

UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., *et al.*,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

C.A. No. 13-cv-00465C

Judge Margaret M. Sweeney

**WASHINGTON FEDERAL PLAINTIFFS' MOTION FOR LEAVE TO FILE
RESPONSE TO JOINT STATUS REPORT SUGGESTING FURTHER PROCEEDINGS**

Washington Federal, Michael McCredy Baker and City of Austin Police Retirement System, plaintiffs in *Washington Federal, et al. v. United States*, No. 13-cv-00385(Fed. Cl.) (collectively, "*Washington Federal* Plaintiffs"), respectfully move for leave to file a brief response to the Joint Status Report Suggesting Further Proceedings (the "Report"), filed on January 28, 2016, by the parties in this action. *See* Dkt. No. 288. The *Washington Federal* Plaintiffs were not consulted before the filing of the Report, which proposes a schedule for further proceedings that, if adopted as proposed, would govern the *Washington Federal* action. We therefore seek leave to file our Response, attached as Exhibit A to this motion, in order to briefly provide our position on the Report.

Dated: February 9, 2016

Respectfully submitted,

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Exhibit A

UNITED STATES COURT OF FEDERAL CLAIMS

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Plaintiffs,
v.
THE UNITED STATES OF AMERICA,
Defendant.

C.A. No. 13-cv-00465C
Judge Margaret M. Sweeney

**WASHINGTON FEDERAL PLAINTIFFS' RESPONSE
TO JOINT STATUS REPORT SUGGESTING FURTHER PROCEEDINGS**

Plaintiffs in the related matter *Washington Federal, et al. v. United States*, No. 13-cv-00385C (Fed. Cl.) (“*Washington Federal*”), respectfully submit this Response to the Joint Status Report Suggesting Further Proceedings (the “Report”), submitted by the parties to this action (Dkt. No. 288). In the Report, the parties represent that, prior to its filing, they did not consult “with all of the plaintiffs in the related cases.” Report at 1 n.1. The *Washington Federal* Plaintiffs were not consulted prior to filing, and therefore submit this brief Response in order to assist the Court in evaluating the proposal set forth in the Report with the benefit of all the affected parties.

I. BACKGROUND

A. The *Washington Federal* Plaintiffs

On June 10, 2013, the *Washington Federal* Plaintiffs filed an action 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-cv-00385C (Fed. Cl.), Dkt. No. 1. It 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 (“Third Amendment”) 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 Companies, is the only action which alleges that the imposition of the conservatorships constituted a taking and an illegal exaction.

B. The *Washington Federal* Plaintiffs’ Agreed Stay of Their Action

Before the Government filed its Reply in support of its Motion to Dismiss in the *Washington Federal* action, in response to this Court’s order requesting Plaintiffs’ position, the *Washington Federal* Plaintiffs agreed to stay their case pending any deadline set for the filing of an opposition to the Government’s Motion to Dismiss. The *Washington Federal* Plaintiffs stated at that time 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*, Dkt. No. 42 at 2. Accordingly, on February 7, 2014, this Court entered an order staying the *Washington Federal* action concurrently with the *Cacciapalle* action (Case No. 13-cv-00466C) “in order to promote the efficient administration of justice and to prevent inconsistent rulings.” See Order, *Washington Federal*, Dkt. No. 43.

C. This Court’s Order Allowing the *Washington Federal* Plaintiffs Access to Jurisdictional Discovery

On July 10, 2015, in response to submissions filed by plaintiffs in the related actions, including us, and after a telephonic status conference, the Court ordered, among other things, that: (1) documents produced as jurisdictional discovery in this action subject to the protective order could be used by the *Washington Federal* Plaintiffs in accordance with the protective

order; and (2) counsel for the *Washington Federal* Plaintiffs could attend depositions in this action and receive electronic copies of those deposition transcripts, but could not depose witnesses. *See* Dkt. No. 59, Case No. 13-cv-00466C. Since that order, the *Washington Federal* Plaintiffs have received a substantial volume of jurisdictional discovery, including deposition transcripts. Because the *Washington Federal* Plaintiffs have not been directly involved with negotiations with the Government regarding discovery, we are uncertain whether the production provided to us is complete or still being updated as the parties resolve disputes related to the Government's privilege assertions.

II. THE WASHINGTON FEDERAL PLAINTIFFS' POSITION

First, the *Washington Federal* Plaintiffs plan to amend their Complaint. Because briefing related to the Motion to Compel (Dkt. No. 270) was filed under seal, and we were not provided copies, we have not reviewed the substance of that briefing, and it is difficult for us to assess whether additional discovery will be permitted. Nevertheless, we are willing to agree to a deadline to amend our Complaint consistent with the deadline proposed by the parties in this action in their Report. However, depending on the nature of the subsequent discovery ordered by the Court, if at all, we may file our amended complaint before the *Fairholme* plaintiffs file theirs.

Second, with respect to the proposed briefing schedule, we respectfully suggest that it is premature at this time for the Court to establish one. While the Report contemplates the Government filing an omnibus motion to dismiss, because our case contains allegations related to the imposition of the conservatorships themselves that are not contained in any other action – and to which jurisdictional discovery has not been directed – we are unable to conclude at this stage whether such a briefing schedule would be appropriate in the *Washington Federal* case.

Moreover, the proposed schedule, which gives the Government 120 days to file an omnibus motion to dismiss, seems too attenuated, particularly for the *Washington Federal* action. In addition, absent circumstances presently unknown to the *Washington Federal* Plaintiffs, we do not believe we will require 90 days to file our opposition to the Government's motion and cannot currently conceive of circumstances under which the Government would need 90 days to file its reply.

It has been nearly three years since the *Washington Federal* Plaintiffs filed their original Complaint. If the Court adopts the briefing schedule proposed by the parties in the Report, it is likely to be another year or longer before there is a decision on the Government's proposed omnibus motion to dismiss. Although we recognize and appreciate the Court's need to conduct these proceedings efficiently by coordinating briefing schedules and deadlines as appropriate, we also respectfully suggest that at some point it might be necessary for the briefing schedules in the related cases to diverge, particularly given significant differences that exist between the allegations and claims.

Third, because many of the affected related parties were not consulted prior to the filing of the Report, we respectfully request that, rather than entering the proposed schedule requested by the parties to this action, the Court instead schedule a conference at which all parties can be heard regarding the proposal for further proceedings. We anticipate that we will have had the opportunity to request and review the briefing on the pending motion to compel (Dkt. No. 270) so that we will be better informed regarding the status of the proceedings at that time.

Dated: February 9, 2016

Respectfully submitted,

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