

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

**Louise Rafter, et al.,**

Plaintiffs,

v.

**The United States,**

Defendant.

Case No. 1:14-cv-740

Judge Margaret M. Sweeney

**Plaintiffs' Motion For Limited Participation In Discovery**

On July 10, 2015, this Court entered an order partially lifting the stays entered in four cases (*Cacciapalle v. United States* (13-466C), *Washington Federal, Inc. v. United States* (13-385C), *Reid v. United States* (14-152C), and *Fisher v. United States* (13-608C)) and granting the plaintiffs in those cases limited participation in the discovery in *Fairholme Funds, Inc. v. United States* (13-465C). Order, *Cacciapalle* (July 10, 2015), Dkt. No. 59 ("Disc. Order"). During a telephonic hearing that same day, the Court stated that it would entertain a motion for similar relief in this related case. In accordance with the Court's statement and its Discovery Order, Plaintiffs Louise Rafter, Josephine and Stephen Rattien, and Pershing Square Capital Management, L.P. ("Rafter Plaintiffs") now respectfully request the right to participate in the *Fairholme* discovery, solely for purposes of accessing and using electronic copies of all discovery materials and documents produced in that case, without prejudice to the Rafter Plaintiffs' right to seek additional discovery as may be necessary after the *Fairholme* discovery concludes.

Undersigned counsel has consulted with counsel for the Government and Fairholme. The Government does not oppose the Rafter Plaintiffs' request for access to and use of electronic copies of all discovery documents produced in *Fairholme*. The Government also recognizes that the Rafter Plaintiffs have a right to request

additional discovery (to the extent necessary) after the close of discovery in *Fairholme*, while it does not consent to additional discovery at this time. Counsel for Fairholme also does not oppose the Rafter Plaintiffs' request for limited participation in the ongoing discovery in their case.

The Court is familiar with these related cases, which challenge the Government's conduct in connection with the conservatorships of the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"). The Government has moved to dismiss the *Fairholme*, *Cacciapalle*, *Washington Federal*, and *Fisher* complaints.<sup>1</sup> The Court then suspended briefing on the Government's motion in *Fairholme* pending discovery, and stayed the remaining cases pending the completion of that discovery. The plaintiffs subject to the Discovery Order entered last week are now permitted to participate in the discovery as follows:

- the plaintiffs in *Cacciapalle* can ask up to one hour's worth of questions in each deposition, seek to depose additional witnesses, and participate in motions practice;
- the plaintiffs in *Washington Federal*, *Reid*, and *Fisher* can attend the depositions but not ask questions; and
- the plaintiffs in all four cases can access and use electronic copies of documents produced in *Fairholme*.

Disc. Order at 1-2.

In this case, the Government has not yet filed a responsive pleading. Instead, it sought an extension of its due date for responding to the complaint until 60 days af-

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<sup>1</sup> The Government has not moved to dismiss the complaint in *Reid*. The *Reid* plaintiffs are identical to those in *Fisher*, and after the Government moved to dismiss the latter case, the plaintiffs agreed to stay both actions. Derivative Pls.' Partial Joinder in Mot. for Limited Disc. at 2-3, *Cacciapalle* (July 2, 2015), Dkt. No. 56.

ter the close of discovery in *Fairholme*. Dkt. No. 8. The Court granted that motion, effectively placing this case in the same posture as the stayed cases. Dkt. No. 9.

In light of the common issues raised in this case and the cases addressed in the Discovery Order, the Rafter Plaintiffs respectfully seek a limited right to participate in the *Fairholme* discovery. Specifically, the Rafter Plaintiffs request: (1) access to electronic copies of all discovery materials and documents produced in *Fairholme*, including transcripts of all depositions, and (2) the right to use those documents, including documents subject to the *Fairholme* protective order (to the extent permitted by that order).<sup>2</sup> The Rafter Plaintiffs do not seek the right to participate in or attend depositions in *Fairholme*, or to participate in motions practice. Because this request is narrower than the discovery the Court is now allowing in four other cases, granting this motion will not prejudice any party or otherwise hinder any of the related litigation. To the contrary, because the topics of discovery in *Fairholme* will also be relevant here, granting this narrow request would simply serve the Court's and the parties' interest in avoiding duplication of efforts.

In filing this motion, the Rafter Plaintiffs reserve the right to seek additional discovery as may be necessary after the discovery in *Fairholme* concludes. There are material differences between this case and the other cases challenging the Government's conduct in connection with the conservatorships of Fannie Mae and Freddie Mac. Whereas all other plaintiffs have exclusively brought takings claims, the Rafter Plaintiffs have also brought a claim for breach of an implied contract. Dkt. No. 1 at ¶¶ 107-21. In addition, the Rafter Plaintiffs are all common shareholders of Fan-

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<sup>2</sup> The Court instructed the parties subject to its Discovery Order to confer regarding revisions to the protective order. Disc. Order at 2. The Rafter Plaintiffs are prepared to similarly confer with those parties regarding this issue.

nie Mae and/or Freddie Mac, unlike many of the preferred shareholders in the other cases. *Id.* at ¶¶ 20-22. Other differences could emerge following the Government's response to the Rafter Plaintiffs' complaint. For these and other reasons, additional discovery may prove necessary. In that event, the Rafter Plaintiffs will of course make every effort—working with the Government—to avoid duplicating the discovery already completed. Granting this motion will greatly aid that endeavor and conserve the resources of this Court, the Government, and the Rafter Plaintiffs.

Accordingly, the Rafter Plaintiffs respectfully request access to and the right to use electronic copies of all discovery materials and documents produced in *Fairholme*, without prejudice to the Rafter Plaintiffs' right to seek additional discovery after the discovery in *Fairholme* concludes.

July 15, 2015

Respectfully submitted,

/s/ Lawrence D. Rosenberg  
Lawrence D. Rosenberg  
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**Certificate of Service**

I hereby certify that on July 15, 2015, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the Court's CM/ECF system.

Date: July 15, 2015

Respectfully submitted,

/s/ Lawrence D. Rosenberg

Lawrence D. Rosenberg