IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSEPH CACCIAPALLE, *et al.*,	)	
Plaintiffs,	)	No. 13-466C
	)	(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, Joseph Cacciapalle, et al. (Pl. Br.). Based on the Court's reasoning in *Fairholme Funds, Inc. v. United States*, No. 13-465C, slip op. (Fed. Cl. Dec. 6, 2019, reissued Mar. 9, 2020) (Op.), and the arguments in our omnibus motion to dismiss and reply brief, ECF No. 76, 85, the Court should enter the proposed order attached as Exhibit A and dismiss the complaint.

I. The *Fairholme* Decision Requires Dismissal Of Plaintiffs' Takings, Illegal Exaction, And Breach-Of-Fiduciary-Duty Claims (Counts I, III, and VI)

Because the *Cacciapalle* and *Fairholme* plaintiffs raised virtually identical takings, illegal exaction, and breach-of-fiduciary-duty claims, and submitted the same response to our omnibus motion to dismiss, the Court's dismissal of those claims in *Fairholme* warrants dismissal of those claims here.

A. The Court's Dismissal Of The Taking And Illegal Exaction Claims In *Fairholme* Requires Dismissal Of Those Same Claims In *Cacciapalle* (Counts I and III)

The *Cacciapalle* plaintiffs acknowledge that their taking and illegal exaction claims are "similar" to those alleged in *Fairholme.* Pl. Br. at 1. That is an understatement. In response to our omnibus motion to dismiss, the *Cacciapalle* plaintiffs submitted the same opposition brief as the *Fairholme*, *Arrowood*, *Rafter*, *Fisher*, and *Reid* plaintiffs (Omnibus Opposition), and represented to the Court and the United States that they "adopt and incorporate the arguments and the statement of facts from the Omnibus Opposition." *See* Pl. Supp. Opp. to U.S. Mot. to Dismiss at 1, ECF No. 81-1. The Court addressed the factual and legal arguments raised in the Omnibus Opposition in *Fairholme*, and dismissed "direct" taking and illegal exaction claims for lack of standing because those claims were substantively derivative:

> Plaintiffs focus on the expropriation of the Enterprises' assets via compulsory payments of all profits. The gravamen of each claim

> is the same: The government, via the PSPA Amendments, compelled the Enterprises to overpay Treasury . . . . Plaintiffs cannot transform their substantively derivative claims into direct claims by merely alleging that, as a result of overpayments, they were deprived of their stockholder rights to receive dividends or liquidation payments. The claims remain derivative because plaintiffs' purported "harms are 'merely the unavoidable result . . . of the reduction in the value of the corporate entity."

Op. at 40 (quoting *Protas v. Cavanagh*, No. CIV. A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012)). Given that the *Cacciapalle* and *Fairholme* plaintiffs made the same factual and legal arguments in their response to our omnibus motion to dismiss, and the Court considered those arguments in *Fairholme*, the same reasoning that compelled dismissal of the taking and illegal exaction claims in *Fairholme* compels dismissal of those claims in *Cacciapalle.*

B. The *Cacciapalle* Plaintiffs Identify No Difference Between Their Case And *Fairholme* That Would Justify Survival Of The "Direct" Taking And Illegal Exaction Claims That the Court Dismissed In *Fairholme*

Even if the Court were to consider the *Cacciapalle* plaintiffs' argument that pleading differences between the *Cacciapalle* and *Fairholme* complaints justify survival of the *Cacciapalle* taking and illegal exaction claims, the argument should be rejected. Plaintiffs neither identify allegations in their complaint that are materially different from those in *Fairholme*, nor explain why any purported pleading differences would warrant a different result. Pl. Br. at 2, 4. In fact, the allegations that supposedly reflect purported pleading differences actually highlight the similarities between the *Cacciapalle* and *Fairholme* complaints. The cited allegations fall into four categories: (1) the Government expropriated plaintiffs' alleged economic rights in their Fannie Mae and Freddie Mac (Enterprises) stock;[1] (2) the Government

[1] *Compare Cacciapalle* Am. Compl. ¶¶ 9, 10, 13, 57, 58, 61, 73, 76-79, 86-87, 89, 125-28, *with Fairholme* 2d Am. Compl. ¶¶ 10, 114, 117-18, 120, 146.

nationalized the Enterprises, and operates them to advance the Government's political and economic interests to the detriment of private shareholders;[2] (3) the Third Amendment was unnecessary to arrest the Enterprises' cycle of drawing from the Treasury commitment to pay dividends;[3] and (4) the Government received more in dividends under the Third Amendment than it would have received if the 10-percent dividend remained in place.[4] The *Fairholme* complaint contains the same or similar allegations, which the Court addressed in the *Fairholme* decision. *See* Op. at 5-8. Thus, the *Cacciapalle* plaintiffs identify no factual basis as to why their taking and illegal exaction claims would survive when the Court dismissed those claims in *Fairholme*.

The *Cacciapalle* plaintiffs also argue that the Court's reasoning in *Fairholme* should not apply to their taking and illegal exaction claims because those claims were "not ple[d] as . . . overpayment claim[s]." Pl. Br. at 1, 4. But plaintiffs repeatedly allege that private shareholders were harmed because the Enterprises pay more in dividends under the Third Amendment than they would have paid under the 10-percent dividend. *Cacciapalle* Am. Compl. ¶¶ 10 ("[T]he total amount of dividends paid under the Net Worth Sweep is roughly $125.5 billion more than Treasury would have received under the 10% dividend"); 70 (same); 87 (same). In any event, the "overpayment" label has no legal significance in this context. As the Court explained, whether plaintiffs characterize the Third Amendment as an overpayment, dissipation of corporate assets, waste, or self-dealing, plaintiffs' alleged injuries arise from the Enterprises' Third-

[2] *Compare Cacciapalle* Am. Compl. ¶¶ 55, 59, 68 83, 86, 88, 129, *with Fairholme* 2d Am. Compl. ¶¶ 110, 116, 119-20, 127, 134, 135, 138, 140.

[3] *Compare Cacciapalle* Am. Compl. ¶¶ 58, 72, *with Fairholme* 2d Am. Compl. ¶¶ 12, 14, 141-146.

[4] *Compare Cacciapalle* Am. Compl. ¶¶ 87-88, *with Fairholme* 2d Am. Compl. ¶ 121.

Amendment dividend payments to Treasury. Op. at 40 n.35; *see also Cacciapalle* Am. Compl. ¶¶ 9-10; *see also* U.S. Mot. to Dismiss at 29-31.

Finally, the *Cacciapalle* plaintiffs contend that if the Court's reasoning in *Fairholme* would require dismissal of their taking and illegal exaction claims, the Court should reconsider that reasoning. Pl. Br. at 1. As an initial matter, the Court did not invite plaintiffs to relitigate the motion to dismiss; in fact, the Court explicitly cautioned that the opportunity to address the effect of the *Fairholme* opinion "is not an invitation to challenge the legal conclusions reached in [that opinion]." Order at 1 n.2, Mar. 19, 2020, ECF No. 99.

In any case, the entire point of certifying the *Fairholme* decision was to obtain authoritative guidance from the Federal Circuit on the legal issues the Court decided. Thus, the *Cacciapalle* plaintiffs' proposal that the Court reconsider rulings that are currently at issue in interlocutory-appeal petitions before the Federal Circuit would be a waste of judicial resources.

Moreover, the *Cacciapalle* plaintiffs' request for reconsideration relies on a hypothetical scenario that bears no resemblance to the facts alleged in plaintiffs' complaint. Pl. Br. at 3. Putting aside that plaintiffs never raised the hypothetical in their response to our omnibus motion to dismiss, counsel for the *Cacciapalle* plaintiffs already presented its hypothetical to the Court on behalf of numerous plaintiffs, including *Fairholme*. *See id.* (citing motion-to-dismiss-hearing transcript). If the Court did not find the hypothetical persuasive when it decided *Fairholme*, the *Cacciapalle* plaintiffs provide no reason why the Court would change its mind now.

Accordingly, because the *Cacciapalle* plaintiffs fail to show why the Court's reasoning in the *Fairholme* decision would merit any result other than dismissal of their taking and illegal exaction claims, the Court should dismiss counts I and III of the complaint.

C. Plaintiffs Acknowledge That The Reasoning In The *Fairholme* Decision Requires Dismissal Of Their Breach-Of-Fiduciary-Duty Claim (Count VI)

The *Cacciapalle* plaintiffs concede that the Court's reasoning for dismissing *Fairholme*'s breach-of-fiduciary-duty claim requires dismissal of the *Cacciapalle*'s analogous claim. Pl. Br. at 5. Accordingly, the Court should dismiss count VI of the complaint.

II. Although The Court's Reasoning In *Fairholme* Does Not Fully Resolve The Remaining Claims In The *Cacciapalle* Complaint, Those Claims Should Be Dismissed (Counts II, IV and V)

The *Cacciapalle* plaintiffs also brought three unique claims, alleging a judicial taking and breach of the stock certificates, that do not appear in the *Fairholme* complaint. *See* Am. Compl., counts II (judicial taking), IV and V (breach of contract). Although the Court has not yet addressed these claims, as we demonstrated in our omnibus motion to dismiss, these claims should be dismissed.

First, unlike the takings claim addressed in *Fairholme*, which concerns the Third Amendment, plaintiffs' judicial takings claim (count II) arises out of the D.C. Circuit's ruling that the Housing and Economic Recovery Act of 2008 precludes plaintiffs from seeking equitable relief against the Federal Housing Finance Agency (FHFA) as conservator, and bars shareholder derivative suits. *Cacciapalle* Am. Compl. ¶¶ 136-38; *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 614-16, 624-25 (D.C. Cir. 2017). In our omnibus motion to dismiss, we demonstrated that count II should be dismissed pursuant to Rule 12(b)(6) because plaintiffs fail to identify a property interest. *See* U.S. Mot. to Dismiss at 54-55; U.S. Reply Br. at 63-65.

Second, the *Fairholme* decision does not address the *Cacciapalle* plaintiffs' breach-of-contract claims (counts IV and V), in which plaintiffs allege that the Third Amendment caused the Enterprises to breach plaintiffs' stock certificates. *See* Pl. Br. at 5. These claims are identical to the breach-of-contract claims that plaintiffs are pursuing against the Enterprises and FHFA as

conservator in the United States District Court for the District of Columbia. *See In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigs.*, No. 13-1288 (D.D.C.), 2d Am. Compl. ¶ 150. In both district court and this case, the *Cacciapalle* plaintiffs allege that their stock certificates are contracts between plaintiffs and the Enterprises. *Cacciapalle* Am. Compl. ¶¶ 150, 158. As we demonstrated in our motion to dismiss, the *Cacciapalle* plaintiffs' breach-of-contract claims should be dismissed because they do not allege a contract with the United States. *See* U.S. Mot. to Dismiss at 40-42, 75; U.S. Reply Br. at 42-45, 94-95.

Although the *Fairholme* decision does not address the *Cacciapalle* plaintiffs' contract claims against the United States, the decision supports their dismissal. The Court recognized that the Enterprises operate as "private companies that are under the control of a conservator." Op. at 2. In other words, even if the Court treats FHFA as conservator as the United States for Tucker Act purposes, the Enterprises themselves remain private. Moreover, the Court's determination that the Enterprises are not Government instrumentalities further shows that plaintiffs' stock certificates are contracts with the Enterprises, not contracts with the United States. *See id.* at 23; *see also Cacciapalle* Am. Compl. ¶¶ 150, 158. Given these rulings and the arguments in our omnibus motion to dismiss, plaintiffs' breach-of-contract claims (counts IV and V) should be dismissed.

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. Claims Dismissed Pursuant To Rule 12(b)(1)

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

B. Defendant's motion to dismiss plaintiffs' illegal exaction claim (count III) is GRANTED pursuant to Rule 12(b)(1) because plaintiffs lack standing to pursue it. Although the claim is labeled a "direct" claim, plaintiffs' allegations reflect injuries to the Enterprises, not to plaintiffs, such that their claim is substantively derivative. Because "[a] shareholder lacks standing to litigate nominally direct claims that are substantively derivative in nature," count III is dismissed. *See id.* at 35, 38-40.

C. Defendant's motion to dismiss plaintiffs' breach-of-contract claims (counts IV and V) is GRANTED pursuant to Rule 12(b)(1) because plaintiffs allege no contract between them and the United States sufficient to establish this Court's subject-matter jurisdiction. As alleged, the contracts plaintiffs seek to enforce are between plaintiffs and the Enterprises—not the United States. *Cacciapalle* Am. Compl. ¶¶ 150 ("The Certificates for Fannie Mae and Freddie Mac Preferred Stock constitute contracts between Plaintiffs, on the one hand, and Fannie Mae and Freddie Mac, on the other."), 158 ("The Certificates for Fannie Mae and Freddie Mac Preferred Stock were and are, for all purposes relevant hereto, contracts between the Plaintiffs and the Companies."). Accordingly, counts IV and V are dismissed.

D. Defendant's motion to dismiss plaintiffs' breach-of-fiduciary-duty claim (count VI) is GRANTED pursuant to Rule 12(b)(1) because the Court lacks subject-matter jurisdiction to entertain claims sounding in tort. Accordingly, count VI is dismissed. Op. at 29-33.

II. Claims Dismissed Pursuant To Rule 12(b)(6)

A. Defendant's motion to dismiss plaintiffs' judicial takings claim (count II) is GRANTED pursuant to Rule 12(b)(6). The rulings of the United States Court of Appeals for the District of Columbia that the Housing and Economic Reform Act of 2008 (HERA) precludes (1) derivative common-law claims and (2) claims for equitable relief against the Federal Housing Finance Agency (FHFA) as conservator do not constitute a taking because plaintiffs have no property right in derivative claims or equitable relief. *See Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 617-34 (D.C. Cir. 2017). Accordingly, count II is dismissed.

B. Although plaintiffs' breach-of-contract claims (counts IV and V) are dismissed pursuant to Rule 12(b)(1), defendant's motion to dismiss those claims is also GRANTED pursuant to Rule 12(b)(6) because plaintiffs fail to plausibly allege an essential element of those claims—namely, the existence of a contract with the United States. Accordingly, counts IV and V are dismissed.