IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OWL CREEK ASIA I, L.P., *et al.*, Plaintiffs, v. THE UNITED STATES, Defendant.	No. 18-281C (Chief Judge Sweeney)
AKANTHOS OPPORTUNITY MASTER FUND, L.P., Plaintiff, v. THE UNITED STATES, Defendant.	No. 18-369C (Chief Judge Sweeney)

**Additional plaintiffs on following page*

DEFENDANT'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF

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APPALOOSA INVESTMENT LIMITED PARTNERSHIP I, *et al.*, Plaintiff, v. THE UNITED STATES, Defendant.	No. 18-370C (Chief Judge Sweeney)
CSS, LLC, Plaintiffs, v. THE UNITED STATES, Defendant.	No. 18-371C (Chief Judge Sweeney)
MASON CAPITAL L.P., *et al.*, Plaintiff, v. THE UNITED STATES, Defendant.	No. 18-529C (Chief Judge Sweeney)

Defendant, the United States, respectfully submits this response to the supplemental briefs (Pl. Br.) filed by plaintiffs Owl Creek Asia I, L.P., Akanthos Opportunity Fund L.P., Appaloosa Investment Limited Partnership I, CSS, LLC, and Mason Capital L.P., et al. (collectively, *Owl Creek*). 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.), the *Owl Creek* complaints should be dismissed.[1]

I. The *Fairholme* Decision Requires Dismissal Of The Owl Creek Complaints

Because the *Owl Creek* plaintiffs raise the same four claims that were dismissed in *Fairholme*—"direct" taking, illegal exaction, breach-of-fiduciary-duty, and implied contract claims—and both sets of plaintiffs raise virtually-identical factual and legal arguments, the Court's reasoning in *Fairholme* warrants dismissal of the *Owl Creek* complaints.

First, the Court's ruling that the *Fairholme* plaintiffs lacked standing to pursue direct taking and illegal exaction claims requires dismissal of identical claims in *Owl Creek*. Like the *Owl Creek* plaintiffs, the *Fairholme* plaintiffs alleged that the Third Amendment resulted in the expropriation of private shareholders' economic interests in Fannie Mae and Freddie Mac (Enterprises) stock. *Compare* Pl. Br. at 1, 4, *with Fairholme* 2d Am. Compl. ¶ 117. Although the *Fairholme* plaintiffs characterized these claims as "direct," the Court explained that the "label assigned to [their] claim is irrelevant; it is the substance of the allegations that controls." Op. at 35. And because the *Fairholme* plaintiffs' injuries allegedly arose from the Enterprises' Third-Amendment dividend payments, the Court determined that those injuries were substantively derivative; thus, the *Fairholme* plaintiffs lacked standing to pursue them as direct. Given that the *Fairholme* and *Owl Creek* plaintiffs are the same, the Court's ruling that the

[1] A proposed order is attached as Exhibit A.

Fairholme plaintiffs lack standing to pursue direct taking and illegal exaction claims for those substantively-derivative injuries warrants dismissal of *Owl Creek*'s taking and illegal exaction claims (counts I and II).

Second, the Court's dismissal of *Fairholme*'s breach-of-fiduciary-duty claim warrants dismissal of *Owl Creek*'s analogous claim (count III). Both the *Fairholme* and *Owl Creek* plaintiffs alleged that the Preferred Stock Purchase Agreements (PSPAs) imposed a contractual fiduciary duty running from the Government to the Enterprises' private shareholders. *See Owl Creek* Opp. to U.S. Mot. to Dismiss at 28-29, ECF No. 25. The Court rejected this claim because the PSPAs themselves imposed no such duty; rather, the genesis of the alleged duty purportedly arose from general state-law principles concerning "controlling shareholders." Op. at 31-32. Because the Court only possesses Tucker Act jurisdiction to entertain fiduciary-duty claims based on a contract or a money-mandating statute, the Court concluded that the state-law-based breach-of-fiduciary-duty claim in *Fairholme* fell outside that jurisdiction. *Id.* Because the *Owl Creek* plaintiffs' fiduciary-duty claim also relies on general state-law fiduciary-duty principles, the Court's reasoning in *Fairholme* requires dismissal of that claim (count III).

Finally, the *Owl Creek* plaintiffs concede that the Court's reasoning behind its dismissal of *Fairholme'*s "direct" breach-of-implied-contract claim warrants dismissal of *Owl Creek*'s analogous claim (count IV).

II. The *Owl Creek* Plaintiffs Identify No Pleading Differences Between Their Cases And *Fairholme* That Warrant Survival Of Their Taking, Illegal Exaction, And Breach-Of-Fiduciary-Duty Claims

In its order lifting the stay, the Court (1) directed the *Owl Creek* plaintiffs to explain why their claims should survive our omnibus motion to dismiss when the Court dismissed identical claims in *Fairholme*, and (2) cautioned that plaintiffs should not "challenge the legal conclusions

reached in the *Fairholme* Opinion." Order at 1, Mar. 19, 2020, ECF No. 56. In their response, however, the *Owl Creek* plaintiffs identify no meaningful differences between the *Owl Creek* and *Fairholme* complaints; instead, they seek to relitigate legal issues that the Court has already decided, and which are the subjects of cross-petitions for interlocutory appeal pending in the Federal Circuit. *See Fairholme Funds, Inc. v. United States*, Nos. 20-121 and 20-122 (Fed. Cir.).

A. The *Owl Creek* Plaintiffs Allege The Same Injuries As The *Fairholme* Plaintiffs

Although the *Owl Creek* plaintiffs cite various paragraphs in their complaint that characterize their claims as "direct," plaintiffs fail to identify a single, substantive allegation that would distinguish their injuries from the injuries alleged in *Fairholme*, which the Court determined were substantively derivative.

As the Court explained, whether a claim is direct or derivative turns on two questions: "(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 applied this test in *Fairholme* and determined that the alleged shareholder injuries are derivative. *Id.*

The *Owl Creek* plaintiffs contend that a different result is warranted in their cases because the "essential allegation" in their complaint—that "Treasury benefitted at [private shareholders'] direct expense"—is somehow unique. But that allegation appears repeatedly in the *Fairholme* complaint, and the Court addressed it in the *Fairholme* decision. Op. at 8, 40. *Compare* Pl. Br. at 4 (citing *Owl Creek* Am. Compl. ¶¶ 95, 112-113), *with Fairholme* 2d Am. Compl. ¶¶ 117-20. Accordingly, the *Owl Creek* plaintiffs provide no basis for the Court to reconsider its ruling that these alleged shareholder injuries are derivative.

B. The *Owl Creek* Plaintiffs "Control Group" Allegation Does Not Permit Them To Advance "Dual-Natured" Claims

The *Owl Creek* plaintiffs also contend that their claims qualify as "dual-natured" claims, even though the Court concluded that virtually-identical claims in *Fairholme* were not dual-natured. Pl. Br. at 3-4; Op. at 39. In *Fairholme*, the Court explained that minority shareholders may assert claims that are simultaneously direct and derivative (dual-natured claims) when: (1) a controlling stockholder causes a corporation to issue excessive shares in exchange for assets of the controlling stockholder that have lesser value; and (2) the exchange causes an increase in the percentage of outstanding shares owned by the controlling stockholder and a corresponding decrease in the minority shareholders' economic and voting power. Op. at 39 (citing *Starr Int'l Co. v. United States*, 856 F.3d 953, 968 (Fed. Cir. 2017)). The Court determined that the *Fairholme* plaintiffs' claims did not satisfy those requirements because Treasury is not the Enterprises' controlling stockholder, and the Third Amendment did not involve the issuance of new shares and reallocation of shareholder-voting power. *Id.*

The *Owl Creek* plaintiffs contend that their claims qualify as dual-natured claims because, unlike the *Fairholme* plaintiffs, who alleged that Treasury alone is the Enterprises' controlling shareholder, the *Owl Creek* plaintiffs alleged that Treasury and FHFA operating as a "control group" comprise the Enterprises' controlling shareholder. Pl. Br. at 3-4.[2] The distinction is irrelevant. Whether the Court were to treat Treasury or Treasury/FHFA as a

[2] *Owl Creek*'s assertion that Treasury and FHFA would jointly owe Enterprise shareholders a fiduciary duty as a "control group" is implausible given the Court's determination that FHFA does not "owe a fiduciary duty to shareholders because the conservator is not required to consider shareholders' interests" under the Housing and Economic Recovery Act of 2008 (HERA). Op. at 30 (citing 12 U.S.C. § 4617(b)(2)(J)); *see also id.* at 30 n.24 ("Congress seemingly made a deliberate decision to exclude shareholder interests from the FHFA-C's considerations.").

controlling shareholder, the *Owl Creek* plaintiffs still cannot allege dual-natured claims given the Court's rulings in *Fairholme* that the Third Amendment did not involve the issuance of new shares and reallocation of shareholder-voting power, both of which are essential to show a dual-natured claim.

C. Both The *Fairholme* And *Owl Creek* Plaintiffs' Breach-Of-Fiduciary-Duty Claims Rely On State-Law Fiduciary-Duty Principles

The *Owl Creek* plaintiffs' attempt to distinguish their breach-of-fiduciary-duty claim also relies on the immaterial distinction as to whether Treasury or a Treasury/FHFA "control group" is the Enterprises' controlling shareholder. Pl. Br. at 5. The distinction is irrelevant because both claims rely on state-law fiduciary-duty principles, which the Court already determined were insufficient to invoke the Court's Tucker Act jurisdiction. Op. at 31-32.

III. The *Owl Creek* Plaintiffs May Not Pursue Derivative Claims

Finally, the Court's ruling that a subset of the *Fairholme* plaintiffs may pursue derivative claims has no effect on the Court's disposition of the *Owl Creek* cases because the *Owl Creek* plaintiffs did not assert derivative claims. Unlike the *Fairholme* plaintiffs (or the *Fisher*, *Reid*, and *Rafter* plaintiffs, which also assert derivative claims), the *Owl Creek* plaintiffs neither asserted derivative allegations nor complied with Rule 23.1's derivative-pleading requirements. Indeed, the *Owl Creek* plaintiffs disclaimed any derivative claims in their complaints: "[A]ny claim raised by Owl Creek that might be considered derivative on behalf of the Company is in fact direct, on behalf of Owl Creek itself." *Owl Creek* Am. Compl. ¶ 109.

Putting aside that the *Owl Creek* plaintiffs never asserted derivative claims, permitting them to do so would waste judicial and party resources given that numerous plaintiffs have already asserted derivative claims on the Enterprises' behalf seeking identical recoveries.

CONCLUSION

For these reasons, the Court should enter the attached proposed order in the *Owl Creek* cases and dismiss those complaints.

Respectfully submitted,

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	)	(Chief Judge Sweeney)
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

PROPOSED ORDER

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

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

III. Defendant's motion to dismiss plaintiffs' breach-of-implied-in-fact-contract claim (count IV) is GRANTED pursuant to Rule 12(b)(1) because plaintiffs are not parties to the alleged implied-in-fact contract and fail to plausibly allege that they are intended third-party beneficiaries of that contract. Accordingly, count IV is dismissed. *Id*. at 33-35.