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)

PLAINTIFFS' SUPPLEMENTAL BRIEF ON OUTSTANDING MOTION TO DISMISS

In response to this Court's Order of March 19, 2020 (*e.g.*, *Owl Creek* ECF 56), and without waiving any appellate rights or arguments concerning the propriety of the reasoning in the Court's *Fairholme* Opinion (*e.g.*, *id.*), Plaintiffs state that, given the reasoning in that Opinion, the Court appears likely to hold that Plaintiffs' claims of breach of implied-in-fact contract (Count IV) should be dismissed. However, a different result is warranted on Plaintiffs' claims of takings, illegal exaction, and breach of fiduciary duty (Counts I, II, and III).

Per the Court's direction, Plaintiffs provide in the attached Exhibit a one-page overview of these conclusions, including citing relevant portions of the *Fairholme* Opinion and specifying how this Court's reasoning would apply with respect to the government's challenges under both Rule 12(b)(1) and 12(b)(6). They explain below why applying the *Fairholme* Opinion should not lead to dismissing their claims of takings, illegal exaction, and breach of fiduciary duty. In brief: *First*, material differences between Plaintiffs' factual allegations and those in *Fairholme* establish that Plaintiffs suffered direct injuries due to the expropriation by the government (which was also a shareholder of the Companies) of the non-government shareholders' interests to benefit itself. *Second*, regardless, Plaintiffs, who purchased their shares before the Sweep Amendment in 2012, have standing under *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999). *Third*, Plaintiffs' breach-of-fiduciary duty claims are rooted in contract in a way that such claims in *Fairholme* are not.

I. Plaintiffs' Allegations Demonstrate That Their Claims Are For Direct Harm.

As the Court noted in the *Fairholme* Opinion, the general test for determining whether a claim is direct or derivative turns on "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." *Tooley v. Donaldson, Lufkin &*

Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004). In *Starr International Co. v. United States*, the Federal Circuit explained that under this test shareholders' claims of overpayment to a third party are derivative, "because any dilution in value of the corporation's stock is merely the unavoidable result (from an accounting standpoint) of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction." 856 F.3d 953, 967 (2017); *see El Paso Pipeline GP Co., LLC v. Brinckerhoff*, 152 A.3d 1248, 1261 (Del. 2016) (finding claims derivative, where plaintiff only alleged loss to the limited partnership, making harm just "the proportionally reduced value of [plaintiff's] units"). That is, a shareholder's claim is derivative when "all of a corporation's stockholders are harmed." *Id.* at 1261 (internal quotation omitted). The remedy, accordingly, is damages paid to the corporation as "a restoration of the improperly reduced value," benefitting each shareholder *pro rata*. *Starr*, 856 F.3d at 967.

In its *Fairholme* Opinion, the Court concluded that the *Fairholme* plaintiffs' claims were derivative because "[t]he gravamen of each claim is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury." *Fairholme* Op. 40. The *Fairholme* plaintiffs' complaint "focus[ed] on the expropriation of the Enterprises' assets via compulsory payments of all profits." *Id.*; *see, e.g., Fairholme* Compl. ¶¶ 11, 114, 231 (ECF 413).

By contrast, as Plaintiffs detailed in their Combined Opposition to the motion to dismiss ("Opp.," *Owl Creek* ECF 28), filed separately from the *Fairholme* plaintiffs' opposition: "The gravamen of the Complaint is not that the Sweep Amendment was 'unfair' or constituted 'waste or mismanagement,' but that the government as a controlling shareholder (including in collusion with itself as manager) [benefitted itself] while correspondingly reducing the rights of other shareholders," which "*directly* harmed th[ose] *other* shareholders." Opp. 37 (citation omitted); *see id.* at 37-39 (applying *Gatz v. Ponsoldt*, 925 A.2d 1265 (Del. 2007), and contrasting *El Paso*

Pipeline and *Starr*, among other cases).[1] The relevant harm under the above law is that "[t]he government has discriminated in favor of one, controlling stockholder—itself, in classic self-dealing," not that it has harmed the Companies (although it has done that as well). *Id.* at 36.

The harm Plaintiffs allege in their Complaints is thus very much, and expressly, not harm to "all" shareholders according to their shares. *E.g., Owl Creek* Am. Compl. ¶ 2 (ECF 16) (alleging government benefitted itself "at the expense of the Companies' other shareholders"); ¶ 68 (alleging Treasury "hamper[ed] the Agency as conservator in persevering the value of the Companies for any shareholders other than Treasury"); ¶ 88 (alleging Treasury "nationalize[d] the Companies, stripping their shareholders (other than itself) of any benefit from the Companies' improving operations"); ¶ 95 (alleging that "the diversion of profits under the Sweep Amendment also ensures the perpetual nullification of the liquidation rights of all other shareholders"); ¶ 107 (alleging that Treasury as shareholder "increased its rights with respect to the Companies while correspondingly reducing the rights of all other shareholders"); ¶ 126 (alleging harm to "the Companies' shareholders (other than the United States)"). The Court's finding that the Agency (part of the government) suffers under a conflict of interest regarding the Sweep Amendment highlights this (direct) harm to only some shareholders, by recognizing that the government shareholder benefited at the others' expense. *Fairholme* Op. at 45; *cf. id.* at 24.

Correspondingly, the Plaintiffs here do not seek a repayment to the Companies (or even to all shareholders *pro rata*). That general remedy for derivative suits would not remedy their harms, particularly because the government receives all of the Companies' earnings "in perpetuity" under the Sweep Amendment. *E.g.*, *Owl Creek* Am. Compl. ¶¶ 1, 9, 10, 95, 102. And

[1] Holders of preferred stock lack common voting rights, and both the *Tooley* and "dual nature" tests apply to claims by them. *See MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at * 13 (Del. Ch. May 5, 2010). Thus, in that context, the dual-nature rule of *Gatz* (a case involving common stock) and similar cases cannot depend on reduced voting rights.

even a *pro rata* distribution to all shareholders (if possible) would not remedy the situation, because Treasury would improperly share in the distribution.

Indeed, Plaintiffs' essential allegation is that Treasury benefited at Plaintiffs' direct expense. Before the Sweep Amendment, Plaintiffs (1) were entitled to receive certain portions of any distributions the Companies might make over the 10% dividend owed on Treasury's Senior Preferred Stock and (2) had liquidation rights. After the Sweep Amendment, Plaintiffs lost both rights, as Treasury expropriated the rights to all distributions and perpetually nullified their liquidation rights. *E.g. Owl Creek* Am. Compl. ¶¶ 95, 112-13. This is a quintessential taking of property, and states a direct claim. *See* Opp. 38 (citing Federal Circuit precedent recognizing shareholder's direct claim for taking of contingent property interest).

Finally, to the extent that the Court found it significant whether Treasury was a "controlling shareholder" (*Fairholme* Op. 39), Plaintiffs have allegations, distinct from those in *Fairholme*, that establish the United States' relevant control of the Companies, even if Treasury in isolation was not technically a controlling shareholder. Plaintiffs allege that "[t]he Agency and Treasury acted together as a controlling group to implement their shared goal, the Sweep Amendment, in the interests of the United States. . . ." *Owl Creek* Am. Compl. ¶ 126; *see id.* ¶ 106; Opp. 23-24 (discussing additional allegations). Plaintiffs in their Combined Opposition explained the legal implications of these allegations under settled corporate law recognizing a "control group"—which, rather than depending on there being one controlling shareholder, takes into account all circumstances showing a joint pursuit of a shared goal. Opp. 22-25; *see id.* at 37 (cross-references); *see also Sisti v. FHFA*, 324 F. Supp. 3d 273, 283 n.9 (D. R.I. 2018) (recognizing that combination of positions of Treasury and Agency "ma[d]e the government a 'dominant shareholder'"). This Court did not address this issue in its *Fairholme* Opinion.

II. In Any Event, Plaintiffs Have Standing Given The Agency's Conflict Of Interest.

Applying *First Hartford*, this Court concluded that the Agency, as conservator, has a conflict of interest—it is the federal government, yet it "would need to decide on behalf of the Enterprises whether it should sue the federal government"—and thus that shareholders may assert derivative claims, even though ordinarily only the conservator could. *Fairholme* Op. 45. The Court did not, however, address whether plaintiffs asserting *direct* claims deemed derivative could maintain their claims under *First Hartford*, perhaps because plaintiffs who obtained their shares after the Sweep Amendment lack standing to assert direct claims regardless. *See id.* at 36. Plaintiffs, however, all purchased their holdings *before* Treasury and the Agency imposed the Sweep Amendment. *E.g.*, *Owl Creek* Am. Compl. ¶ 11. As Plaintiffs have explained, they thus may maintain their direct claims under the rule of *First Hartford*. Opp. 36, 39.

III. Plaintiffs' Breach-Of-Fiduciary-Duty Claim Is Founded On A Contract.

The Tucker Act grants jurisdiction over claims "founded on" a contract with the United States. 28 U.S.C. § 1491(a)(1). The Court rejected the *Fairholme* plaintiffs' breach-of-fiduciary-duty claims on the grounds that (1) the Recovery Act does not establish a fiduciary relationship and (2) the plaintiffs were not attempting to enforce a contractual duty "specified in the PSPAs." *Fairholme* Op. 31. This Court did recognize that, "[u]nder Delaware and Virginia law, a controlling shareholder owes a fiduciary duty to the minority shareholders," but held that Treasury was not a controlling shareholder. *Id.* at 32. Plaintiffs, however, as noted above (at 4), include allegations establishing that Treasury, upon and due to entering into the PSPAs, became, with the Agency, part of a *control group* (which is true whether or not Treasury also was precisely a "controlling shareholder"). That was the first of their bases for a fiduciary duty. *See* Opp. 27-29. The Court's reasoning in its *Fairholme* Opinion did not address this basis.

Respectfully submitted:
March 26, 2020

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EXHIBIT
One-Page Overview

POTENTIAL ORDER ON OUTSTANDING MOTION TO DISMISS *

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. The claim, pleaded as direct, is direct in substance, because of material differences from the allegations in *Fairholme*, particularly as the gravamen of the claim is not harm to the Companies but expropriation by the government shareholder from the non-government shareholders. Supp. Br. 1-4; *e.g., Owl Creek* Am. Compl. ¶¶ 2, 68, 88, 95, 107, 126 (ECF 16); *Owl Creek* Opp. 37-39 (ECF 28). Regardless, Plaintiffs who purchased before the Sweep Amendment have standing under *First Hartford*. Supp. Br. 5; Opp. 36, 39.
   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. The claim, pleaded as direct, is direct in substance, because of material differences from the allegations in *Fairholme*, particularly as the gravamen of the claim is not harm to the Companies but expropriation by the government shareholder from the non-government shareholders. Supp. Br. 1-4; *e.g.,* Am. Compl. ¶¶ 2, 68, 88, 95, 107, 126; Opp. 37-39. Regardless, Plaintiffs who purchased before the Sweep Amendment have standing under *First Hartford*. Supp. Br. 5; Opp. 36, 39.
   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 **DENIED**:
   i. The claim is against the United States. *See Fairholme* Op. § IV(B).
   ii. Plaintiffs' allegations establish a claim "founded on" a contract—the Preferred Stock Purchase Agreements—in that, through them, Treasury became, along with the Agency as conservator, a control group. Supp. Br. 5; Am. Compl. ¶ 126; Opp. 22-23, 27-29.

b. The government's motion under *Rule 12(b)(6)* is **DENIED**: Plaintiffs allege a plausible claim for breach of fiduciary duty. Am. Compl. ¶ 125-26; Opp. 60.

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.

* Plaintiffs in *Owl Creek Asia v. U.S.*, No. 18-281; *Appaloosa Investment v. U.S.*, No. 18-370; *Akanthos v. U.S.*, No. 18-369; *CSS, LLC v. U.S.*, No. 18-371; and *Mason Capital L.P. v. U.S.*, No. 18-529 (collectively, "Plaintiffs") offer this potential order in response to the Court's March 19 Order (*e.g., Owl Creek*, ECF 56), which asked the parties to provide a one-page overview of the effects of the Court's Opinion in *Fairholme* (No. 13-465, ECFs 447 & 449) on the government's motion to dismiss. Plaintiffs expressly reserve all appellate rights and do not waive any arguments concerning the propriety of the reasoning in the *Fairholme* Opinion.