

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.

C.A. No. 13-cv-00466

Judge Margaret M. Sweeney

**WASHINGTON FEDERAL PLAINTIFFS' PARTIAL JOINDER IN PLAINTIFFS'
MOTION FOR A PARTIAL LIFT OF STAY AND FOR LIMITED DISCOVERY**

Plaintiffs Joseph Cacciapalle, American European Insurance Co., and Francis J. Dennis have moved this Court for a partial lift of the stay to allow them limited participation in ongoing jurisdictional discovery (the "Motion"). *See* Dkt. No. 51. Washington Federal, Michael McCredy Baker, and City of Austin Police Retirement System, plaintiffs in *Washington Federal, et al. v. United States*, Fed. Cl. No. 13-cv-00385 (collectively, "Washington Federal Plaintiffs") file this Partial Joinder to request that: (1) if the Motion is granted, the Washington Federal Plaintiffs, subject to certain conditions, likewise be given access to the document discovery produced to date and the right to attend the depositions or; (2) if the Motion is denied, be given immediate access to the document discovery produced to date and copies of the transcripts of depositions noticed in the *Fairholme* litigation.

I. BACKGROUND

A. The Washington Federal Plaintiffs

On June 10, 2013, the Washington Federal Plaintiffs filed a case in this Court, challenging conduct by the Government, acting through Treasury and FHFA, in imposing and operating conservatorships over Fannie Mae and Freddie Mac ("the Companies"). *See*

Complaint, *Washington Federal v. United States*, No. 13-385C (Fed. Cl.), Dkt. No. 1. The *Washington Federal* action was the first action to be filed against the Government on behalf of the Companies' shareholders. Like the actions subsequently filed in this Court, the *Washington Federal* action also challenges the Third Amendment to the Senior Preferred Stock Purchase Agreements between the Government and the Companies, under which the Companies were later required to sweep the full amount of their net worth to the Treasury. However, unlike the other actions filed in this Court, the *Washington Federal* action, brought on behalf of preferred and common shareholders of both Fannie Mae and Freddie Mac, alleges that the initial imposition of the conservatorships constituted a taking and an illegal exaction.

On October 29, 2013, this Court entered an order consolidating and coordinating certain related actions in this Court. *See Order, Washington Federal v. United States*, No. 13-385C (Fed. Cl.), Dkt. No. 28. Among other things, pursuant to that order the *Washington Federal* action is now coordinated with *Cacciapalle*. *See id.* ¶ B.1.1.

B. The Washington Federal Plaintiffs' Agreed Stay of Their Action

Before the Government filed its Reply Brief in support of its Motion to Dismiss, in response to this Court's order requesting Plaintiffs' position, the Washington Federal Plaintiffs agreed to stay their case pending any deadline set in this action for an opposition to the Government's motion to dismiss. We stated that doing so would "give [the Washington Federal] Plaintiffs the opportunity to review any discovery obtained in the *Fairholme* action and, if necessary, supplement their opposition to the Government's motion to dismiss." *See Plaintiffs' Response to Order Regarding Jurisdictional Discovery, Washington Federal v. United States*, No. 13-385C (Fed. Cl.), Dkt. No. 42 at 2. Accordingly, on February 7, 2014, this Court entered an order staying this action concurrently with the *Cacciapalle* action (Case No. 13-466) "in order

to promote the efficient administration of justice and to prevent inconsistent rulings.” *See* Order, *Washington Federal v. United States*, No. 13-385C (Fed. Cl.), Dkt. No. 43.

C. The Washington Federal Plaintiffs’ Request to Obtain Access of Jurisdictional Discovery Produced to Date

As referenced in the Motion (*see id.* at 2 n.1), after learning in March 2015 that Fairholme Funds intended to begin taking depositions, the Washington Federal Plaintiffs requested, and 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.” *See* Ex. 1 (Mar. 19, 2015 letter to Gregg W. Schwind) and Ex. 2 (Mr. Schwind’s Mar. 23, 2015 response), attached hereto. However, the Government did not agree to allow other plaintiffs to attend the depositions themselves. *See* Ex. 2, attached hereto.

II. PARTIAL JOINDER IN THE MOTION

The Washington Federal Plaintiffs file this Partial Joinder to request that, if this Court grants the Motion, the Order entered be applicable to the *Washington Federal* action.¹ In the alternative, if this Court denies the Motion, the Washington Federal Plaintiffs respectfully request that the Protective Order be amended to permit documents produced under the Protective Order to be used in either the *Fairholme* case or the *Washington Federal* case and that its counsel be given access to the document discovery immediately and the transcripts of the depositions when they become available.

Our case has been pending since June 10, 2013, and the Government’s Motion to Dismiss has been nearly fully briefed since December 16, 2013. When we asked the Government to

¹ If the Court grants the Motion and our request, we will agree to terms similar to those suggested by the *Cacciapalle* plaintiffs. *See* Motion at 6-7. However, consistent with the position we previously took with the Government (*see* Ex. 1), we will agree not to ask questions during the depositions. Of course, we do not waive the right to subsequently examine these witnesses during the merits phase of discovery.

agree to provide us with access to jurisdictional discovery at the close of that discovery, we did so believing that jurisdictional discovery would conclude on June 29, 2015. Since it now appears that deadline may be extended again (*see* Motion at 5), there is no just reason to continue to delay the prosecution of our case. There have been a large number of documents produced, and depositions have begun, and we require sufficient time to review them to determine if they are relevant to the Government's Motion to Dismiss. In addition, it would be prejudicial to the Washington Federal Plaintiffs and the class they seek to represent to provide full and immediate access to the *Fairholme* document production only to a certain, limited group of the co-lead plaintiffs in this consolidated action. Therefore, if the Court is inclined to grant the Motion, we likewise request access to that discovery at the same time as all the other plaintiffs.

III. CONCLUSION

For all of the foregoing reasons, the Washington Federal Plaintiffs respectfully request that if this Court grants the Motion, the Order apply in the *Washington Federal* action to the extent described in footnote 1 or, in the alternative, should the Court deny the Motion, the Protective Order be amended to permit the Washington Federal Plaintiffs immediate access to the document discovery and the transcripts of the depositions when they become available.

Dated: May 27, 2015

Respectfully submitted,

By /s/ Steve W. Berman
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Exhibit 1

**HAGENS BERMAN**

ATTORNEYS AT LAW
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www.hbsslaw.com

Via Electronic Mail

March 19, 2015

Gregg W. Schwind
Senior Trial Counsel
United States Department of Justice
Gregg.Schwind@usdoj.gov

Re: *Fairholme Funds, Inc. v. United States*, C.A. No. 13-cv-00465C

Dear Gregg:

We write on behalf of the Washington Federal plaintiffs. We were recently provided with copies of Fairholme Funds' deposition notices for Edward DeMarco, Mario Ugoletti and Christopher Dickerson. In light of those notices, we write to determine if the Government will consent to a modification of the *Fairholme* protective order to allow us to attend those depositions, without examining the witnesses, and review any documents introduced as exhibits. Through the proposed modification, we will also seek access to all the documents the Government and third parties have produced in *Fairholme* but, in order to reduce the burden on the *Fairholme* parties, will agree that those documents do not have to be provided to us until after the June 29 close of jurisdictional discovery.

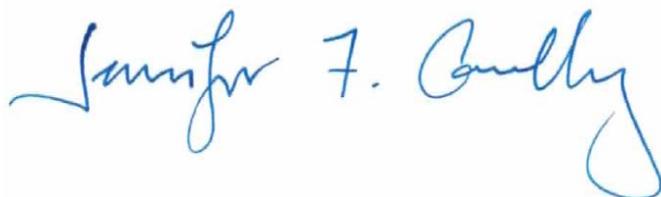
As you will recall, before the Government filed its reply brief in support of its motion to dismiss in the *Washington Federal* action, Plaintiffs agreed to stay their case pending any deadline that is set in *Fairholme Funds* for an opposition to the Government's motion to dismiss in that case. Plaintiffs stated that doing so would "give Plaintiffs the opportunity to review any discovery obtained in the *Fairholme* action and, if necessary, supplement their opposition to the Government's motion to dismiss." On February 7, 2014, the Court subsequently entered an order staying this action concurrently with the *Cacciapalle* action "in order to promote the efficient administration of justice and to prevent inconsistent rulings."

Since that time, over a year has passed and the Government has represented to the Court that it has made substantial document productions to Fairholme Funds. In order to avoid being further prejudiced in our review of discovery obtained in the *Fairholme* action, and in the interests of the judicial efficiency created by the Court in coordinating the related actions in the first instance, it makes sense to allow the Washington Federal plaintiffs to attend the upcoming depositions and to give us access to the Government's and third parties' production after the close of jurisdictional discovery. With regard to the depositions, we will agree to any reasonable limitations as a condition to our attendance at the depositions, such as attendance by certain individuals in Plaintiffs' law firms or other similar measures to address the Government's and the Court's concerns about confidentiality.

Letter to Gregg Schwind
March 19, 2015
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Please let me know by the close of business on Monday, March 23 if the Government is amenable to such a proposal and we will forward a draft modification to the *Fairholme* protective order for your review.

Very truly yours,

A handwritten signature in blue ink that reads "Jennifer F. Connolly". The signature is written in a cursive, flowing style.

Jennifer Fountain Connolly

Robert M. Roseman
Spector Roseman Kodroff &
Willis, P.C.

cc: Josh Kaplan
Steve W. Berman

Exhibit 2

Jennifer Connolly

From: Schwind, Gregg (CIV) <Gregg.Schwind@usdoj.gov>
Sent: Monday, March 23, 2015 3:02 PM
To: Jennifer Connolly
Cc: Robert M. Roseman (RRoseman@srkw-law.com); Joshua B. Kaplan (JKaplan@srkw-law.com)
Subject: RE: Washington Federal v. United States

Jennifer:

Thank you for your letter. We can agree 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. However, we will not agree to allow other plaintiffs to attend the depositions themselves.

Regards,

Gregg

From: Jennifer Connolly [<mailto:jenniferc@hbsslaw.com>]
Sent: Thursday, March 19, 2015 8:37 AM
To: Schwind, Gregg (CIV)
Cc: Robert M. Roseman (RRoseman@srkw-law.com); Joshua B. Kaplan (JKaplan@srkw-law.com)
Subject: Washington Federal v. United States

Gregg:

Please see the attached correspondence.

Thanks –
Jennifer

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