

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LOUISE RAFTER, JOSEPHINE RATTIEN, STEPHEN RATTIEN, PERSHING SQUARE CAPITAL MANAGEMENT, L.P., on behalf of Pershing Square, L.P., Pershing Square II, L.P., Pershing Square Holdings, Ltd., and Pershing Square International, Ltd., PERSHING SQUARE, L.P., PERSHING SQUARE II, L.P., PERSHING SQUARE HOLDINGS, LTD., and PERSHING SQUARE INTERNATIONAL, LTD.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant,

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Nominal Defendant.

Case No. 14-740C

Judge Margaret M. Sweeney

PLAINTIFFS' MOTION FOR JOINDER OF FEDERAL NATIONAL MORTGAGE ASSOCIATION AS A NOMINAL DEFENDANT AND FOR ISSUANCE OF A SUMMONS

Pursuant to Rules 19(a), 23.1 and 83(b) of the Rules of the Court of Federal Claims (“**RCFC**”) and the All Writs Act, Plaintiffs respectfully move the Court for:

- (1) an order joining Federal National Mortgage Association (“**Fannie Mae**”) as a nominal defendant in Plaintiffs’ shareholder derivative claims against Defendant the United States of America (“**Defendant**”); and
- (2) an order issuing to Fannie Mae a summons.

Before filing this motion, Plaintiffs consulted with Defendant, who opposes this Motion. Plaintiffs also consulted with counsel for Fannie Mae, who has agreed to accept service of the Plaintiffs' Second Amended Verified Complaint ("SAC"), which was filed under seal. Fannie Mae opposes this Motion.

BACKGROUND

This lawsuit arises from actions taken by the Department of Treasury ("**Treasury**") and the Federal Housing Finance Agency ("**FHFA**") (together, the "**Government**") during an FHFA conservatorship imposed on Fannie Mae and the Federal Home Loan Mortgage Corporation ("**Freddie Mac**") (together with Fannie Mae, the "**Companies**") during the 2008 financial crisis. Plaintiffs allege that the Government used "Net Worth Sweep" dividends on senior preferred stock issued to the Government in connection with the conservatorship to wrongfully appropriate all of the Companies' future earnings and virtually all of its net worth. Three of the claims in Plaintiffs' SAC—for taking of Fannie Mae's property without just compensation (Claim I), illegal exaction (Claim III), and breach of contract and reformation of Fannie Mae's contract with Treasury to undo an unlawful amendment (Claim IV)—are brought derivatively on behalf of Fannie Mae pursuant to RCFC 23.1.

This action was commenced on August 14, 2014, by the filing of a Verified Complaint. (ECF No. 1.) Pursuant to an Order dated October 10, 2014, this Court extended the time for Defendant to respond to the Verified Complaint until sixty days after the completion of jurisdictional discovery in *Fairholme Funds, Inc. v. United States*, 13-465C. (ECF No. 9). On August 14, 2015, Plaintiffs filed an Amended Verified Complaint. (ECF Nos. 14-19). On March 8, 2018, pursuant to this Court's February 21, 2018 Scheduling Order (ECF No. 22) and with Defendant's written consent, Plaintiffs filed the SAC. (ECF No. 25). Pursuant to an Order

dated February 21, 2018, Defendant's motion to dismiss is due by June 29, 2018, and Plaintiffs' response to the Defendant's motion to dismiss is due by September 20, 2018. (ECF No. 24).

ARGUMENT

This Court has jurisdiction over derivative claims against the United States, and Fannie Mae is a necessary party that should be joined in this action as a nominal defendant under this Court's rules. In *Starr International Co. v. United States*, 103 Fed. Cl. 287, 290 (2012), Judge Wheeler recognized that this Court's rules do not prescribe a mechanism for providing nominal defendants in derivative actions, like Fannie Mae, with notice of the action and binding it to any judgment obtained. "[T]here appears to be structural dissonance between RCFC 23.1(b), which specifies 'Pleading Requirements' for derivative complaints, and RCFC 4 ('Serving a Complaint on the United States'), which fails to provide for service of those complaints upon government agencies or corporations." *Id.* Accordingly, in *Starr* this Court issued an order, under RCFC 19(a), joining American International Group, Inc. ("AIG") as a nominal defendant in the derivative action brought against the United States by one of AIG's shareholders. *Id.* at 290-91.

Plaintiffs respectfully request that the Court issue a similar order here, to establish procedures so that Fannie Mae can be properly brought into this case.

A. This Court Has Jurisdiction Over Plaintiffs' Derivative Claims

This Court has jurisdiction to hear Plaintiffs' shareholder derivative claims. As the Federal Circuit stated in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999):

The procedural device of derivative actions does not broaden the scope of the [Tucker Act's] waiver of sovereign immunity. Rather, in circumstances in which those in control of the management of the corporation are unable or unwilling to bring suit, it permits shareholders to step into the shoes of the corporation and file suit as fiduciaries on the corporation's behalf and for the corporation's benefit.

Id. at 1293. More recently, in *Starr*, this Court explained that the derivative plaintiff “steps into the shoes of AIG to challenge the Government’s alleged taking of AIG’s property without just compensation, in violation of the Fifth Amendment to the Constitution,” and “[t]he Court merely hears the corporation’s claim against the Government and awards any relief to the corporation within the ordinary scope of the Tucker Act.” *Starr*, 103 Fed. Cl. at 289 (“Irrespective of its derivative posture, this action falls squarely within the Tucker Act’s waiver of sovereign immunity.”).

This Court’s rules confirm that its jurisdiction includes derivative claims against the Government. In 2002, the Court approved RCFC 23.1, which is applicable when “one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce.” RCFC 23.1(a). *See* Rules Comm. Notes, 2002 Adoption for RCFC 23.1 (citing *First Hartford* for the proposition that “this court has jurisdiction to hear shareholder derivative suits”).

B. Fannie Mae is a Necessary Party to Plaintiffs’ Derivative Claims and Should Be Joined as a Nominal Defendant Under RCFC 19(a)

“The corporation is a necessary party to [a shareholder derivative] action; without it the case cannot proceed.” *Ross v. Bernhard*, 396 U.S. 531, 538 (1970).¹ Thus, in *Starr*, for example, Judge Wheeler concluded that AIG was a necessary party pursuant to RCFC 19(a) and should be

¹ *See also Meyer v. Fleming*, 327 U.S. 161, 167 (1946) (in “stockholders’ derivative suits, ... [t]he corporation is a necessary party... [and] it is joined as a defendant.”); *Bagdon v. Bridgestone/Firestone, Inc.*, 916 F.2d 379, 382 (7th Cir. 1990) (“If this is a derivative suit, the corporation is an indispensable party. So much has been settled since *Davenport v. Dows*, ..., a decision reaffirmed [by the Supreme Court] after the adoption of Rule 19.”); CHARLES ALAN WRIGHT, ET AL., 7 FEDERAL PRACTICE & PROCEDURE § 1615 (3d ed. 2017) (“In a stockholder-derivative suit, the corporation whose rights are being enforced must be made a party to the action whenever possible”).

made a party to the derivative action. *Starr*, 103 Fed. Cl. at 289-90. Since “the standard practice in shareholder-derivative actions is to align the corporation as a defendant,” Judge Wheeler concluded that AIG should be named as a nominal defendant. *Id.* (quotation marks omitted).²

The same is true here. Fannie Mae is a necessary party to Plaintiffs’ derivative claims. Moreover, the SAC alleges that FHFA, in its capacity as conservator, controls Fannie Mae (*see* SAC ¶¶102-04), and “[i]t makes little conceptual sense for a Government-controlled entity to be aligned in litigation *with* a dissident shareholder ... and *against* the Government that controls it.” *Starr*, 103 Fed. Cl. at 289 (noting that it was appropriate to align AIG with the Government, since the Government was AIG’s “controlling shareholder”).

C. This Court Has Authority to Serve Fannie Mae with a Summons

Because Fannie Mae is a necessary party, the Company must be joined by court order under RCFC 19(a)(2), which provides:

If a person has not been joined as required, *the court must order that the person be made a party*. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(emphasis added).

The complication is that, while RCFC 19(a)(2) requires that Fannie Mae be joined in this action, this Court’s rules do not provide a clear mechanism for serving Fannie Mae. This Court’s rules conform closely to the Federal Rules of Civil Procedure (“**FRCP**”) in certain respects, and diverge in others. Here, that divergence creates a conundrum for derivative plaintiffs. RCFC

² Naming a corporation in a derivative action as a defendant is a standard procedure. *See City of Davenport v. Dows*, 85 U.S. 626, 627 (1873) (derivative proceedings “should be so conducted that any decree which shall be made on the merits shall [have preclusive effect upon] the corporation. This can only be done by making the corporation a party defendant”); *Smith v. Sperling*, 354 U.S. 91, 97 (1957) (alignment of the parties should comport with “the real collision of issues” in the litigation); *Bagdon*, 916 F.2d at 382 (“the unwilling corporation is aligned as a defendant”).

23.1, which provides detailed pleading and other procedures for derivative complaints in the Court of Claims, was drafted “in conformity with the corresponding FRCP,” and later “amended to conform to the general restyling of the FRCP.” Rules Comm. Notes, 2002 Adoption; 2008 Amendment. Although neither FRCP 23.1 nor RCFC 23.1 addresses service of a derivative complaint on the nominal defendant, for derivative plaintiffs in federal district courts, the omission is inconsequential because FRCP 4(h) provides for service of process upon “a Corporation, Partnership, or Association.” However, this Court’s counterpart, RCFC 4, only addresses service of a complaint on the United States. The FRCP’s provisions “dealing with service upon agencies, corporations, or officers of the United States—have not been made a part of this court’s RCFC 4 because, in this court . . . , only the United States is properly the named defendant.” Rules Comm. Notes, 2002 Revision.³

Accordingly, to carry out RCFC 19’s requirement that Fannie Mae be added to this action as a nominal defendant, this Court “must order that [it] be made a party.” RCFC 19(a)(2). Plaintiffs respectfully request that the Court do so by issuing an order joining Fannie Mae to this action as a nominal defendant and issuing a summons that Plaintiffs can serve on Fannie Mae.

This Court may issue a summons to Fannie Mae under its inherent powers as reflected in RCFC 83 or based on its authority under the All Writs Act, 28 U.S.C. §1651. *See* RCFC 83 (when there is “no controlling law,” a “judge may regulate practice in any manner consistent with federal law or [the FRCP]”); 28 U.S.C. §1651 (“The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”); *see also* 28 U.S.C.

³ The *Starr* Court “caution[ed] the parties against too literal a reading of the Rules Committee Notes to RCFC 4. After all, the Court regularly exercises at least limited jurisdiction over non-Government ‘Defendant–Intervenors.’” 103 Fed. Cl. at 290 n.2. Here, Plaintiffs’ derivative claims are brought solely against the Government and seek no relief from Fannie Mae.

§2521(c) (“The United States Court of Federal Claims shall have such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States.”).⁴ Because the SAC has been filed under seal, Plaintiffs further request permission to serve on Fannie Mae, with the summons, the redacted, public version of the SAC.

D. Joinder of, and Service of a Summons on, Fannie Mae Present Procedural Issues That Do Not Require Resolution of Substantive Dismissal Arguments

Defendant has informed Plaintiffs that (1) it opposes this Motion because Defendant takes the position that Plaintiffs lack the authority to bring derivative claims on behalf of Fannie Mae under the Housing and Economic Recovery Act (“**HERA**”) and that Fannie Mae is not a necessary party in this action, and (2) it considers the Motion premature because this HERA argument will be addressed in Defendants’ anticipated motion to dismiss. But Defendant’s anticipated opposition to this Motion under HERA puts the substantive cart before the procedural horse. A summons (or a notice of joinder) directs an individual or entity to participate in a civil action or forgo procedural or substantive rights. Issuing one is not a determination on the merits

⁴ In *Starr*, instead of issuing a summons, Judge Wheeler elected to issue a Notice and Order to Fannie Mae, notifying Fannie Mae that it has been deemed a party in this action, can participate if it wishes, and will be bound by any judgment issued in the case. Judge Wheeler directed the plaintiff to serve a notice and order on AIG “advising AIG that (i) the Court would join it as a party to this case pursuant to RCFC 19(a)(2); (ii) “AIG will be bound by the Court’s final judgment in this case;” and (iii) “AIG may participate in this case to any extent it deems appropriate.” *Starr*, 103 Fed. Cl. at 290-91. A copy of that order is annexed hereto as **Exhibit B**. Because Judge Wheeler concluded that notice of joinder under Rule 19(a) was the appropriate mechanism for adding AIG to the case, he did “not address Starr’s argument that the gap filling provisions of RCFC 83(b) ... or the All Writs Act ... provide alternative authority for the Court to issue a summons to AIG.” *Starr*, 103 Fed. Cl. at 290 n.3. In its ruling on appeal, the Federal Circuit referenced Judge Wheeler’s notice and order without comment. *See Starr Int’l Co. v. United States*, 856 F.3d 953, 960-61 (Fed. Cir. 2017) (“Starr asserted claims directly—on behalf of itself and similarly situated shareholders—for individual relief. It also asserted claims derivatively, on behalf of AIG, for relief that would flow to the corporation. The Claims Court joined nominal defendant AIG as a necessary party for the derivative claims under [RCFC] 19(a).”). In the event that this Court declines to issue a summons to Fannie Mae, Plaintiffs respectfully request that the Court issue a similar notice and order to Fannie Mae in the form annexed hereto as **Exhibit A**, which is modeled on the order issued in *Starr*.

of that civil action. *Cf. E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005) (concluding that the Navajo Nation was a necessary party that should have been joined in litigation, without “decid[ing], even implicitly, the merits” of plaintiff’s claim against defendant).

While Plaintiffs intend to vigorously contest Defendant’s substantive dismissal arguments when they are raised, the exclusive purpose of this motion is to ensure that this Court can properly exercise jurisdiction over the nominal defendant, Fannie Mae, and to afford Fannie Mae the opportunity to participate in the anticipated dismissal motion and the proceedings thereafter. Defendant’s arguments regarding Plaintiffs’ authority to bring derivative claims need not be resolved in order to grant the instant Motion. Nevertheless, so that substantive dismissal arguments are not adjudicated in a piecemeal fashion, Plaintiffs 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.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (1) order joinder of Fannie Mae as a nominal defendant in the above-captioned action and (2) issue to Fannie Mae a summons.

Dated: April 30, 2018

By: /s Gregory P. Joseph

Gregory P. Joseph
Counsel of Record

Of Counsel
Mara Leventhal
Sandra M. Lipsman
Christopher J. Stanley

JOSEPH HAGE AARONSON LLC

485 Lexington Avenue, 30th Floor
New York, New York 10017
Tel. (212) 407-1200
Fax (212) 407-1280
Email: gjoseph@jha.com

Counsel for Plaintiffs

794661

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LOUISE RAFTER, JOSEPHINE
RATTIEN, STEPHEN RATTIEN,
PERSHING SQUARE CAPITAL
MANAGEMENT, L.P., on behalf of
Pershing Square, L.P., Pershing Square II,
L.P., Pershing Square Holdings, Ltd., and
Pershing Square International, Ltd.,
PERSHING SQUARE, L.P., PERSHING
SQUARE II, L.P., PERSHING SQUARE
HOLDINGS, LTD., and PERSHING
SQUARE INTERNATIONAL, LTD.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant,

FEDERAL NATIONAL MORTGAGE
ASSOCIATION,

Nominal Defendant.

Case No. 14-740C

Judge Margaret M. Sweeney

CERTIFICATE OF SERVICE

I, Christopher J. Stanley, a partner with the law firm Joseph Hage Aaronson LLC, hereby certify under penalty of perjury that on April 30, 2018, I caused a true copy of Plaintiffs' Motion for Joinder of Federal National Mortgage Association as a Nominal Defendant and for Issuance of a Summons to be served upon the following counsel:

By electronic mail and Federal Express:

Meaghan VerGow
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006
mvergow@omm.com

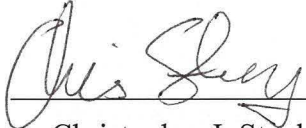
Counsel for Nominal Defendant Federal National Mortgage Association

By CM/ECF:

Kenneth M. Dintzer
Deputy Director
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
kenneth.dintzer@usdoj.gov

Counsel of Record for Defendant the United States of America

Dated: April 30, 2018

By:  _____

Christopher J. Stanley
JOSEPH HAGE AARONSON LLC
485 Lexington Avenue, 30th Floor
New York, New York 10017
Tel. (212) 407-1222
Fax (212) 407-1269
Email: cstanley@jha.com

Counsel for Plaintiffs

EXHIBIT A

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LOUISE RAFTER, JOSEPHINE
RATTIEN, STEPHEN RATTIEN,
PERSHING SQUARE CAPITAL
MANAGEMENT, L.P., on behalf of
Pershing Square, L.P., Pershing Square II,
L.P., Pershing Square Holdings, Ltd., and
Pershing Square International, Ltd.,
PERSHING SQUARE, L.P., PERSHING
SQUARE II, L.P., PERSHING SQUARE
HOLDINGS, LTD., and PERSHING
SQUARE INTERNATIONAL, LTD.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant,

FEDERAL NATIONAL MORTGAGE
ASSOCIATION,

Nominal Defendant.

Case No. 14-740C

Judge Margaret M. Sweeney

[PROPOSED] NOTICE AND ORDER

TO: Federal National Mortgage Association
3900 Wisconsin Avenue, N.W.
Washington, D.C. 20016

The above-captioned lawsuit has been filed in this Court by your shareholders. Plaintiffs commenced the action with the filing of a Verified Complaint on August 14, 2014. Plaintiffs filed a Second Amended Verified Complaint on March 8, 2018, a public redacted copy of which is attached hereto. Pursuant to Rule 19(a)(2) of this Court, Federal National Mortgage Association (“**Fannie Mae**”) is hereby added as a party to this case as a nominal defendant. In all future pleadings and orders, the caption will show Fannie Mae as a nominal defendant.

As a party, Fannie Mae will be bound by the Court’s final judgment in this case. Fannie Mae may participate in this case to any extent it deems appropriate. Fannie Mae is not required to answer or respond to the attached complaint (although it may answer or respond if it wishes), and no action is required of Fannie Mae at the present time. However, the Court invites Fannie

Mae to enter an appearance in this case through counsel of its choice (a member of the bar of this Court) as a means of being informed of all pleadings, motions, briefs, and orders filed in this case. The Court will include Fannie Mae's counsel of record in all notifications regarding this case.

Fannie Mae may review all publicly available documents filed to date in this case by accessing the Court's Case Management/Electronic Case Files ("CM/ECF") system. These documents are available through PACER, an acronym for "Public Access to Court Electronic Records."

For your information, the following attorneys are representing the Plaintiffs and Defendant in this case:

For Plaintiffs:

Gregory P. Joseph
JOSEPH HAGE AARONSON LLC
485 Lexington Avenue, 30th Floor
New York, New York 10017
Tel. (212) 407-1200
Fax (212) 407-1280
Email: gjoseph@jha.com

For Defendant:

Kenneth M. Dintzer
Acting Deputy Director
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tel. (202) 616-0835
Fax (202) 514-8624
Email: Kenneth.Dintzer@usdoj.gov

Counsel of record for Plaintiffs is directed to serve this Notice and Order upon Fannie Mae, with a public redacted version of the Second Amended Verified Complaint, and to serve this Notice and Order upon counsel for Fannie Mae, with a sealed version of the Second Amended Verified Complaint, and to file thereafter Proof of Service with the Court.

IT IS SO ORDERED.

MARGARET M. SWEENEY
Judge

EXHIBIT B

In the United States Court of Federal Claims

No. 11-779C

(Filed: January 31, 2012)

 *
 STARR INTERNATIONAL COMPANY, INC., *
 *
 Plaintiff, *
 *
 v. *
 *
 THE UNITED STATES, *
 *
 Defendant, *
 *

NOTICE AND ORDER

TO: American International Group, Inc.
 180 Maiden Lane
 New York, New York 10038

A lawsuit has been filed in this Court by shareholders of your corporation. Plaintiff commenced the action with the filing of a Verified Class Action Complaint on November 21, 2011. Plaintiff filed an Amended Verified Class Action Complaint on January 31, 2012, a copy of which is attached hereto. Pursuant to Rule 19(a)(2) of this Court, American International Group, Inc. (“AIG”) is hereby added as a party to this case as a nominal defendant. In all future pleadings and orders, the caption will show AIG as a nominal defendant.

As a party, AIG will be bound by the Court’s final judgment in this case. AIG may participate in this case to any extent it deems appropriate. AIG is not required to answer or respond to the attached complaint (although it may answer or respond if it wishes), and no action is required of AIG at the present time. However, the Court invites AIG to enter an appearance in this case through counsel of its choice (a member of the bar of this Court) as a means of being informed of all pleadings, motions, briefs, and orders filed in this case. The Court will include AIG’s counsel of record in all notifications regarding this case.

AIG may review all documents filed to date in this case by accessing the Court’s Case Management/Electronic Case Files (“CM/ECF”) system. These documents are

available to the public through PACER, an acronym for “Public Access to Court Electronic Records.”

For your information, the following attorneys are representing the Plaintiff and Defendant in this case:

For Plaintiff:

David Boies
Boies, Schiller & Flexner LLP
333 Main Street
Armonk, New York 10504
Tel. (914) 749-8200
Fax (914) 749-8300
Email: dboies@bsflp.com

For Defendant:

Brian M. Simkin
Assistant Director
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tel. (202) 616-8239
Fax (202) 514-7969
Email: brian.simkin@usdoj.gov

Counsel of record for Plaintiff is directed to serve this Notice and Order upon AIG, with the attached amended complaint, and to file thereafter Proof of Service with the Court.

IT IS SO ORDERED.

s/Thomas C. Wheeler
THOMAS C. WHEELER
Judge