# In the United States Court of Federal Claims

No. 13-698C (Filed: March 30, 2020)

*******	**
ARROWOOD INDEMNITY COMPANY	*
et al.,	*
Plaintiffs,	*
	*
V.	*
	*
THE UNITED STATES,	*
	*
Defendant.	*
*****	**

#### ORDER

The court conducted a status conference on March 5, 2020, during which the parties discussed the implications for their case of the court's December 6, 2019 opinion on defendant's motion to dismiss in <u>Fairholme Funds</u>, Inc. v. United States, 13-465C ("<u>Fairholme</u> Opinion"). The parties also discussed the related issue of lifting the stay of the court's consideration of defendant's motion to dismiss the instant case. After considering the parties' arguments, the court finds that it is appropriate to grant plaintiffs' request, made during the status conference, that the court consider supplemental briefing on the motion to dismiss. The court LIFTS the stay in this matter to consider supplemental briefing.

The court **DIRECTS** plaintiff to file, by **no later than Monday, April 6, 2020**: (1) a one-page overview following the template attached as Exhibit 1 and (2) a supplemental brief of no more than five pages. In the supplemental brief, plaintiff should expand upon relevant points from the overview, identify which claims (if any) it stipulates should be dismissed based on the reasoning in the <u>Fairholme</u> Opinion, and identify which claims should not be dismissed.<sup>1</sup> If plaintiff is contending that the court should not dismiss the same type of claim (e.g., taking, illegal exaction, and breach of contract) that it dismissed in the <u>Fairholme</u> Opinion, plaintiff should explain why a different result is warranted for its case and do so with reference to specific

<sup>&</sup>lt;sup>1</sup> Plaintiff's stipulations, if any, will not be construed as a waiver of appellate rights or as a waiver of any arguments concerning the propriety of the reasoning in the <u>Fairholme</u> Opinion.

paragraphs in its complaint.<sup>2</sup> The court also **DIRECTS** defendant to file a supplemental response brief, not to exceed six pages, by **no later than Monday**, April 20, 2020.<sup>3</sup>

#### IT IS SO ORDERED.

<u>s/ Margaret M. Sweeney</u> MARGARET M. SWEENEY Chief Judge

 $<sup>^2</sup>$  This directive is not an invitation to challenge the legal conclusions reached in the <u>Fairholme</u> Opinion. Instead, the court is merely providing plaintiff with an opportunity to explain why a specific claim they assert is factually different than the related claim in the <u>Fairholme</u> Opinion.

<sup>&</sup>lt;sup>3</sup> The court is providing additional time to defendant because it will need to file a response in a number of cases.

#### I. As to Count I (Takings):

- a. The government's motion under *Rule* 12(b)(1) is **DENIED**:
  - i. The claim is against the United States. See Fairholme Op. § IV(B).
  - ii. The claim does not sound in tort. See Fairholme Op. IV(D)(2).
- b. The government's motion under *Rule* 12(b)(6) is **DENIED**:
  - i. Because:

[A] Plaintiffs' claim, pleaded as direct, is direct in substance, because of material differences from the allegations in *Fairholme*, particularly in that the gravamen of the claim is not harm to the Companies but rather diversion from the non-government shareholders to the government, a shareholder. *E.g., Owl Creek* Am. Compl. ¶¶ 2, 68, 76, 85, 88, 93, 95, 126; *see Fairholme* Op. § V(B).

[B] Although Plaintiffs pleaded a direct claim, it is derivative in substance, not materially different from the direct claim in *Fairholme*. See *Fairholme* Op. § V(B). But, under Federal Circuit precedent, the Recovery Act permits derivative claims here, and thus Plaintiffs—who acquired their stock before the government imposed the Sweep Amendment—may proceed with the claim as deemed derivative. See Fairholme Op. § V.

ii. Allegations of illegal conduct do not defeat this claim. See Fairholme Op. § VI(A).

OR

#### II. As to Count II (Illegal Exaction):

- a. The government's motion under Rule 12(b)(1) is **DENIED**:
  - i. The claim is against the United States. See Fairholme Op. § IV(B).
  - ii. The claim does not sound in tort. See Fairholme Op. IV(D)(2).

OR

- b. The government's motion under Rule 12(b)(6) is **DENIED**:
  - i. Because:

[A] Plaintiffs' claim, pleaded as direct, is direct in substance, because of material differences from the allegations in *Fairholme*, particularly in that the gravamen of the claim is not harm to the Companies but rather diversion from the non-government shareholders to the government, a shareholder. *E.g., Owl Creek* Am. Compl. ¶¶ 2, 68, 76, 85, 88, 93, 95, 126; *see Fairholme* Op. § V(B).

**[B]** Although Plaintiffs pleaded a direct claim, it is derivative in substance, not materially different from the direct claim in *Fairholme*. *See Fairholme* Op. § V(B). But, under Federal Circuit precedent, the Recovery Act permits derivative claims here, and thus Plaintiffs—who acquired their stock before the government imposed the Sweep Amendment—may proceed with the claim as deemed derivative. *See Fairholme* Op. § V.

ii. Although the Sweep Amendment was not illegal under the Recovery Act, the claim may proceed because the government did not respond to other arguments for why the Sweep Amendment was illegal. *See Fairholme* Op. § VI(B).

## III. As to Count III (Breach of Fiduciary Duty):

- a. The government's motion under *Rule 12(b)(1)* is **GRANTED**, because the claim sounds in tort. *See Fairholme* Op. § IV(D)(1).
- b. Accordingly, Count III is **DISMISSED** for lack of jurisdiction.

## IV. As to Count IV (Breach of Implied-in-Fact Contract Between the U.S. and the Companies):

- a. The government's motion under *Rule 12(b)(1)* is **GRANTED**. The Complaint sufficiently alleges an implied-in-fact contract with the U.S. *See Fairholme* Op. § VI(C). But it does not sufficiently allege that Plaintiffs are third-party beneficiaries of that contract. *See id.* § IV(E). On the latter issue, the *Fairholme* plaintiffs adopted the arguments of Plaintiffs here, and the Court does not consider any differences in allegations to be material. *Cf. id.* § II.
- b. Accordingly, Count IV is **DISMISSED** for lack of jurisdiction.