IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSEPH CACCIAPALLE, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Case No. 13-466C Judge Margaret M. Sweeney

PLAINTIFFS' SUPPLEMENTAL BRIEF ON OUTSTANDING MOTION TO DISMISS

In accordance with the Court's March 19, 2020 order, the *Cacciapalle* class plaintiffs submit this supplemental brief and the attached proposed order (Ex. A) showing a proposed disposition of the counts in our First Amended Complaint given the Court's December 6, 2019 opinion on Defendant's motion to dismiss in *Fairholme Funds, Inc. v. United States,* 13-465C ("Fairholme Opinion"). We explain below the basis for the proposed disposition for each count.

We acknowledge at the outset that Counts I and III are similar to the direct Takings and Illegal Exaction claims brought by the *Fairholme* plaintiffs, which this Court dismissed in the Fairholme Opinion. In our motion to lift the stay in this case, we recognized that the rulings in the Fairholme Opinion may also require dismissal of these direct claims. However, we also recognized there are "solid grounds for distinguishing" our claims from those dismissed in the Fairholme Opinion. We explain below that the way in which we pled these claims, and the arguments we made against dismissal, arguably distinguish them from *Fairholme* because the gravamen of our claim is not that there was an injury to the Companies that had an indirect effect on the shareholder-plaintiffs, but rather that Treasury and FHFA directly appropriated rights held by shareholder-plaintiffs, and gave those rights to Treasury. We identify specific paragraphs in our complaint and excerpts from oral argument demonstrating this. We also recognize, however, that the Court may conclude there is not a significant enough difference to warrant a different result. If that is the case, then we ask the Court to consider the arguments made below to determine if it should reconsider its dismissal of the direct Takings and Illegal Exaction claims.

Counts II, IV, and V, by contrast, are completely different from any claim brought by the *Fairholme* plaintiffs and cannot be dismissed based on any of the reasoning in the Fairholme Opinion. These claims require a separate decision, and we briefly identify for the Court the relevant pages of prior briefing that address the issues pertinent to each claim and attempt to

distill the critical points to show why dismissal is not warranted.

Finally, we recognize that Count VI is the same fiduciary breach claim as was presented in *Fairholme*, and therefore the Court's decision to dismiss that claim in the Fairholme Opinion (with which we respectfully disagree) requires dismissal of Count VI.

I. COUNT I SHOULD NOT BE DISMISSED BECAUSE IT IS A DIRECT TAKINGS CLAIM THAT WAS NOT PLED AS AN OVERPAYMENT CLAIM

Count I of the *Cacciapalle* complaint pleads a direct claim under the Takings clause for appropriation of the dividend and liquidation rights held by preferred shareholders. Although this claim is similar to the direct Takings claim pled by the *Fairholme* plaintiffs that this Court held should be dismissed, Fairholme Opinion at 38-40, we do not concede that the Fairholme Opinion requires Count I to be dismissed because the Opinion does not address specific allegations in the *Cacciapalle* complaint and specific arguments we made.

We refer the Court to paragraphs 9-10, 13, 55, 57-59, 61, 68, 72-73, 76-89, 125-130 of the *Cacciapalle* First Amended Complaint, in which we pled that the government's implementation of the Net Worth Sweep constituted a ***direct appropriation*** of ***shareholders'*** property rights. We do not complain that the shareholders' rights to dividends and liquidation preferences were ***indirectly*** impaired as a result of the Companies being forced to overpay the government, thereby being left with insufficient assets to pay shareholders. Indeed, we do not complain about harm to the Companies at all. Rather, we complain that the government reordered the priority of shareholder rights with the specific purpose and effect of ***transferring private shareholders' (contingent) rights to distributions to the Treasury*** – a direct taking.

The importance of these factual allegations is especially clear if the correct legal standard is applied. The question of whether shareholders have a direct Takings claim is not controlled by whether Treasury owed a fiduciary duty to shareholders, and therefore is not determined by

whether Treasury exercised control over the Enterprises (though we submit that it did). Rather, the question of whether shareholders have a direct Taking claim is answered by determining whether, under the facts alleged, Treasury now holds property rights that were previously held by the shareholders. It does. Before the Third Amendment, private shareholders owned property rights to receive portions of any distributions the enterprises might ever make over and above the 10% dividend owed on the Treasury's Senior Preferred Stock, and the Treasury owned a right to receive the remaining portions. *See* Ex. B. After the Third Amendment, the private shareholders no longer own any rights to receive any such distributions; instead, the Treasury owns the right to ***all*** such distributions. Treasury now owns what private shareholders used to own. *Id.* Therefore, shareholders have a direct Takings claim.

This can also be seen by looking at pages 181-83 of the transcript of the November 19, 2019 oral argument (ECF 91-1). That is where counsel for *Cacciapalle* argued that the existence of their direct Takings claim can be seen by considering the hypothetical scenario where the defendants created a Third Amendment that (a) was identical to the actual Third Amendment in requiring that 100% of any and all future distributions must go only to Treasury, thereby appropriating shareholders' dividend and liquidation rights, but (b) was different from the actual Third Amendment insofar as it was not damaging to the enterprises because it allowed them to retain as much capital as they wished, allowing them to decide when and whether to make distributions to Treasury. This hypothetical Third Amendment would not have given rise to any derivative claim because it would not harm the Companies. But it would have given rise to a direct shareholder claim because it would have taken the contingent rights to dividends held by shareholders and given them to Treasury. Shareholder-plaintiffs cannot possibly lose that direct claim merely because the actual Third Amendment was even ***worse*** than the hypothetical,

causing injury ***both*** to the enterprises (by depriving them of capital) ***and*** to the shareholders (by depriving them of their dividend and liquidation rights). ECF 91-1 at 181-183.

II. COUNT II SHOULD NOT BE DISMISSED BECAUSE IT STATES A CLAIM THAT WAS NOT ALLEGED BY FAIRHOLME

This count alleges that any interpretation of HERA that precludes shareholders from bringing derivative claims and claims for declaratory and injunctive relief, and thereby prevents shareholders from fully remedying the harm suffered as a result of the Third Amendment, is itself a Taking for which just compensation must be paid. ECF 67 at ¶¶ 134-38. The Fairholme Opinion does not address this claim because the *Fairholme* plaintiffs did not bring such a claim. And while this Court allowed derivative claims for Takings and Illegal Exaction to proceed, the D.C. Circuit held that all derivative common law claims and all claims for declaratory and injunctive relief were precluded by HERA. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 617-34 (D.C. Cir. 2017). Thus, Count II remains ripe for decision. The arguments for and against dismissal of Count II are found at ECF 76 at 54-55, ECF 81-1 at 2-5, and ECF 85 at 63-65.

III. COUNT III SHOULD NOT BE DISMISED BECAUSE IT IS A DIRECT ILLEGAL EXACTION CLAIM THAT WAS NOT PLEAD AS AN OVERPAYMENT CLAIM

This Count alleges a direct claim for illegal exaction. This is similarly situated to Count I. We rely on the same argument here as made in Section I above, and refer the Court to ¶¶ 94, 99, 101, 141-148 of our complaint to show this was pled as a direct claim.

IV. COUNT IV SHOULD NOT BE DISMISSED BECAUSE IT STATES A CLAIM THAT WAS NOT ALLEGED BY FAIRHOLME

Count IV alleges that when FHFA succeeded to all of Fannie and Freddie's rights, title and obligations, FHFA became the counterparty to the shareholder contracts between the preferred shareholders and the enterprises. This Court correctly held that FHFA is an agency of the United States even when acting as conservator, Fairholme Op. at 24, and therefore the United

States became the counterparty to those preferred shareholder contracts. The Third Amendment breached the contractual rights of preferred shareholders, and the United States is liable for that breach. This claim is direct (not derivative) because the contractual rights at issue were enforceable by the preferred shareholders ***against*** the enterprises, so the breach of those rights by the United States harmed ***only*** the preferred shareholders, not the enterprises.

This claim was not made by the *Fairholme* plaintiffs and is therefore not addressed in the Fairholme Opinion. The *Fairholme* implied-in-fact contract claim was completely different, as it was based on the contract between the FHFA and each of the Companies created by the agreement establishing the conservatorship. The briefing on the motion to dismiss for Count IV can be found at ECF 76 at 75-77, ECF 81-1 at 6-8, and ECF 85 at 94-96.

V. COUNT V SHOULD NOT BE DISMISSED BECAUSE IT STATES A CLAIM THAT WAS NOT ALLEGED BY FAIRHOLME

This count is for breach of the implied covenant of good faith and fair dealing in the shareholder contracts between preferred shareholders and the Companies. It is therefore similarly situated to Count IV, and we incorporate the arguments regarding Count IV above.

VI. COUNT VI STATES THE SAME FIDUCIARY BREACH CLAIM AS WAS ALLEGED BY FAIRHOLME AND DISMISSED BY THE COURT

The *Cacciappalle* plaintiffs agree that their breach of fiduciary duty claim is the same as that alleged in *Fairholme*. Accordingly, since the Court dismissed the *Fairholme* claim, the same ruling requires dismissal of Count VI. The *Cacciappalle* plaintiffs respectfully disagree with that ruling and reserve their rights to appeal it (and all other adverse rulings).

CONCLUSION

For the foregoing reasons, the Court should enter the proposed order attached.

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Respectfully Submitted,

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