UNITED STATES COURT OF FEDERAL CLAIMS

JOSEPH CACCIAPALLE, On Behalf of Himself and All Others Similarly Situated, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 13-cv-00466-MMS (Consolidated Action)

PLAINTIFFS' MOTION FOR A PARTIAL LIFT OF STAY
AND FOR LIMITED DISCOVERY

Pursuant to this Court's order, dated July 14, 2014 [Dkt. 49], and Rule 12(b) of the Rules of the United States Court of Federal Claims ("RCFC"), plaintiffs Joseph Cacciapalle, American European Insurance Co., and Francis J. Dennis (collectively, "Class Plaintiffs"), respectively request that this Court partially lift the stay in this consolidated action for the limited purpose of permitting Class Plaintiffs to participate in the remainder of the jurisdictional discovery currently underway in the action *Fairholme Funds, Inc., et al. v. United States*, 13-cv-00465 (Fed. Cl.) ("*Fairholme*"). Class Plaintiffs will proceed expeditiously and will coordinate discovery efforts with plaintiffs' counsel in *Fairholme* to minimize the burden on defendant the United States, and to ensure that the discovery scheduled is not prolonged or delayed as a result of the limited participation by counsel for Class Plaintiffs. Class Plaintiffs are entitled to access to this jurisdictional discovery for the same reasons that counsel for Fairholme is entitled to it, and since depositions have now commenced, counsel for Class Plaintiffs should be permitted to review the relevant documents and participate, to a limited degree, in those ongoing depositions.

Class Plaintiffs' counsel consulted with counsel for the United States, and defendant's counsel has indicated that the United States will oppose this motion.[1]

BACKGROUND AND PROCEDURAL HISTORY

In the wake of the national housing crisis, the Federal Housing Finance Administration ("FHFA") placed the government-sponsored entities the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, the "Government Sponsored Enterprises" or "GSEs") into conservatorship in September 2008. Compl. ¶¶ 2, 40.[2] At the beginning of the conservatorship, the government entered into nearly identical Preferred Stock Purchase Agreements with each GSE. Compl. ¶ 3. These agreements provided that: (1) the United States Treasury ("Treasury") would receive $1 billion of preferred stock, senior to all other series of the GSE's stock, which could be increased by the amount Treasury invested in the GSEs; (2) the senior stock generally would accrue dividends at 10% per year if the companies elected to pay in cash or 12% if the companies paid the dividend in kind and had preferential liquidation rights; (3) Treasury would receive warrants to acquire 79.9% of the GSEs' common stock at a nominal price; and (4) the GSEs were required to pay Treasury a periodic commitment fee. Compl. ¶¶ 3, 43-46.

In August 2012, the government unilaterally amended the Preferred Stock Purchase Agreements to eliminate the rights of non-governmental shareholders to receive any dividends.

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[1] We note and acknowledge that counsel for the government has previously agreed in a written exchange with counsel for plaintiffs in the action *Washington Federal, et al. v. United States*, No. 13-cv-00385 ("*Washington Federal*") that the government agreed "to modify the protective order at the close of discovery so that other plaintiffs, including Washington Federal, may gain access to protected documents and deposition transcripts." [March 23, 2015 Email from Gregg Schwind of the Department of Justice to Jennifer Connolly, Counsel for *Washington Federal* plaintiffs].

[2] Citations to Class Plaintiffs' Class Action Complaint [Dkt. 1] will be referenced as "Compl. ¶ __."

Compl. ¶ 70. This amendment, referred to as the "Third Amendment" or "Net Worth Sweep," replaced Treasury's fixed dividend payments with a "'quarterly sweep of every dollar of profit that each firm earn[ed] going forward.'" Compl. ¶ 71 (internal citations omitted). Beginning on January 1, 2013, the Net Worth Sweep obligated the GSEs to pay a quarterly dividend equal to their net worth minus a capital reserve amount that would decrease from $3 billion to $0 by January 2018. Compl. ¶ 71. Thus, the Net Worth Sweep resulted in all of the GSEs' profits flowing to Treasury regardless of whether those profits exceeded the dividend originally contemplated by the Preferred Stock Purchase Agreements. Compl. ¶ 72.

Owners of the GSEs' junior preferred stock, including Class Plaintiffs, filed multiple actions, alleging that the government's Net Worth Sweep effected an unconstitutional taking of their private property requiring payment of Just Compensation in accordance with the Fifth Amendment of the Constitution. In an Order dated October 29, 2013, this Court consolidated a number of these actions -- *Cacciapalle, et al. v. United States*, No. 13-cv-00466, *American European Ins. Co. v. United States*, No. 13-cv-00496, and *Dennis v. United States*, No. 13-cv-00542 -- under the instant *Cacciapalle* caption and number. [Dkt. 36]. The Court also ordered that this action was to be "coordinated with *Fairholme, et al v. United States*, No. 13-cv-00465 ('*Fairholme*') and *Arrowood Indemnity Co., et al. v. United States*, No. 13-cv-00698 ('*Arrowood'*) . . . for discovery, motion practice, case management and scheduling, and other pretrial proceedings, as appropriate." [*Id*., p. 2].

On December 9, 2013, the government filed a motion to dismiss Class Plaintiffs' consolidated action and, on the same date, filed a motion to dismiss the *Fairholme* action. The government's two motions to dismiss were virtually identical, and both argued, among other things, that this Court lacks jurisdiction over plaintiffs' complaints, that plaintiffs lack standing,

that plaintiffs fail to state a claim under the Takings Clause, and that plaintiffs' claims are not ripe. *Compare* Gov't Mot. To Dismiss in *Fairholme*, 13-cv-00465, Dkt. 30 *with* Gov't Mot. To Dismiss in *Caccipalle*, 13-cv-00466, Dkt. 41.

Because of factual assertions made by the government in its motion to dismiss that contradicted factual allegations set forth in their complaint, the *Fairholme* plaintiffs filed a motion for a continuance and to permit discovery on December 20, 2013. This Court granted the *Fairholme* plaintiffs' motion on February 26, 2014, concluding that discovery would assist the plaintiffs in establishing jurisdiction and resolving factual disputes between the parties related to, *inter alia*: (1) the profitability of the GSEs; (2) questions as to when, and how, the GSEs' conservatorship will end; and (3) whether FHFA acted at the behest of Treasury when it entered into the Third Amendment or was otherwise acting as an agent or arm of the United States for purposes of the Tucker Act. *See Fairholme*, 114 Fed. Cl. 718, 720-21 (2014). In addition, the Court held that the *Fairholme* plaintiffs were entitled to pursue discovery relating to the government's argument that plaintiffs could not state a claim under the Takings Clause, and in particular permitted plaintiffs to pursue discovery relating to facts concerning: (1) the GSEs' solvency; (2) the reasonableness of expectations of future profits; and (3) the reasoning behind the government's decision to maintain the existing capital structure and whether it was based on the partial expectation that the GSEs would once again become profitable. *Id.* at 721-22.

On April 4, 2014, this Court entered a discovery schedule in *Fairholme* and, on the same date, stayed Class Plaintiffs' case and further briefing on the government's motion to dismiss "pending the conclusion of jurisdictional discovery in *Fairholme*." [Dkt. 45]. On July 11, 2014, Class Plaintiffs filed a "statement" prior to a status conference in the *Fairholme* case seeking guidance from the Court to confirm that Class Plaintiffs would have access to any discovery

materials the *Fairholme* plaintiffs might use in any further briefing on the motions to dismiss, and that Class Plaintiffs' decision not to seek admission to the Protective Order in the *Fairholme* case at that juncture would not prejudice or waive their ability to seek such discovery in the future. On July 14, 2014, the Court issued an order stating that it would not provide an advisory opinion regarding Class Plaintiffs' case, but that it would confirm that Class Plaintiffs "shall have a full and fair opportunity to pursue the appropriate discovery when briefing in this case is no longer stayed," and that "[a]llowing the *Fairholme* plaintiffs to pursue discovery initially does not in any way prejudice similarly situated plaintiffs in the related cases or prevent them from pursuing discovery." [Dkt. 49].

Although discovery began in *Fairholme* last year, it is Class Plaintiffs' understanding that depositions just began in May 2015, and are likely to continue for at least the next two months if not beyond.

ARGUMENT

Based on factual assertions and arguments made by the government that are substantially similar to those made in this case, the Court has already recognized that the *Fairholme* plaintiffs have a right to jurisdictional discovery. *See Fairholme*, 114 Fed. Cl. at 721. As with the *Fairholme* plaintiffs, Class Plaintiffs will need information within the government's exclusive possession to provide a full and complete opposition to the government's motion to dismiss, which is still pending in this case. Specifically, Class Plaintiffs' complaint conflicts with the government's factual recitation in the motion to dismiss on the following points: (1) the GSEs's profitability; (2) whether the GSEs' conservatorship will end; (3) whether FHFA acted at Treasury's direction when imposing the Net Worth Sweep or was otherwise acting as an agent or arm of the United States for purposes of the Tucker Act; (4) the GSEs' solvency; (5) the

reasonable expectation of future profits; and (6) whether the government had the partial expectation that the GSEs would become profitable.[3] There is no meaningful difference between the right of Class Plaintiffs to this discovery and the right of the *Fairholme* plaintiffs to this discovery, and counsel for the Class is entitled to independently represent the interests of the Class.

Up to now, Class Plaintiffs have been willing to let the *Fairholme* plaintiffs take the lead in discovery. However, now that depositions have begun, Class Plaintiffs respectfully request the right to participate in the ongoing discovery in the *Fairholme* case. To promote efficiency and avoid possible duplication in deposition efforts in the future, Class Plaintiffs request access to the jurisdictional discovery that bears directly on this action.

Mindful of the resources that the government has already dedicated to engaging in discovery in *Fairholme*, Class Plaintiffs request participation in the remainder of the discovery only in the following, limited ways:

1. *Protective Order*. Appreciating that many of the documents produced by the government in *Fairholme* are highly confidential, Class Plaintiffs would promptly file an application to have just four attorneys for Class Plaintiffs admitted to the *Fairholme* protective order. Those attorneys are: Hamish PM Hume of Boies, Schiller & Flexner LLP; Stacey Grigsby of Boies, Schiller & Flexner LLP; Eric L. Zagar of Kessler Topaz Meltzer & Check, LLP; and Matthew A. Goldstein of Kessler Topaz Meltzer & Check, LLP (collectively, "Class Counsel"). The Protective Order would also be amended to permit documents produced under the Protective Order to be used in either the *Fairholme* case or Class Plaintiffs' case.[4]

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[3] To be sure, Class Plaintiffs maintain that their Takings claim is principally a *per se* Takings claim, not a regulatory takings claim. Nevertheless, Class Plaintiffs are entitled to the facts that rebut all of the arguments and factual assertions advanced by the government in order to present a comprehensive response relating to their adequately stated claim under the Takings Clause.

[4] Class Plaintiffs are aware the current Protective Order specifies that it is for use only in the *Fairholme* case. As an alternative to admission to the protective order and amendment of that provision to allow documents to be used in Class Plaintiffs' case as well, Class Plaintiffs could file a motion for entry of a separate protective order in this consolidated action that would be substantially similar to the one entered by this Court in *Fairholme*.

2. *Document Discovery*. Class Plaintiffs seek only electronic copies of the documents produced to the *Fairholme* plaintiffs – a request that should not significantly increase the litigation costs of any of the producing parties.

3. *Deposition Discovery*. Class Plaintiffs seek to participate in the depositions currently taking place in *Fairholme*. Class Plaintiffs propose that counsel for *Fairholme* would continue to take the lead in the depositions, but that Class Plaintiffs would have the opportunity to question government witnesses at the end of each deposition. Counsel for Class Plaintiffs would work collaboratively with *Fairholme*'s counsel to ensure that each deposition does not exceed the seven hour limit for each witness. *See* RCFC 30(d)(1). Class Counsel does not seek to depose witnesses who have already been deposed in *Fairholme*. Class Counsel, however, would be entitled to receive copies of the transcripts of the depositions that have already taken place. In addition, Class Plaintiffs reserve the right to potentially seek the depositions of witnesses who may not be noticed by counsel for *Fairholme*, subject to the right of the government or the witness to object to any such deposition. Class Plaintiffs do not currently anticipate the need to seek such depositions, but such a need may arise depending upon what is learned from the discovery and depositions that have already occurred and that may occur in the future.

4. *Discovery Disputes*. Should a dispute arise concerning the scope of this Court's jurisdictional discovery Order, going forward, Class Plaintiffs request that this Court permit Class Plaintiffs to participate in motions practice, including by challenging the assertion of privilege or the resistance of discovery by the government, and/or by submitting responses to any government motions.

To the extent it appears that good cause exists to take additional written discovery, independent of the discovery already sought in *Fairholme*, Class Plaintiffs would file a separate motion with this Court, unless it was able to agree upon such discovery with Defendant.

CONCLUSION

For all of the foregoing reasons, Class Plaintiffs respectfully request that this Court partially lift the stay in this action and permit limited discovery.

Dated: May 22, 2015

Respectfully submitted,

BOIES, SCHILLER & FLEXNER LLP

/s/ Hamish P.M. Hume
Hamish P.M. Hume
5301 Wisconsin Ave., NW, Suite 800

Washington, DC 20015
Telephone: (202) 237-2727
Facsimile: (202) 237-6131

KESSLER TOPAZ MELTZER & CHECK, LLP
Lee D. Rudy
Eric L. Zagar
Matthew A. Goldstein
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056

Co-Lead Counsel for Class Plaintiffs