

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LOUISE RAFTER <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 14-740C
	)	(Judge Sweeney)
THE UNITED STATES,	)	
	)	
Defendant.	)	

**DEFENDANT’S MOTION TO STAY BRIEFING AND CONSIDERATION OF PLAINTIFFS’ MOTION FOR JOINDER OR, IN THE ALTERNATIVE, MOTION FOR ENLARGEMENT OF TIME**

Defendant, the United States, respectfully requests that the Court stay briefing and consideration of the April 30, 2018 motion filed by plaintiffs, Louise Rafter *et al.* (collectively Pershing Square), for joinder of Federal National Mortgage Association (Fannie Mae) as a nominal defendant and for issuance of a summons, until the Court has resolved the Government’s upcoming omnibus motion to dismiss. Alternatively, if the Court does not grant a stay, defendant respectfully requests that the Court enlarge the time for the Government’s response to Pershing Square’s motion by 249 days to first allow for the completion of briefing on the Government’s omnibus motion to dismiss.

The Court’s “power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Coast Fed. Bank, FSB v. United States*, 49 Fed. Cl. 11, 15 (2001) (“court has broad discretion to stay proceedings”). In deciding whether to stay proceedings, courts consider “the most orderly course of justice and the interests of the parties, weighing any competing interests.” *UnionBanCal Corp. & Subsidiaries v. United States*, 93 Fed. Cl. 166, 167 (2010). “The orderly

course of justice and judicial economy is served when granting a stay simplifies the ‘issues, proof, and questions of law which could be expected to result from a stay.’” *Id.* (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)).

In its motion, Pershing Square asks the Court to issue an order (1) joining Fannie Mae as a nominal defendant to Pershing Square’s derivative complaint, and (2) issuing a summons to Fannie Mae. Pl. Mot. for Joinder of Fed. Nat’l Mortgage Assoc. as a Nominal Def. & for Issuance of a Summons (Pl. Joinder Mot.) 1, Apr. 30, 2018, ECF No. 28. In two short paragraphs, Pershing Square assures the Court that it does have “jurisdiction to hear Plaintiffs’ shareholder derivative claims.” Pl. Joinder Mot. 3. Pershing Square then suggests to the Court that plaintiffs’ motion is a routine procedural step, not requiring resolution of any substantive issue on the merits. Pl. Joinder Mot. 7.

We explained during the original round of dismissal motions that shareholder derivative suits are statutorily prohibited. Def. Mot. to Dismiss 9-12, *Fisher v. United States*, No. 13-608C (Fed. Cl. Jan. 23, 2014), ECF No. 20; *see also Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 624 (D.C. Cir. 2017), *cert. denied sub nom. Cacciapalle v. Fed. Hous. Fin. Agency*, 138 S. Ct. 978 (2018), *and cert. denied*, 138 S. Ct. 978 (2018), *and cert. denied sub nom. Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency*, 138 S. Ct. 978 (2018). The same issue will be presented to the Court in our upcoming omnibus motion to dismiss. Once presented in that motion, all interested plaintiffs in these coordinated cases will have the opportunity to participate in the briefing of that issue.

Whether by design or not, Pershing Square’s motion asks the Court to rule—even if only implicitly—that the Court has the authority to entertain a derivative suit from a Fannie Mae shareholder, and to make that ruling outside of the coordinated motion-to-dismiss briefing

schedule the Court has adopted. Pershing Square characterizes its motion as merely procedural in nature, suggesting that that the Court need not decide a substantive issue to grant the relief requested. But the Court obviously cannot exercise its judicial power to summon and join a party as to a claim for which the Court lacks jurisdiction. *See Johns-Manville Corp. v. United States*, 893 F.2d 324, 327 (Fed. Cir. 1989) (“As the Supreme Court has stated, where the court has no jurisdiction, it has no power to do anything but strike the case from its docket . . . .”); *Estate of McFarlin ex rel. Laass v. City of Storm Lake*, 277 F.R.D. 384, 388 (N.D. Iowa 2011) (“federal courts may not join persons to an action if the courts do not have jurisdiction to hear their claims”). Thus, to grant the relief Pershing Square requests necessarily requires a determination that the Court has the power to act on a shareholder derivative claim, which it does not.

Even if the Court ultimately were to conclude that Fannie Mae is a necessary party to this action, it is not at all clear that joining Fannie Mae as a nominal defendant would be appropriate. *See, e.g., Weeks v. United States*, No. 13-1025C, 2014 WL 128596, at \*1 (Fed. Cl. Jan. 3, 2014) (“it is well settled that the United States is the only proper defendant in the United States Court of Federal Claims”).

The resolution of our omnibus motion to dismiss may well render Pershing Square’s joinder motion moot. But even if it does not, we are unable to discern any concrete harm that could arise from the Court staying consideration of Pershing Square’s joinder motion until the motion to dismiss has been resolved. To the contrary, a stay of Pershing Square’s joinder motion will provide for the orderly resolution of issues with the involvement of all interested plaintiffs under the coordinated briefing schedule the Court has adopted.

Alternatively, if the Court does not stay briefing and consideration of Pershing Square's joinder motion, the Court should grant an enlargement of 249 days for the Government to respond to the motion. In its motion, Pershing Square states that it "would not oppose an extension of the time for Defendant to respond to this Motion to ensure that Defendant's response to this motion is briefed with, or following, Defendant's motion to dismiss." Pl. Joinder Mot. 8. Our response to Pershing Square's motion is currently due by May 14, 2018. A 249-day enlargement would extend our response date to 30 days after December 19, 2018, when our reply regarding our omnibus motion to dismiss is scheduled to be filed. Accordingly, if the Court does not grant a stay, we respectfully request that the Court enlarge the time for our response by 249 days, to and including January 18, 2019.

Respectfully submitted,

CHAD A. READLER  
Acting Assistant Attorney General

s/Robert E. Kirschman, Jr.  
ROBERT E. KIRSCHMAN, JR.  
Director

s/Kenneth M. Dintzer  
KENNETH M. DINTZER  
Deputy Director  
Commercial Litigation Branch  
Civil Division  
U.S. Department of Justice  
P.O. Box 480  
Ben Franklin Station  
Washington, DC 20044  
Telephone: (202) 616-0385  
Facsimile: (202) 307-0973  
Email: Kenneth.Dintzer@usdoj.gov

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Attorneys for Defendant