

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

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

² This directive is not an invitation to challenge the legal conclusions reached in the Fairholme 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 Fairholme Opinion.

³ The court is providing additional time to defendant because it will need to file a response in a number of cases.

POTENTIAL ORDER APPLYING FAIRHOLME OPINION TO “OWL CREEK ACTIONS” ***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)*.

OR

[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)*.

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)*.
- 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)*.

OR

[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.