet. For any plaintiff, their signed Initial Fact Sheet: (1) will be treated as answers to interrogatories; (2) can be used to the extent allowed by the Federal Rules of Evidence, pursuant to RCFC 33(c); and (3) may be amended, pursuant to RCFC 26(e).
6. Plaintiffs whose cases are filed after January 30, 2018 will serve on the Government, through Downstream Co-Lead Counsel, a completed Initial Fact Sheet no later than 30 days after the date the case was filed.
7. All complaints other than the Master Complaint, whether pre-existing or hereafter filed, are administratively stayed except for service of the Initial Fact Sheet, referenced above, pending further order of the court. Plaintiffs in all stayed actions are hereby relieved of the responsibility to: (i) provide initial disclosures pursuant to RCFC 26(a)(1); (ii) respond to the Government’s motions for more definite statement; and (iii) respond to the Government’s motions to dismiss pursuant to RCFC 12. The claims of any plaintiffs later added to the Master Complaint by amendment are not stayed and such plaintiffs must meet any discovery and other obligations under the RCFC, including providing initial disclosures and responding to subsequent discovery requests.
8. Downstream Co-Lead Counsel and counsel for the Government will meet and confer for the purpose of drafting a mutually-agreeable Short Form Complaint adopting the Master Complaint. On or before Friday, February 2, 2018, Downstream Co-Lead Counsel and counsel for the Government are directed to provide the court with an agreed proposed Short Form Complaint.

³ When used herein, the term Downstream Co-Lead Counsel means counsel appointed as “Co-Lead Counsel” and “Of Counsel” for downstream plaintiffs in the court’s November 20, 2017 Orders. *See In re Addicks and Barker (Texas) Flood-Control Reservoirs*, Master Docket No. 17-3000L, ECF Nos. 67, 69 (Fed. Cl. Nov. 20, 2017). When used herein, the term Upstream Co-Lead Counsel means counsel appointed as “Co-Lead Counsel” and “Of Counsel” for upstream plaintiffs in the court’s November 20, 2017 Orders. *See In re Addicks and Barker (Texas) Flood-Control Reservoirs*, Master Docket No. 17-3000L, ECF Nos. 68, 70 (Fed. Cl. Nov. 20, 2017).

9. Once the court approves the Short Form Complaint procedure agreed to by the parties, presently and subsequently-filed cases may adopt the Master Complaint by filing a Short Form Complaint in the Downstream Sub-Master Docket. Nothing herein will prevent an attorney from filing a single Short-Form Complaint on behalf of multiple plaintiffs.
10. The Government need not answer any complaint or newly-filed complaint other than the Master Complaint, or specifically respond to any claim not asserted in the Master Complaint.
11. The Government's filings under RCFC 12, including any motions to dismiss or answer, will apply equally to any complaint adopting the allegations of a Master Complaint. Pursuant to Case Management Order No. 3, the Government will file any Motion To Dismiss, pursuant to RCFC 12(b) on or by February 15, 2018 (ECF No. 2, Ct. Att. A at 3), and an Answer, pursuant to RCFC 7(a)(2) on or by February 28, 2018 (ECF No. 2, Ct. Att. B at 3).
12. Downstream Co-Lead Counsel will facilitate, coordinate, and effect all communications with the Government on behalf of all plaintiffs in this consolidated action, all *pro se* plaintiffs in this consolidated action, and all attorneys who have not been designated as Downstream Co-Lead Counsel in this consolidated action. Attorneys who have not been designated Downstream Co-Lead Counsel are directed to communicate with Downstream Co-Lead Counsel, and not the Government or the court, concerning discovery, case management, scheduling, and all other case-related matters. In the event that an attorney who has not been designated Downstream Co-Lead Counsel seeks to submit a motion or any other filing to the court, such attorney must first request and obtain leave from the court.
13. All discovery on behalf of plaintiffs in this consolidated action must be served by Downstream Co-Lead Counsel. Downstream Co-Lead Counsel will provide, facilitate, or coordinate the use of translators, if necessary. All discovery on behalf of the Government in this consolidated action need be served only to Downstream Co-Lead Counsel.
14. Service upon Downstream Co-Lead Counsel is accomplished by serving each of the following via electronic mail, file sharing link, United States Mail and/or another method agreed by the parties:

Derek Potts at dpotts@potts-law.com
Rand Nolen at Rand_Nolen@fleming-law.com
Richard Mithoff at RMithoff@mithofflaw.com
Jack McGehee at jmcgehee@lawtx.com
David Frederick at dfrederick@kelloggghansen.com
William Consovoy at will@consovoymccarthy.com

15. All requests for discovery, including but not limited to interrogatories and requests for production, should, to the extent possible, be jointly submitted from Downstream Co-Lead Counsel and Upstream Co-Lead Counsel to avoid duplicative requests of documents, streamline the response process, and ensure Downstream Co-Lead Counsel and Upstream

Co-Lead Counsel receive the same information. Downstream Co-Lead Counsel will coordinate and serve upon the Government, on behalf of all plaintiffs, responses to any discovery requests served by the Government.

16. Downstream Co-Lead Counsel will cross-notice all depositions in both the Downstream Sub-Master Docket and *In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs*, Sub-Master Docket No. 17-9001L, and coordinate the conduct of depositions among Downstream Co-Lead Counsel and Upstream Co-Lead Counsel to avoid duplicate examination.
17. In any case filed and consolidated into the Downstream Sub-Master Docket after entry of this Order, Downstream Co-Lead Counsel will provide the attorney representing the plaintiff(s) or, if the plaintiff(s) is proceeding *pro se*, the plaintiff(s), a copy of: (a) this Order, (b) the operative Master Complaint, (c) the template for a Short-Form Complaint, and (d) an Initial Fact Sheet. A completed Initial Fact Sheet on behalf of each plaintiff will be served on the Government within 30 days of consolidation.

IT IS SO ORDERED.

s/ Susan G. Braden
Susan G. Braden
Chief Judge

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

In re DOWNSTREAM ADDICKS AND BARKER (TEXAS) FLOOD-CONTROL RESERVOIRS

Sub-Master Docket No. 1:17-9002L

THIS DOCUMENT RELATES TO:

ALL DOWNSTREAM CASES

INITIAL FACT SHEET

COMPLETE EACH OF THE FOLLOWING. IF YOU DO NOT KNOW THE ANSWER TO A QUESTION, PLEASE AFFIRMATIVELY INDICATE YOU DO NOT KNOW THE ANSWER.

1. Name of Plaintiff(s): _____
2. Address of Plaintiff(s)' real property that allegedly flooded as a result of the U.S. Army Corps of Engineers' operations of the Addicks and Barker Dams and Reservoirs (hereinafter the "Property"):

3. Location of any other property allegedly taken as a result of the U.S. Army Corps of Engineers' operations of the Addicks and Barker Dams and Reservoirs: _____

4. County Property Parcel Identification number¹: _____
5. If known, describe the date, timing, and extent/amount of Property flooding during Tropical Storm Harvey (i.e. how deep was the water over time, and how much, and what parts, of

¹ County Property Parcel Identification Numbers are available at [the FBCAD website](#) and [the HCAD website](#).

your property did it cover): _____

6. If known, describe the date and extent of previous Property flooding (if any): _____

7. As of August 24, 2017, was the Property located in: the 100-year floodplain ____; the 500-year floodplain ____; no known floodplain_____.
8. When was the Property purchased or leased by you, or do you have some other type of property interest _____
9. What is the elevation of the Property according to this website²? _____
10. Do you have additional information regarding the elevation of the Property (*e.g.*, measurements taken for insurance purposes or a floodplain certificate)? If so, please provide the source and date of the information used to determine the elevation.

11. Nature of Property interest (check all that apply): residential ____; commercial ____; industrial ____; owner ____; renter_____.
12. Condition of Property at time of acquisition (i.e. vacant, improved, partially improved): _____

13. Is the Property currently listed on MLS for sale? _____
14. Has the Property been sold since Tropical Storm Harvey? _____
15. Was there flood insurance for the Property during Tropical Storm Harvey? Yes __ No __

Plaintiff(s) Name: _____

² Elevation information is available at https://www.mapdevelopers.com/elevation_calculator.php

Plaintiff(s) Signature: _____

Date: _____

Exhibit 4

13

1 class certification came online, and that may have other
2 consequences.

3 So I -- I personally would prefer to have the
4 two. If they can be merged together in some form or
5 fashion, that's fine. We talked with DOJ about this
6 yesterday. I'm just concerned about, through a
7 short-form complaint, people adopting a class action
8 complaint and maybe unwittingly they just opted into
9 something that doesn't exist yet. So that was some of
10 the thinking behind having the two separate complaints.

11 THE COURT: That's understandable.

12 Ms. Brown, would you mind answering two
13 complaints and giving the plaintiffs fan option, when
14 they file a short-form complaint, to either file a
15 short-form based on the master complaint or the master
16 individual complaint?

17 MR. VINCENT: Your Honor, this is Larry Vincent.
18 The question I have is, how -- how can one opt into a
19 class that hasn't been certified yet? I would think the
20 Court could go with the master -- the master amended
21 complaint and just issue an order that the short-forms
22 are not meant and do not constitute an election to opt
23 in to a class that doesn't exist yet. That can only
24 happen, as I understand it, in a (b)(2), or in the Court
25 of Federal Claims, after the certification

14

1 THE COURT: Well, as part of the certification or
2 in conjunction with the certification, that is quite
3 true, and, in fact, in a case like this one, one could
4 expect a fair number of subclasses or at least some
5 subclasses. So there might even be an opt-in process
6 that occurs later in conjunction with the liability
7 phase and then a division of a certified class, if there
8 is such a thing, into subclasses. I've just dealt with
9 one case where we had six different subclasses.

10 Ms. Brown, let's hear from you. Let's hear your
11 views on these subjects.

12 MS. BROWN: Well, Your Honor, we would actually
13 agree with Mr. Vincent that one cannot opt in to a class
14 that has not yet been certified and would add that we
15 don't know whether all of the plaintiffs who file
16 short-form complaints would even meet the definition of
17 a not-yet-certified class.

18 So I think that until a class is certified, then,
19 again, everyone is proceeding individually and, thus,
20 can have the same allegations in one master complaint,
21 and I think that that would be easiest for the parties
22 and both -- and for those who are -- who are joining the
23 case and filing the short-form complaint.

24 THE COURT: In this connection, let's talk a
25 little bit about issue preclusion, because the Court has

15

1 the view that any identification of test plaintiffs and
2 identification of issues related to those test
3 plaintiffs -- and I'm talking about facts basically --
4 would bind those particular test plaintiffs but not
5 others.

6 Is that the view of the parties?

7 MR. CHAREST: This is Daniel Charest. From my
8 perspective, when we've been identifying what -- what
9 the Court identified as test plaintiffs or test cases,
10 I've always viewed it through the lens of trying to
11 identify class representatives that would sort of flesh
12 out the different contours of the class within -- within
13 the two pools, right, that come within Addicks and
14 Barker.

15 And so from my perspective, we have tried to
16 address what I -- what I perceive to be an argument
17 against typicality or commonality by including, you
18 know, like a business owner, an adjusted property, a
19 homeowner, you know, those different types of people in
20 order to, like I said, give the class the -- give the
21 flood victims relief through the class mechanism. So
22 that's -- I think I'm answering your question, but
23 that's how I've been looking at the test case selection
24 process. Really, for me, it's been identifying class
25 representatives.

16

1 THE COURT: There may be a --

2 MR. VINCENT: Your Honor, this is Larry Vincent
3 again.

4 THE COURT: Yes?

5 MR. VINCENT: I don't think the question is that
6 other plaintiffs would be bound. I think the issue
7 that's going to be put before the Court is offensive
8 collateral estoppel against the United States.

9 THE COURT: Well, the Court is very familiar with
10 offensive collateral estoppel and mutual defensive
11 collateral estoppel through the Mendoza and the Stauffer
12 cases. In fact, I argued Stauffer in the Supreme Court.
13 Let's just put it that way.

14 One of the -- one of the things that I guess the
15 Court is drawing a distinction between are bellwether
16 cases and representatives of particular classes or even
17 potential subclasses. For the moment, I would treat
18 these -- this question of identification of test
19 plaintiffs as a bellwether situation that might evolve
20 to something that could turn into a representative of a
21 class or subclass.

22 Does that make sense? Ms. Brown, do you have
23 views?

24 MS. BROWN: I think our views are the same as
25 yours, Your Honor, that if there is a need in the future

FORM 19. Certificate of Compliance with Type-Volume Limitations

Form 19
July 2020

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

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 21-1131

Short Case Caption: Milton et al. v. United States

Instructions: When computing a word, line, or page count, you may exclude any items listed as exempted under Fed. R. App. P. 5(c), Fed. R. App. P. 21(d), Fed. R. App. P. 27(d)(2), Fed. R. App. P. 32(f), or Fed. Cir. R. 32(b)(2).

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets one of the following:

- ☒ the filing has been prepared using a proportionally-spaced typeface and includes 3,060 words.
- ☐ the filing has been prepared using a monospaced typeface and includes _____ lines of text.
- ☐ the filing contains _____ pages / _____ words / _____ lines of text, which does not exceed the maximum authorized by this court's order (ECF No. _____).

Date: 03/15/2021

Signature: s/Nancie G. Marzulla

Name: Nancie G. Marzulla