

IN THE 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.

No. 1:13-cv-00466-MMS

**DERIVATIVE PLAINTIFFS’ PARTIAL JOINDER IN PLAINTIFFS’
MOTION FOR A PARTIAL LIFT OF STAY AND 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 “Cacciapalle Motion”). Dkt. No. 51. Plaintiffs in *Washington Federal et. al. v. United States*, Case No. 13-cv-00385 -MMS subsequently filed a notice of partial joinder with the Cacciapalle Motion, requesting access to the document discovery produced to date and the right to attend any depositions (the “Washington Federal Joinder”).

Bryndon Fisher, Bruce Reid, and Erick Shipmon, plaintiffs in *Fisher et. al. v. United States*, Case No. 1:13-cv-00608-MMS, and *Reid et. al. v. United States*, Case No. 1:14-cv-00152-MMS, (collectively, “Derivative Plaintiffs”)¹ now likewise file this Partial Joinder with the Cacciapalle

¹ Fisher and Reid are plaintiffs in both the Fannie Mae and Freddie Mac derivative actions. Shipmon is only a plaintiff in the derivative action on behalf of nominal defendant Fannie Mae.

Motion. Derivative Plaintiffs request that if the Cacciapalle Motion is granted, the Derivative Plaintiffs likewise be given access to the document discovery produced to date and the right to attend any depositions. In the alternative, if the Cacciapalle Motion is denied, Derivative Plaintiffs seek immediate access to the document discovery produced to date and copies of the transcripts of depositions noticed in the *Fairholme* action. This would place Derivative Plaintiffs on equal footing with the plaintiffs in *Cacciapalle* and *Washington Federal*.

PROCEDURAL BACKGROUND

I. The Derivative Plaintiffs

On August 26, 2013, plaintiffs Fisher and Reid filed a shareholder-derivative complaint on behalf of nominal defendant Fannie Mae against the United States of America (the “United States” or “Government”) for the alleged taking of the private property of Fannie Mae for public use by the United States in violation of the Fifth Amendment to the U.S. Constitution.

Specifically, Derivative Plaintiffs allege that in 2012, the United States unilaterally imposed upon Fannie Mae what the Government describes as a “Net Worth Sweep,” which requires the Company to pay its entire net worth to the U.S. Treasury every quarter in perpetuity. Derivative Plaintiffs allege that the Net Worth Sweep took Fannie Mae’s entire value without providing any compensation to the Company, and as a result, Fannie Mae is owed “just compensation.”

In its consolidation and coordination orders filed October 29, 2013 (Dkt. No. 14) and October 30, 2013 (Dkt. No. 16), the Court consolidated this action with *Shipmon v. United States*, No. 1:13-cv-00672-MMS, another shareholder-derivative action, and coordinated the newly-consolidated derivative action with the class actions and individual actions filed on behalf of Fannie Mae and Freddie Mac shareholders challenging the Third Amendment. As part of these

orders, the Court coordinated *Fisher* with *Fairholme* for discovery, motion practice, case management and scheduling, and other pretrial proceedings.

Likewise, on February 25, 2014, plaintiffs Reid and Fisher filed a similar shareholder-derivative action on behalf of Freddie Mac involving substantively identical claims against the Government. *Reid v. United States*, No. 1:14-cv-00152-MMS. This action is similarly coordinated with the other Fannie Mae and Freddie Mac actions.

II. Derivative Plaintiffs Agreed to Stay their Actions

After the Government filed its motion to dismiss in *Fisher* (and prior to the Government's response in *Reid*), Plaintiffs agreed to a stay of both derivative actions, pending the conclusion of jurisdictional discovery in *Fairholme*. *Fisher*, Dkt. No. 22; *Reid*, Dkt. No. 12. In doing so, Derivative Plaintiffs advised the Court that their assent to a stay was "premised on the expectation that, in conformance with the Court's October 29, 2013 coordination order (Dkt. No. 14), Derivative Plaintiffs will have the benefit of any jurisdictional discovery the Court may grant in *Fairholme* and that any discovery the Government provides in *Fairholme* will be concurrently provided to Derivative Plaintiffs." *Id.* at p. 2. Accordingly, on February 11, 2014, this Court stayed a response to the Government's motion to dismiss until after the close of jurisdictional discovery in *Fairholme*. *Fisher*, Dkt. No. 23. On July 28, 2014, the Court issued a similar order in *Reid*, staying the deadline for the Government to respond to the complaint until sixty days after the close of jurisdictional discovery in *Fairholme*. *Reid*, Dkt. No. 13.

PARTIAL JOINDER IN THE CACCIAPALLE MOTION

Derivative Plaintiffs, like the *Washington Federal* plaintiffs, file this Partial Joinder in the Cacciapalle Motion to request that, if this Court grants the Motion, the Order be equally applicable in the *Fisher* and *Reid* derivative actions. In the alternative, if this Court denies the

Cacciapalle Motion, Derivative Plaintiffs respectfully request that the Protective Order be amended to permit documents produced under the Order to also be used in *Fisher* and *Reid*, including immediate access to all documents produced to date and the transcripts of depositions as they become available.

It has now been over sixteen months since Derivative Plaintiffs agreed to stay their actions pending the conclusion of jurisdictional discovery in *Fairholme*. Since the cases share the same nexus of operative facts, any relevant documents and deposition transcripts produced in *Fairholme* are very likely to be equally relevant in *Fisher* and *Reid*. And since the discovery process continues without end in *Fairholme*, Derivative Plaintiffs believe it would be more efficient to allow the plaintiffs in the coordinated cases to begin reviewing the voluminous production now, instead of waiting until after the close of discovery in *Fairholme* to begin that process. This will avoid unnecessary delay.

More importantly, Derivative Plaintiffs ask that any expansion of discovery beyond the *Fairholme* action also include *Fisher* and *Reid*. It would be prejudicial to the Derivative Plaintiffs for this Court to grant full access to the *Fairholme* document production to only a narrow subset of the coordinated cases concerning Fannie Mae and Freddie Mac. Moreover, allowing access to the discovery to date in *all* coordinated cases would allow counsel in each of these actions to specifically coordinate their review of the documents and depositions, conserving legal resources and avoiding the unnecessary duplication of work.

In sum, Derivative Plaintiffs seek to be treated identically to the *Cacciapalle* and *Washington Federal* plaintiffs with respect to any jurisdictional discovery. Derivative Plaintiffs agree to abide by the terms of the Protective Order and to work cooperatively with counsel in each of the coordinated cases to streamline the discovery process.

CONCLUSION

For the foregoing reasons, Derivative Plaintiffs respectfully request that if this Court grants the Cacciapalle Motion that they be granted equal access to the document production and the right to attend any depositions. In the alternative, if the Court denies the Cacciapalle Motion, Derivative Plaintiffs ask that the Protective Order be amended to permit them immediate access to the documents produced to date and the transcripts of depositions as they become available.

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