IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WASHINGTON FEDERAL, *et al.*,	)	
Plaintiffs,	)	No. 13-385C
	)	(Chief Judge Sweeney)
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF

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Defendant, the United States, respectfully submits this response to the supplemental brief filed by plaintiffs, Washington Federal, *et al.* (Pl. Br.). Based on the Court's reasoning in *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl. Dec. 6, 2019, reissued Mar. 9, 2020) (Op.), and the arguments in our omnibus motion to dismiss (ECF No. 62) and reply brief (ECF No. 75), the Court should enter the proposed order attached as Exhibit A and dismiss the complaint.

I. Fannie Mae And Freddie Mac Shareholders Lack Standing To Assert Substantively-Derivative Claims As Direct Claims

Although the *Washington Federal* plaintiffs contend that their complaint is "entirely distinct" from the *Fairholme* complaint, Pl. Br. at 4, both groups of plaintiffs are Fannie Mae and Freddie Mac (Enterprises) shareholders who allege that the Government's exercise of its statutory powers under the Housing and Economic Recovery Act of 2008 (HERA) resulted in a taking or illegal exaction of their interests in Enterprise stock. The *Fairholme* plaintiffs allege that their interests in Enterprise stock were taken or illegally exacted when the Federal Housing Finance Agency (FHFA) and Treasury amended securities purchased by Treasury pursuant to HERA, and the *Washington Federal* plaintiffs allege that their interests in Enterprise stock were taken or illegally exacted when FHFA placed the Enterprises into conservatorship under HERA.[1] Although the statutory powers at issue in *Washington Federal* and *Fairholme* are different, the alleged injuries are virtually identical: the loss of rights and value in Enterprise stock, including

[1] Although the *Washington Federal* plaintiffs appear to concede that unauthorized conduct does not support a takings claim, they contend that their complaint does not allege that the Enterprises' placement in conservatorship was unauthorized. Pl. Br. at 2 n.3. However, in their complaint, plaintiffs repeatedly contend that the conservatorships were unauthorized. *Washington Federal* Am. Compl. ¶¶ 8, 137, 222, and Headings V.G and V.H. If the Court were to reach the merits of *Washington Federal*'s takings claim, plaintiffs' allegations of unauthorized conduct would require dismissal of that claim.

dividends. *Compare Washington Federal* Am. Compl. ¶¶ 78, 189, 203, 218, 222, *with Fairholme* 2d Am. Compl. ¶¶ 117, 169.

Like the *Fairholme* plaintiffs, the *Washington Federal* plaintiffs assert that these injuries permit them to bring "direct" taking and illegal exaction claims against the United States.[2] Pl. Br. at 4. In *Fairholme*, however, the Court determined that the substance of the plaintiff's injury, not the label, controls whether a claim is direct or derivative. Op. at 35. Accordingly, the Court evaluated the *Fairholme* claims by applying the following two-part test to determine whether they are direct or derivative: "(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)?" Op. at 40 (quoting *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)). The Court determined that the underlying harm alleged in *Fairholme* was the Enterprises' payment of Third-Amendment dividends to Treasury; thus, because plaintiffs' alleged loss of rights and value in Enterprise stock derived from the Enterprises' dividend payments, their injuries were substantively derivative. Accordingly, the Court determined that the *Fairholme* plaintiffs lacked standing to pursue their substantively-derivative claims as direct. *Id.*

Applying the Court's reasoning in *Fairholme* to the *Washington Federal* complaint compels the conclusion that *Washington Federal*'s alleged injuries are also substantively derivative. *See* U.S. Mot. to Dismiss at 28-30, ECF No. 63. The *Washington Federal* plaintiffs

[2] The *Washington Federal* complaint asserts only one count, which purports to include both a taking and illegal exaction claim. *See Washington Federal* Am. Compl., ¶¶ 217-25. And, although the complaint cites various means by which the Government allegedly took or exacted their property rights, including the Third Amendment, the *Washington Federal* plaintiffs clarified in their response to our omnibus motion to dismiss that their "case challenges the constitutionality of the original imposition of the conservatorships, not the Third Amendment." *Washington Federal* Opp. to U.S. Mot. to Dismiss at 11, ECF No. 69.

premise their taking and illegal exaction claims on various "Government actions, made *with respect to the Companies*," including "(a) imposing the conservatorships *on the Companies*. . . ; (b) imposing the usurious terms of the PSPAs *on the Companies* . . . ; [and] (c) dissipating the assets *of the Companies*[.]" *Washington Federal* Am. Compl. ¶ 185 (emphasis added). The injuries for which the *Washington Federal* plaintiffs seek compensation—decline in stock price, loss of dividends—occurred "*as a result*" of those actions. *Id*. ¶¶ 77-78, 189, 202-03, 222 (emphasis added). The *Washington Federal* plaintiffs may not assert these injuries as direct; indeed, injuries such as a "diminution in stock value or a loss of dividends" exemplify derivative injuries. Op. at 40. (quoting *Hometown Fin. Inc. v. United States*, 56 Fed. Cl. 477, 486 (2003)). Thus, because the *Washington Federal* plaintiffs do not identify an injury unique to them that is independent from any Enterprise injury, *Washington Federal* Am. Compl. ¶ 185, the *Washington Federal* complaint should be dismissed, consistent with the Court's decision in *Fairholme*, because plaintiffs lack standing to pursue it.

Because nothing in the *Fairholme* decision would support *Washington Federal*'s argument that its injuries are direct, the *Washington Federal* plaintiffs instead contend that the Fifth Circuit's decision in *Collins v. Mnuchin*, 938 F.3d 553, 574-75 (5th Cir. 2019), supports their argument. Pl. Br. at 4. Although plaintiffs provide no further explanation for this assertion, we understand plaintiffs to argue that this Court should treat their claims as direct because the *Collins* court treated other Enterprise-shareholder claims as direct. In its order lifting the stay, however, the Court permitted plaintiffs to explain how the *Fairholme* decision would apply to their complaint—not how another decision might apply. Order at 1-2, Mar. 9, 2020, ECF No. 90. In any event, the *Collins* court determined that shareholders brought direct claims under different reasoning than this Court applied in *Fairholme*. Moreover, the *Collins* decision is the

subject of cross-petitions for writs of certiorari pending in the Supreme Court. If anything, the *Washington Federal* plaintiffs' reliance on *Collins* only highlights their inability to show, under the Court's reasoning in *Fairholme*, that their claims are direct.

Finally, the *Washington Federal* plaintiffs contend that their claims are direct because they concern FHFA's placement of the Enterprises *into* conservatorship, unlike the *Fairholme* plaintiffs' claims, which concern FHFA's operation of the Enterprises *during* conservatorship. Pl. Br. at 4. But that distinction is irrelevant. The two-part test applied in *Fairholme* to distinguish between direct and derivative claims focuses on the nature of the injury, not its timing. Op. at 39-40. And, as applied to *Washington Federal*'s complaint, the nature of the injury is derivative and, consistent with the Court's decision in *Fairholme*, should be dismissed.

II. The Court Lacks Jurisdiction To Review The Merits Of The Enterprises' Placement In Conservatorship

The *Washington Federal* complaint should also be dismissed because HERA divests the Court of jurisdiction to entertain plaintiffs' assertion that the Enterprises' placement in conservatorship was improper. *See* U.S. Mot. to Dismiss at 79-80, ECF No. 63; U.S. Reply In Support of Mot. to Dismiss at 98-100, ECF No. 75. In HERA, Congress limited judicial review of the conservator's appointment to an action brought "within 30 days of such appointment, in the United States district court for the judicial district in which the home office of [an Enterprise] is located, or in the United States District Court for the District of Columbia, for an order requiring the [FHFA] to remove itself as conservator[.]" 12 U.S.C. § 4617(a)(5). Section 4617(a)(5) was not invoked within 30 days; indeed, the *Washington Federal* plaintiffs filed their suit nearly five years after the Enterprises' placement in conservatorship. The *Washington Federal* plaintiffs cannot now circumvent HERA's limitation on judicial review by asking this

Court to review the Enterprises' placement in conservatorship under the guise of a taking or illegal exaction claim. Accordingly, the Court should dismiss the complaint on that basis, too.

III. The *Washington Federal* Plaintiffs May Not Pursue Derivative Claims

Finally, the Court's ruling that a subset of the *Fairholme* plaintiffs may pursue derivative claims should have no effect on the Court's disposition of the *Washington Federal* complaint because the *Washington Federal* plaintiffs did not plead derivative claims. Unlike the *Fairholme* plaintiffs (or the *Fisher*, *Reid*, and *Rafter* plaintiffs, which also assert derivative claims), the *Washington Federal* plaintiffs neither asserted derivative allegations nor complied with Rule 23.1's derivative-pleading requirements. And given that the Enterprises declined to bring a direct challenge within 30 days of their placement into conservatorship pursuant to Section 4617(a)(5), no basis exists to permit the *Washington Federal* plaintiffs to pursue a derivative challenge many years later.

CONCLUSION

For these reasons, the Court should enter the attached proposed order and dismiss the complaint.

Respectfully submitted,

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PROPOSED ORDER

I. Defendant's motion to dismiss plaintiffs' complaint is GRANTED pursuant to Rule 12(b)(1) because plaintiffs lack standing to pursue a direct taking or illegal exaction claim. Although plaintiffs' complaint purports to bring a direct claim, the complaint reflects injuries to Fannie Mae and Freddie Mac (Enterprises), not to plaintiffs, such that the complaint is substantively derivative. Because "[a] shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature," plaintiffs' complaint is dismissed. *See Fairholme Funds, Inc. v. United States*, No. 13-465C, slip op. at 35, 38-40 (Fed. Cl. Dec. 6, 2019, reissued Mar. 9, 2020).

II. Defendant's motion to dismiss plaintiffs' complaint is also GRANTED pursuant to Rule 12(b)(1) because entertaining the claim would require the Court to evaluate the merits of the Federal Housing Finance Agency's (FHFA) decision to appoint itself as the Enterprises' conservator, which is beyond the Court's subject-matter jurisdiction. Pursuant to the Housing and Economic Recovery Act of 2008 (HERA), Congress limited judicial review of the conservator's appointment to an action brought "within 30 days of such appointment, in the United States district court for the judicial district in which the home office of [an Enterprise] is located, or in the United States District Court for the District of Columbia, for an order requiring the [FHFA] to remove itself as conservator[.]" 12 U.S.C. § 4617(a)(5). Section 4617(a)(5) was never invoked and Congress provided no other avenue for judicial review. Accordingly, the Court does not possess subject-matter jurisdiction to entertain the merits of FHFA's appointment of a conservator under the guise of a taking or illegal exaction claim. Accordingly, plaintiffs' complaint is dismissed.