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.	Case No. 13-cv-00466-MMS (Consolidated Action)

PLAINTIFFS' REPLY IN SUPPORT OF THEIR 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, plaintiffs Joseph Cacciapalle, American European Insurance Co. and Francis J. Dennis respectfully submit this Reply in further support of their Motion for a Partial Lift of Stay and for Limited Discovery (the "Motion") [Dkt. 51], and in reply to Defendant's Response to Plaintiffs' Motion for a Partial Lift of Stay and for Limited Discovery (the "Opposition") [Dkt. 53].

The Government makes three related arguments in opposing the right of Class Plaintiffs[1] to participate in the remainder of the jurisdictional discovery that is occurring in the *Fairholme* case.

First, the Government claims that the Motion from Class Plaintiffs is too late. [Dkt. 53 at 7-9]. This argument has no merit as it is based on a seriously inaccurate characterization of the actions of Class Plaintiffs prior to seeking to join the discovery, and also ignores or mischaracterizes this Court's July 14, 2014 Order (the "July 14 Order") [Dkt. 49].

[1] Unless otherwise indicated, all capitalized terms used herein shall have the meanings set forth in Plaintiffs' Motion.

Second, the Government argues that granting the Motion will cause prejudice to the Government because it will "needlessly prolong" the jurisdictional discovery already occurring in the *Fairholme* case. [Dkt. 53 at 1, 9-11]. This argument is based on a mischaracterization of the very limited right to participate in the *Fairholme* discovery that Class Plaintiffs seek, as clarified below. In particular, Class Plaintiffs do not seek to do anything that will prolong the jurisdictional discovery beyond what would occur absent their participation, and do not seek any rights to participate that are not available to the *Fairholme* plaintiffs right now. We do not seek to re-open prior agreements on discovery or to open new fronts of discovery. We seek limited participation only so that we may have current access to the documents that have been produced and so that we may be physically present at the depositions and have an opportunity to ask a small number of questions. Any request for greater participation than that can be subject to a "motion for leave" requirement that Class Plaintiffs would have to file and that the Court could evaluate when and if the need arises.

Third, the Government argues that Class Plaintiffs have not given any justification for why they should be entitled to participate in discovery. [Dkt. 53 at 7]. That is not accurate. Class Plaintiffs face *exactly the same* factual assertions and extra-record arguments that are faced by the *Fairholme* plaintiffs. Moreover, as shown by the Government's own supplemental motion to dismiss filed on June 8, 2015, the *Fairholme* plaintiffs purchased their Fannie Mae and Freddie Mac preferred stock several months after the August 17, 2012 Third Amendment. [*Fairholme*, 13-cv-00465, Dkt. 161 at 1-2]. They are therefore potentially situated slightly differently from Class Plaintiffs, all of whom purchased their Fannie Mae and Freddie Mac preferred stock before August 17, 2012. [Dkt. 1 at ¶15; *American European Ins. Co. v. United States*, 13-cv-00496 (Fed. Cl.), Dkt. 1 at ¶15; *Dennis v. United States*, 13-cv-00542 (Fed. Cl.),

Dkt. 1 at ¶23]. The *Fairholme* plaintiffs may have slightly different perspectives on how best to frame this case or what facts are most important to unearth. Thus, while we have the utmost respect for counsel for the *Fairholme* plaintiffs, Class Plaintiffs are entitled to at least the very limited participation in discovery that they seek. It is far more efficient to allow them to do so now, than to force them to make a request for independent discovery after *Fairholme* completes its jurisdictional discovery.[2]

A. Class Plaintiffs' Motion Is Timely

The Government repeatedly states that Class Plaintiffs' Motion is "belated," "ill-timed" and essentially too late. [Dkt. 53 at 1-2, 6-7, 11]. According to the Government, on July 11, 2014, Class Plaintiffs "**confirmed that they were not interested** in joining the protective order and discovery in *Fairholme*." [*Id*. at 4 (emphasis added)]. That is not accurate. On July 11, 2014, Class Plaintiffs submitted a statement to the Court in response to the proposed submission of the protective order in the *Fairholme* case (the "July 11 Statement"). [Dkt. 48]. In that submission, Class Plaintiffs stated that they "seek confirmation" from the Court that (1) if documents or other information were produced in *Fairholme* that are used in any amended pleadings or briefing, then Class Plaintiffs' would have the opportunity to obtain "at least those documents or other information relevant to such pleadings and briefing;" and that "(2) Plaintiffs' decision not to join in the Protective Order and discovery in the *Fairholme* Action at this time is not and shall not be construed as a waiver of Plaintiffs' right to seek such discovery in the future. Rather, Plaintiffs' right to see any and all discovery produced to plaintiffs in the *Fairholme*

[2] The Opposition also makes several references to "Washington Federal Plaintiffs' Partial Joinder in Plaintiffs' Motion for a Partial Lift of Stay and for Limited Discovery" (the "Washington Federal Motion") [Dkt. 52]. Class Plaintiffs take no position with respect to the relief sought in the Washington Federal Motion to the extent such relief differs from the relief sought in Class Plaintiffs' Motion. To the extent the Court orders relief with respect to the Washington Federal Motion, Class Plaintiffs reserve the right to seek similar relief.

Action is and shall be preserved." [*Id*. at 1-2]. These statements of interest in the *Fairholme* discovery, which sought to reserve all rights to that discovery, cannot be characterized as confirming that Class Plaintiffs "were not interested in joining the protective order and discovery in *Fairholme*," as the Government inaccurately asserts.

The Government also asserts that Class Plaintiffs asked for nothing more than to obtain the documents and other information produced in *Fairholme*. [Dkt. 53 at 5]. That is also inaccurate. As quoted above, Class Plaintiffs expressly sought to confirm that its decision not to seek to join the *Fairholme* discovery "at this time" would not "and shall not be construed as a waiver of Plaintiffs' right to seek such discovery in the future." [Dkt. 48 at 2]. Thus, it is simply inaccurate for the Government to assert that Class Plaintiffs are now making arguments that "contradict the *Cacciapalle* plaintiffs' repeated statements that they neither needed nor wanted to participate in jurisdictional discovery." [Dkt. 53 at 7]. The Government supports this assertion with just one citation, which is to the July 11 Statement submitted by Class Plaintiffs. As shown above, the July 11 Statement simply cannot accurately be characterized as saying that Class Plaintiffs "neither needed nor wanted to participate in jurisdictional discovery." The Government's assertions are simply not correct, and not fair.

Moreover, the Government also mischaracterizes the July 14 Order this Court issued in response to the Statement submitted by Class Plaintiffs. That Order stated:

> The court will confirm, however, that in order to promote the efficient administration of justice and to prevent inconsistent rulings, plaintiffs shall have a full and fair opportunity to pursue the appropriate discovery when briefing in this case is no longer stayed. Allowing the Fairholme plaintiffs to pursue discovery initially does not in any way prejudice similarly situated plaintiffs in the related cases or prevent them from pursuing discovery.

[Dkt. 49]. The Government quotes only the first sentence of the Order, and ignores the second. [Dkt. 53 at 4]. Indeed, the Government apparently takes a position that directly contradicts the second sentence quoted above from this Court's July 14 Order: according to the Government, the fact that Class Plaintiffs did not join in the *Fairholme* discovery from inception should "prejudice" Class Plaintiffs and should "prevent them from pursuing discovery" now. This again is an inaccurate understanding of the Court's July 14 Order, and is not fair. The Court's July 14 Order assured Class Plaintiffs that they would not be prejudiced by a decision not to join the *Fairholme* discovery immediately at the outset. Based on that, Class Plaintiffs chose not to file a motion to join that discovery at that time, and instead to allow it to proceed as efficiently as possible between Fairholme and the Government. But that decision was never intended to foreclose the ability of Class Plaintiffs to join that discovery effort later, once depositions began. As explained below, we do not seek to "re-start" discovery or to renegotiate agreements that have already been made. We simply seek some limited participation rights to ensure that the interests of Class Plaintiffs are protected and that the questions most important to us are asked during the remaining depositions.

Finally, this situation is very different from the single, unpublished case cited by the Government in support of its "untimeliness" argument, *Grynberg v. Ivanhoe Energy, Inc.*, 490 F. App'x 86 (10th Cir. 2012). In *Grynberg*, the Tenth Circuit affirmed a district court's ruling that appellants were not entitled to jurisdictional discovery in light of their repeated representations that discovery was not necessary until after the district court ruled on appellees' motion to dismiss. *Id.* at 104. In its decision, the Tenth Circuit also noted that appellants failed to articulate the specific documents that they would have sought in discovery and that their discovery requests were "'largely irrelevant to the jurisdictional issues . . . before the court.'" *Id.*

at 104-05. As discussed above, Class Plaintiffs have never represented that jurisdictional discovery should be deferred until the Court rules on the Government's motion to dismiss; and Class Plaintiffs only requests limited discovery concerning the information that, in *Fairholme*, this Court held was necessary to resolve the same disputed factual issues. *Grynberg* is therefore inapposite.

B. Granting Plaintiffs' Motion Will Not Prejudice The Government

The Government asserts that Class Plaintiffs' participation in jurisdictional discovery "will be disruptive, prejudicial and will needlessly prolong *Fairholme's* jurisdictional discovery." [Dkt. 53 at 9]. This assertion rests on a fundamental misunderstanding of the limited discovery Class Plaintiffs seek. Class Plaintiffs propose proceeding expeditiously and in coordination with plaintiffs' counsel in *Fairholme* in such a way that the current discovery schedule would not be prolonged or delayed. Class Plaintiffs do not seek to extend the current period for jurisdictional discovery or to broaden the scope of the jurisdictional discovery already underway.

As explained in our opening Motion, Class Plaintiffs seek to participate in the remainder of discovery in only limited ways, outlined with four headers in the opening Motion. [Dkt. 51 at 6-7]. We clarify the scope of this limited participation below, and demonstrate why it is not prejudicial to the Government and will not "needlessly prolong" discovery or call for the renegotiation of any "comprehensive agreements" the Government and *Fairholme* have agreed to. Class Plaintiffs seek only the following:

i. *Protective Order.* To have four lawyers admitted to the Protective Order and amending the Order to allow produced information to be used in this case as in *Fairholme* – this does not cause any prejudice to the Government, as shown by the fact that the Government has already agreed to do this at the end of discovery. It is no more burdensome to do this now.

ii. *Document Discovery*. To receive electronic copies of the documents and deposition transcripts already produced to the *Fairholme* plaintiffs – this should not cause any delay or change to the *Fairholme* discovery schedule and is not a prejudicial burden since the Government has already agreed to do this at the end of discovery; it is no more burdensome to do so.

iii. *Deposition Discovery*:

a. We ask that at least one of the four lawyers for Class Plaintiffs admitted to the Protective Order be permitted to attend the depositions already noticed in *Fairholme*. Given that we have four lawyers able to attend these depositions, we represent that we will not unreasonably disrupt the scheduling of any of these depositions, and the Court's Order can admonish us not to do so.

b. We have asked that we be permitted to ask questions "at the end of each deposition," and have agreed that "counsel for *Fairholme* would continue to take the lead in the depositions." Again, we do not see how limited questioning at the end of depositions that are already occurring could materially prolong the entire discovery process. We are not seeking to enlarge the seven-hour limit. We do not anticipate the need for any such request, which would require a separate motion, or an agreement among counsel.

c. We ask for transcripts of the depositions that have already occurred. This does not impose any material burden on the Government and will not prolong discovery.

d. We seek to "reserve the right" to request depositions that may not be noticed by counsel for *Fairholme*. But we also stated that this would be "subject to the right of the government or the witness to object." To make this abundantly clear, we believe the Government could raise all of the arguments it makes in its opposition about needless delay, prejudice and burden in response to any such deposition requests. We do not anticipate making such requests, and any such requests would likely be very small in number. We ask only that we have the right to move for such depositions if we conclude that they are warranted. Such a request does not prejudice the Government or "needlessly prolong" discovery.

iv. *Discovery Disputes*:

a. We seek to be able to participate in the briefing of any dispute. This should not be materially burdensome to the Government. We could perhaps agree to consolidate or limit briefing on any issue in which *Fairholme* and Class Plaintiffs are making the same arguments as we have no wish to burden the Court with duplicative briefing.

b. We do not seek to re-negotiate the "comprehensive agreement" the *Fairholme* plaintiffs apparently entered into with the Government. [Dkt. 53 at 5, 10]. We merely seek to be able to raise issues relating to documents or privilege assertions that *Fairholme* itself could raise (whether or not *Fairholme* chooses to raise it). That can hardly be said to "needlessly prolong" discovery since we are simply asking for the right to raise issues *Fairholme* itself could raise.

As made clear in the initial Motion and above, Class Plaintiffs are making every effort *not* to delay or prolong jurisdictional discovery. Anything Class Plaintiffs may do to seek discovery beyond participating in the limited ways described above would require a new motion, and would be subject to the same objections the Government makes (prematurely) in its opposition. Class Plaintiffs do not anticipate any such requests, and would seek them only if "good cause" exists to take additional discovery independent of the discovery already being sought in *Fairholme*. [Dkt. 51 at 7]. Class Plaintiffs would then file an appropriate motion at the appropriate time. [*Id*.]. At this time, though, Class Plaintiffs seek only to receive the documents already produced and attend the depositions already noticed, neither of which will prejudice the Government in any meaningfully way.

If anything, Class Plaintiffs' Motion should promote efficiency by avoiding the risk that Class Plaintiffs will need to seek potentially duplicative discovery once the *Fairholme* discovery has finally come to an end.

C. Class Plaintiffs Are Justified In Making Their Request

Finally, as explained above, Class Plaintiffs are justified in seeking to participate in jurisdictional discovery. First, the factual assertions made by the Government in their motion to dismiss the *Fairholme* complaint were also made in the Government's motion to dismiss Class Plaintiffs' complaint. *Compare Fairholme*, 13-cv-00465, Dkt. 20 at 9 (arguing that the Net Worth Sweep was an act of economic necessity because the GSEs found themselves in a "death

spiral"), 15 (contending that the Third Amendment was voluntary and stating that "FHFA decided, on behalf of the Enterprises, to enter into the Third Amendment. Treasury, acting as the United States, was counterparty to that voluntary agreement."), 40 (arguing claims for loss of dividend rights are not ripe because "whether and when Fannie Mae and/or Freddie Mac will emerge from conservatorships is unknown") *with* Dkt. 41 at 9 (asserting that the GSEs found themselves in a "death spiral"), 15 (contending that the Third Amendment was voluntary), 40 (again contending that loss of dividend rights claims are not ripe because "whether and when Fannie Mae and/or Freddie Mac will emerge from conservatorships is unknown"). Second, Class Plaintiffs are at least potentially differently situated from the *Fairholme* plaintiffs: Class Plaintiffs all owned their preferred stock on the date of the alleged taking on August 17, 2012; some or all of the *Fairholme* plaintiffs allegedly did not. [*See Fairholme*, 13-cv-00465, Dkt. 161]. The Government should not be permitted to seek dismissal of the *Fairholme* plaintiffs on that basis while refusing to allow Class Plaintiffs to participate in the jurisdictional discovery that is relevant to both the *Fairholme* plaintiffs and Class Plaintiffs.

CONCLUSION

For all of the foregoing reasons and those set forth in Class Plaintiffs' Motion, Class Plaintiffs respectfully request that this Court partially lift the stay in this action and permit counsel for Class Plaintiffs to participate in limited discovery to the extent described in that Motion and in this reply.

Dated: June 18, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Federal Claims by using the Court's CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

/s/ Eric L. Zagar
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