No. 13-466C
(Judge Sweeney)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSEPH CACCIAPALLE, et al.,

Plaintiffs,
v.

THE UNITED STATES,

Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION
FOR A PARTIAL LIFT OF STAY AND FOR LIMITED DISCOVERY

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	)	**(Judge Sweeney)**
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Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR A PARTIAL LIFT OF STAY AND FOR LIMITED DISCOVERY

Pursuant to Rule 7(b) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully submits this response in opposition to the motion for a partial lift of stay and for discovery that was filed by plaintiffs Joseph Cacciapalle, American European Insurance Co., and Francis J. Dennis (collectively, the "*Cacciapalle* plaintiffs"), on May 22, 2015. In their motion, the *Cacciapalle* plaintiffs belatedly seek permission to participate in the limited "jurisdictional discovery" that this Court authorized in *Fairholme Funds, Inc. v. United States*, No. 13-465C. On May 27, 2015, Washington Federal, Michael McCredy Baker, and City of Austin Police Retirement System (collectively, the "*Washington Federal* plaintiffs"), plaintiffs in the coordinated action *Washington Federal, et al. v. United States*, No. 13-385C, filed a "partial joinder," requesting that, should the Court grant the *Cacciapalle* plaintiffs' motion, the order also apply in *Washington Federal*. The *Washington Federal* plaintiffs also request alternative relief should the *Cacciapalle* plaintiffs' motion be denied.[1]

[1] The *Washington Federal* plaintiffs have not filed a motion seeking relief under the caption of the *Washington Federal* action.

Plaintiffs' belated requests to participate in jurisdictional discovery should be denied because allowing plaintiffs in other cases to participate in the *Fairholme* discovery would be burdensome, disruptive, prejudicial to the Government, and would needlessly prolong jurisdictional discovery. Accordingly, the Court should deny the *Cacciapalle* plaintiffs' motion and deny the alternative relief requested by the *Washington Federal* plaintiffs.

BACKGROUND

During 2013 and 2014, numerous parties (the Fairholme Funds, *Cacciapalle* plaintiffs, and *Washington Federal* plaintiffs, among others) who owned stock in the Federal National Mortgage Association (Fannie Mae) and/or the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the GSEs) filed suits in this Court. These plaintiffs alleged that, in connection with the Government's efforts at rescuing and stabilizing the GSEs during the global financial crisis, the United States effected a Fifth Amendment taking of shareholder rights in the GSEs.

In late 2013, pursuant to RCFC 12(b)(1) and (6), the United States filed separate motions to dismiss complaints filed in *Washington Federal*, *Cacciapalle*, and *Fairholme*. In response to the Government's motion to dismiss, plaintiffs in *Fairholme* filed a motion requesting that the Court permit them to pursue limited jurisdictional discovery before filing their response to the Government's motion to dismiss.

Unlike the *Fairholme* plaintiffs, neither the *Cacciapalle* plaintiffs nor the *Washington Federal* plaintiffs sought jurisdictional discovery. The *Cacciapalle* plaintiffs responded to the Government's motion to dismiss with a motion for an enlargement of time, in which they requested that the Court extend the deadline for their opposition to the motion to dismiss until the later of (a) February 21, 2014, or (b) any deadline set by the Court in the *Fairholme* action for

those plaintiffs to file their opposition to the Government's motion to dismiss. *Cacciapalle* Pls.' Motion for Enlargement of Time at 2, 3, No. 13-466C (Jan. 7, 2014), ECF No. 43. Although the *Cacciapalle* plaintiffs also requested that the Court allow them "to review any discovery obtained by the *Fairholme* plaintiffs, to reflect that discovery in its briefing to the extent appropriate, and to file their briefs on the same schedule as the *Fairholme* plaintiffs," the *Cacciapalle* plaintiffs did *not* request permission to conduct their own jurisdictional discovery or to participate in *Fairholme's* discovery. *Id*. at 3. The Court granted the *Cacciapalle* plaintiffs' motion, which, as it turned out, operated as an open-ended stay of briefing in that case while the *Fairholme* plaintiffs conducted jurisdictional discovery. Order, No. 13-466C (Jan. 8, 2014), ECF No. 44.

The *Washington Federal* plaintiffs also chose to sit out jurisdictional discovery. Those plaintiffs filed an opposition to the Government's motion to dismiss, that contained no request for jurisdictional discovery. After the Court granted the *Cacciapalle* plaintiffs' motion for an enlargement, the Court ordered the *Washington Federal* plaintiffs to advise the Court whether they intended to seek "discovery in aid of jurisdiction." *See* Order, No. 13-385C (Feb. 3, 2014), ECF No. 41. In response, the *Washington Federal* plaintiffs affirmatively indicated that they would *not* seek jurisdictional discovery. *See Washington Federal* plaintiffs' Response To Order Regarding Jurisdictional Discovery, No. 13-385C (Feb. 7, 2014), ECF No. 42.

On February 26, 2014, the Court issued an order in *Fairholme* that granted plaintiffs' motion to permit jurisdictional discovery. Order, No. 13-465C (Feb. 26, 2014), ECF No. 32. The *Fairholme* plaintiffs served document requests on April 7, 2014, and the parties pursued negotiations and motions practice to define the scope of jurisdictional discovery. *See* Def.'s

Mot. for Prot. Order, No. 13-465C (May 30, 2014), ECF No. 49; Order, No. 13-465C (July 16, 2014), ECF No. 72.

Neither the *Cacciapalle* plaintiffs nor the *Washington Federal* plaintiffs were involved in this motions practice. To the contrary, several days before the Court issued its July 16, 2014 *Fairholme* discovery orders, the *Cacciapalle* plaintiffs confirmed that they were not interested in joining the protective order and discovery in *Fairholme*. Pls.' Statement Regarding the Proposed Protective Order in the *Fairholme Funds* Action at 1 (July 11, 2014), ECF No. 48 (*Cacciapalle* Pls.' Statement) (acknowledging that the *Fairholme* plaintiffs "are the only plaintiffs that have sought jurisdictional discovery"). Rather, the *Cacciapalle* plaintiffs requested only that the Court allow them to obtain documents and information produced during jurisdictional discovery, if those materials were later used in amended pleadings or briefings in *Fairholme*. *Id.* at 1-2. On July 14, 2014, the Court issued an order confirming that the *Cacciapalle* plaintiffs would have "a full and fair opportunity to pursue the appropriate discovery *when briefing in this case is no longer stayed*." Order at 1 (July 14, 2014), ECF No. 49 (emphasis added).

The Court also issued an order in *Fairholme* scheduling biweekly discovery status conferences, when requested by the Government or the *Fairholme* plaintiffs. Order, No. 13-465C (April 9, 2014), ECF No. 41. The Court's order expressly precludes anyone other than counsel for the Government and Fairholme to speak at the status conferences. *Id*. at 1. Neither the *Cacciapalle* plaintiffs nor the *Washington Federal* plaintiffs objected to that order.

Following issuance of the Court's July 16, 2014 protective order and order limiting discovery in *Fairholme*, the Government and the *Fairholme* plaintiffs engaged in lengthy negotiations to conform discovery to fit within the Court's orders and to resolve areas of dispute. *See, e.g.*, JSR Regarding Proposed Discovery Completion Date at 1 n.1 (Sept. 5, 2014), ECF No.

90. Ultimately, in October 2014, the parties reached a comprehensive agreement regarding the *Fairholme* plaintiffs' document requests that limited discovery to specified search terms, topic areas, and date ranges. Further, a team of Government attorneys spent many months reviewing and coordinating the processing of hundreds of thousands of pages of documents for production to Fairholme. We have now completed our document production of FHFA and Treasury documents, with the exception of a small number of documents that may be produced in whole or in part as a part of our final privilege review. Over 600,000 pages have been produced, and several provisional privilege logs have been served. We expect to serve our final privilege log by the end of this month. In addition, plaintiffs in *Fairholme* have deposed two FHFA officials (one present, one former), and the parties are negotiating deposition dates for current and former Treasury officials, former Fannie Mae and Freddie Mac chief financial officers, and an accountant formerly employed by Grant Thornton LLP, a Treasury consultant.

On March 19, 2015, the *Washington Federal* plaintiffs contacted us seeking consent to a modification of the *Fairholme* protective order to allow plaintiffs' counsel in *Washington Federal* (1) access, at the close of discovery, to all documents the Government and third parties have produced in *Fairholme*; and (2) to attend (but not participate in) depositions noticed by *Fairholme*. *Washington Federal* Pls.' Partial Joinder in *Cacciapalle* Pls.' Mot. for a Partial Lift of Stay, No. 13-466C (May 27, 2015), ECF No. 52, at Exh. 1 (*Washington Federal* notice). In response, we agreed to modify the protective order at the close of jurisdictional discovery so that other plaintiffs, including the *Washington Federal* plaintiffs, may gain access to the protected documents and deposition transcripts. *Id*. at Exh. 2. We advised the *Washington Federal* plaintiffs, however, that we would not agree to allow counsel for other plaintiffs to attend the depositions. *Id*. The *Washington Federal* plaintiffs did not pursue the issue further.

Subsequently, on May 22, 2015, the *Cacciapalle* plaintiffs filed their motion seeking permission to participate in and expand the *Fairholme* discovery. *See* Pls.' Mot. for a Partial Lift of Stay and For Limited Discovery (May 22, 2015), ECF No. 51 (Pls.' Mot.). In their motion, filed more than a year after the *Cacciapalle* plaintiffs decided to sit out jurisdictional discovery, the *Cacciapalle* plaintiffs seek authority to (1) participate in depositions currently noticed in *Fairholme*, (2) notice additional depositions, and (3) engage in motions practice regarding privileges and the scope of jurisdictional discovery; and, upon motion, serve additional written discovery. *See* Pls.' Mot. at 6-7.

After the *Cacciapalle* plaintiffs filed their motion, and nearly two months after we agreed to provide the *Washington Federal* plaintiffs with documents and deposition transcripts at the conclusion of jurisdictional discovery, the *Washington Federal* plaintiffs filed a notice of "partial joinder" in the *Cacciapalle* plaintiffs' motion. *See Washington Federal* notice, No. 13-466C, ECF No. 52. The *Washington Federal* plaintiffs urge the Court to extend whatever permissions may be granted to the *Cacciapalle* plaintiffs to the *Washington Federal* plaintiffs, with the exception that they will not ask questions at the *Fairholme* depositions. *Id*. at 3, n.1.

ARGUMENT

The Court Should Deny The *Cacciapalle* Plaintiffs' Belated Motion To Participate In The *Fairholme* Jurisdictional Discovery And Deny The Alternative Relief Requested By The *Washington Federal* Plaintiffs

The Court should deny the *Cacciapalle* plaintiffs' motion to participate in the *Fairholme* discovery that is now almost completed. The motion is ill-timed, disruptive, and prejudicial. Further, if permitted, the *Cacciapalle* plaintiffs' participation will needlessly extend jurisdictional discovery and delay resolution of the United States' pending motions to dismiss. Having decided over a year ago not to seek jurisdictional discovery, or to otherwise participate in

the *Fairholme* discovery, the *Cacciapalle* plaintiffs and *Washington Federal* plaintiffs should not be permitted to insert themselves into the process at this late stage.

A. Plaintiffs' Belated Request To Participate In *Fairholme's* Discovery Is Undermined By Their Previous Decisions Not To Seek Jurisdictional Discovery

Plaintiffs have offered no adequate justification for their belated requests to participate in the ongoing jurisdictional discovery in *Fairholme*. The *Cacciapalle* plaintiffs argue that they should now be allowed to join the *Fairholme* discovery because they "are entitled to access to this jurisdictional discovery for the same reasons that counsel for Fairholme is entitled to it," and "counsel for the Class is entitled to independently represent the interests of the Class." Pls.' Mot. at 1, 6. These eleventh hour arguments contradict the *Cacciapalle* plaintiffs' repeated statements that they neither needed nor wanted to participate in jurisdictional discovery. *See, e.g.*, *Cacciapalle* Pls.' Statement, No. 13-465C, ECF No. 48. Had counsel for the *Cacciapalle* plaintiffs believed that they needed to "independently represent the interests of the Class" in jurisdictional discovery, *see* Pls. Mot. at 6, they could have sought their own jurisdictional discovery, or sought to participate in the *Fairholme* discovery when it was granted by the Court in February 2014.

The *Cacciapalle* plaintiffs' inaction for over one year speaks far louder than their current words. The *Cacciapalle* plaintiffs stood on the sidelines and affirmatively decided "to let the *Fairholme* plaintiffs take the lead in discovery." *Id.* The *Cacciapalle* plaintiffs' previous decision not to seek jurisdictional discovery – but, instead, to rely on discovery obtained by the *Fairholme* plaintiffs – negates their purported justification for now attempting to intervene in the *Fairholme* discovery. *See Grynberg v. Ivanhoe Energy, Inc.*, 490 F. App'x 86, 103-05, 2012 WL 2855777 (10th Cir. 2012) (not published) (no abuse of discretion in court's denial of

jurisdictional discovery as untimely, where plaintiff initially indicated it did not need jurisdictional discovery "at that time").

The *Washington Federal* plaintiffs' request to participate in the *Fairholme* jurisdictional discovery at this late date is likewise unjustified. In December 2013, the *Washington Federal* plaintiffs filed their response in opposition to our motion to dismiss, thus conceding that the motion could be resolved without discovery. Subsequently, in February 2014, the Court affirmatively asked whether the *Washington Federal* plaintiffs "intend[ed] to seek discovery in aid of jurisdiction." Order, No. 13-385C (Feb. 3, 2014), ECF No. 41. In response, the *Washington Federal* plaintiffs opted out, unequivocally stating that they did "not intend to seek jurisdictional discovery in addition to the discovery sought in *Fairholme.*" No. 13-385C (Feb. 7, 2014), ECF No. 42. Instead, the *Washington Federal* plaintiffs indicated only that they would seek "the opportunity to review any discovery obtained in the *Fairholme* action and, if necessary, supplement their opposition to the Government's motion to dismiss." *Id*. Relying upon this representation, the Court issued an order acknowledging that the *Washington Federal* plaintiffs "advised the court that . . . they do not intend to seek jurisdictional discovery." Order, No. 13-385C (Feb. 7, 2014), ECF No. 43.[2]

We have already agreed to provide the *Cacciapalle* plaintiffs and the *Washington Federal* plaintiffs the materials they requested when the Court authorized discovery in *Fairholme*. The *Cacciapalle* plaintiffs sought only to preserve the "right to seek any and all discovery produced to plaintiffs in [*Fairholme.*]" *See* Pls.' Statement at 2, ECF No. 48. Similarly, the *Washington Federal* plaintiffs asked only for an opportunity to "review any discovery obtained in

[2] The *Washington Federal* plaintiffs state that "there is no just reason to continue to delay the prosecution of [their] case." *Washington Federal* Pls. Notice at 4. But the *Washington Federal* plaintiffs ignore the fact that they could end the delay by asking the Court to lift the stay of their case; we would not oppose such a motion, as it would permit the conclusion of briefing.

Fairholme." *See* No. 13-385C (Feb. 7, 2014), ECF No. 42. As the *Washington Federal* plaintiffs and the *Cacciapalle* plaintiffs acknowledge, in March of this year, we agreed to provide the documents and deposition transcripts generated during the course of the *Fairholme* jurisdictional discovery to all plaintiffs at the close of discovery. Pls. Mot. at 2, n.1.

In sum, the *Washington Federal* and *Cacciapalle* plaintiffs have failed to identify any legitimate basis for their late-filed request to participate in the *Fairholme* discovery. Because neither the *Washington Federal* nor *Cacciapalle* plaintiffs have alleged, much less demonstrated, that they will be prejudiced by receiving exactly what they asked for at the commencement of the *Fairholme* jurisdictional discovery, the Court should deny the *Cacciapalle* plaintiffs' motion.

B. Allowing Plaintiffs In Other Cases To Join *Fairholme's* Jurisdictional Discovery Will Be Disruptive, Prejudicial, And Will Needlessly Prolong *Fairholme's* Jurisdictional Discovery

The *Cacciapalle* plaintiffs' attempt to interject themselves into the nearly completed jurisdictional discovery is disruptive, prejudicial to the Government, and will needlessly extend jurisdictional discovery. The *Cacciapalle* plaintiffs insist that they seek only "limited participation" in the remaining jurisdictional discovery in *Fairholme*, and that they will "ensure that the discovery scheduled is not prolonged or delayed" as a result of their "limited" involvement. *See* Pls.' Mot. at 1. Plaintiffs' discovery wish list, however, demonstrates that their demands are anything but "limited."

The *Cacciapalle* plaintiffs' characterization of their request as "limited" is belied by the comprehensive list of discovery actions they reserve the right to undertake. The *Cacciapalle* plaintiffs seek permission to: (1) gain immediate access to documents produced to the *Fairholme* plaintiffs; (2) participate in the depositions currently taking place in *Fairholme*; (3) potentially take "the depositions of witnesses who may not be noticed by counsel for [the *Fairholme* plaintiffs], . . . depending upon what is learned from the discovery and depositions

that have already occurred and that may occur in the future;" (4) "take, upon motion, additional written discovery, independent of the discovery already sought in *Fairholme*;" (5) engage in "motions practice" should a dispute arise concerning the scope of this Court's [*Fairholme*] jurisdictional discovery Order" in *Fairholme*; (6) challenge "the assertion of privilege or the resistance of discovery by the government;" and (7) "submit responses to any government motions." *Id.* at 7. The *Washington Federal* plaintiffs seek the same discovery requested by the *Cacciapalle* plaintiffs, with the exception that they plan to attend, but not participate in *Fairholme* depositions. In sum, these plaintiffs seek to do much more than "review the relevant documents and participate, to a limited degree, in [the] ongoing depositions" currently scheduled in *Fairholme*. *See id.* at 1.

Regardless of the precise scope of their requests, participation of any kind in *Fairholme* discovery by the *Washington Federal* and *Cacciapalle* plaintiffs at this late date would unduly disrupt the discovery that is currently underway and nearing completion. As outlined above, counsel for the Government and the *Fairholme* plaintiffs engaged in extensive negotiations in mid-to-late 2014 and reached a comprehensive agreement regarding disputed document requests that limited discovery to specified search terms, topic areas, date ranges, and custodians. In reliance upon the agreements reached by the parties following those lengthy discussions, the Government has completed its production to the *Fairholme* plaintiffs of over 600,000 pages of documents. Moreover, the *Fairholme* plaintiffs have already conducted two depositions, and five more are expected to be completed by the end of July. Thus, the Fairholme plaintiffs are already nearing the 10-deposition limit imposed by the Court's Rules. RCFC 30(a)(2). Should the Court grant the *Cacciapalle* plaintiffs' motion, the Government would be faced with coordinating deposition scheduling with at least two other parties, and could be subject to

additional deposition requests by the *Cacciapalle* plaintiffs, assuming Fairholme decides to conduct less than 10 depositions. Should that occur, it is unlikely that depositions could be concluded by the end of July.

Further, if the *Cacciapalle* and *Washington Federal* plaintiffs were permitted to file additional requests for the production of documents, the Government would be forced to again negotiate document custodians, search terms, and topics, and recommence the laborious and time-consuming process of reviewing the Treasury and FHFA document collections, producing documents, and compiling privilege logs. Had these plaintiffs promptly sought discovery, rather than affirmatively representing that they would rely upon discovery obtained by the plaintiffs in *Fairholme*, we could have engaged in a single production of documents to all parties. If the Court were to grant these plaintiffs' belated requests, the Government would be required to reopen a process that has already consumed nearly a year and thousands of attorney hours.

Likewise, the *Cacciapalle* and *Washington Federal* plaintiffs' request to participate in motions practice, including challenges to our privilege assertions, would, if granted, be burdensome and time-consuming because we would be required to respond to motions and briefs filed by the *Fairholme* plaintiffs, the *Cacciapalle* plaintiffs, and the *Washington Federal* plaintiffs. In short, the disruption and prejudice to the Government that will result from the *Washington Federal* and *Cacciapalle* plaintiffs' reversal of their decisions not to participate in jurisdictional discovery just as the process is nearing completion would be substantial.

Moreover, the requested expansion of discovery will needlessly delay the Court's resolution of the Government's motions to dismiss. Briefing on these motions is set to resume at the conclusion of Fairholme's jurisdictional discovery. Because plaintiffs' request to participate in the *Fairholme* discovery at this late date serves no apparent purpose other than to disrupt and

prolong a process that has been underway since February 2014, the Court should deny the *Cacciapalle* plaintiffs' motion and deny the alternative relief requested by the *Washington Federal* plaintiffs.

CONCLUSION

For these reasons, the Court should deny the *Cacciapalle* plaintiffs' motion to participate in the jurisdictional discovery in *Fairholme* and deny the alternative relief requested by the *Washington Federal* plaintiffs.

Respectfully submitted,

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