

UNITED STATES COURT OF FEDERAL CLAIMS

OWL CREEK ASIA I, L.P., *et al.*,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 18-281C
(Chief Judge Sweeney)

APPALOOSA INVESTMENT LIMITED
PARTNERSHIP I, *et al.*,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 18-370C
(Chief Judge Sweeney)

AKANTHOS OPPORTUNITY FUND, L.P.,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 18-369C
(Chief Judge Sweeney)

CSS, LLC,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 18-371C
(Chief Judge Sweeney)

MASON CAPITAL L.P., *et al.*,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 18-529C
(Chief Judge Sweeney)

NOTICE OF FILING POTENTIAL ORDER AND CHART IN SUPPORT

PLEASE TAKE NOTICE that during the March 5, 2020, status conference in the above captioned cases the Court instructed the Plaintiffs to file on the docket certain demonstratives Plaintiffs presented at the status conference; and

PLEASE TAKE FURTHER NOTICE that attached hereto as **Exhibit A** is the Potential Order Applying *Fairholme* Opinion to “*Owl Creek* Actions” that the Plaintiffs presented to the Court during the status conference; and

PLEASE TAKE FURTHER NOTICE that attached hereto as **Exhibit B** is the chart “*Owl Creek* Actions” Complaints Focus On Harm To The Non-Governmental Shareholders in support of Exhibit A that the Plaintiffs presented to the Court during the status conference.

Respectfully submitted:
March 6, 2020

By: /s/ Lawrence D. Rosenberg

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EXHIBIT A

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.

* The plaintiffs in *Owl Creek Asia I, L.P. v. United States*, No. 18-281; *Appaloosa Investment Limited Partnership I v. United States*, No. 18-370; *Akanthos Opportunity Master Fund, L.P. v. United States*, No. 18-369; *CSS, LLC v. United States*, No. 18-371; and *Mason Capital L.P. v. United States*, No. 18-529 (here, collectively, the, “Plaintiffs” and the “*Owl Creek Actions*”) offer this potential order in further response to the Court’s Order of February 20, 2020 (*e.g.*, *Owl Creek*, Dkt. 46), which asked the parties to consider the effects of the Court’s Opinion and Order in *Fairholme* (No. 13-465C, Dkts. 447 & 449) on the government’s motion to dismiss as to other plaintiffs, in the interest of expediting a decision and possible appeal to avoid prejudice to Plaintiffs from a potential appeal in *Fairholme*. This potential order is one way in which the Court might wish to apply that Opinion to the government’s motion as to Plaintiffs’ complaints. In providing it in response to the Court as a possible aid to the Court, the Plaintiffs do not concede or in any way suggest that this is how that Opinion should apply to their complaints, nor do they waive (but in fact expressly preserve) any arguments as to how that Opinion should apply, as to any issue (or as to the correctness of that Opinion).

EXHIBIT B

**“Owl Creek Actions” Complaints¹ Focus On
Harm To The Non-Governmental Shareholders**

¶ 2: “Through the operation of the Sweep Amendment, the United States has expropriated hundreds of billions of dollars in net worth from the Companies, to benefit the government at the expense of the Companies’ other shareholders As a direct result of the Sweep Amendment, Owl Creek has suffered severe economic loss to its property interests in the Junior Preferred Stock.”

¶ 68: “Treasury had used that power over the conservatorships to place the general interest of the government’s coffers—beyond Treasury’s interest in repayment of draws and in receiving dividends—ahead of the interests of shareholders and to hamper the Agency as conservator in preserving the value of the Companies for any shareholders other than Treasury.”

¶ 76: “After imposing the Sweep Amendment, Treasury made no attempt to hide from the public that Treasury’s purpose was to expropriate the entirety of the Companies’ shareholders’ private property rights for public use and a public purpose.”

¶ 85: “Rather than acting as a true conservator, or in the interests of the shareholders whose rights, titles, powers, and privileges with respect to the Companies it had assumed as conservator (§ 4617(b)(2)(A)), the Agency was acting under the de facto authority of, and in collusion, with Treasury.”

¶ 88: “Treasury’s actions to nationalize the Companies, stripping their shareholders (other than itself) of any benefit from the Companies’ improving operations, proved well timed for the United States, in light of the Companies’ results and market expectations as of August 2012.”

¶ 93: “This reveals the real intent behind the Sweep Amendment—to benefit the government at the expense of the Junior Preferred stockholders. . . .”

¶ 95: “[T]he diversion of profits under the Sweep Amendment also ensures the perpetual nullification of the liquidation rights of all other shareholders, particularly the Junior Preferred holders, who would be first in line but for Treasury’s holdings.”

¶ 126: “The United States breached its fiduciary duty to Owl Creek by entering into the Sweep Amendment, which was not in the best interests of the Companies’ shareholders (other than the United States), but rather was contrary to their interests and arbitrarily and unreasonably provided a windfall to the United States at the expense of non-controlling shareholders.”

¹ Quotations are of the Amended Complaint in *Owl Creek*, No. 18-281, Dkt. 16 (Aug. 16, 2018), the first-filed of the “Owl Creek Actions” (as defined in the Potential Order), whose contents are representative of the others.