

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LOUISE RAFTER et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 14-740C
)	(Senior Judge Margaret M. Sweeney)
THE UNITED STATES,)	
)	
Defendant.)	

**PLAINTIFFS’ UNOPPOSED MOTION
FOR VOLUNTARY DISMISSAL**

Pursuant to Rules 23.1(c) and 41(a)(2) of the Rules of the United States Court of Federal Claims (the “**Rules**”), plaintiffs Louise Rafter, Josephine Rattien, Stephen Rattien and Pershing Square Capital Management, L.P. (the “**Rafter Plaintiffs**”), by and through their counsel, respectfully move this Court for an Order granting their request to voluntarily dismiss the above-captioned action with prejudice. In support of this motion, the *Rafter Plaintiffs* state as follows:

The *Rafter Plaintiffs* filed a verified complaint on August 14, 2014 (ECF No. 1), an amended verified complaint on September 2, 2015 (ECF No. 19) and a second amended verified complaint on March 8, 2018 (ECF No. 25) (the “**SAC**”). The SAC, which is the operative complaint in this action, asserts both direct claims on behalf of the plaintiffs (SAC Claims II, V, VI and VII) and derivative claims on behalf of nominal defendant Federal National Mortgage Association (SAC Claims I, III and IV).

Upon commencement of this action, the *Rafter Plaintiffs* filed a Notice of Directly Related Cases (ECF No. 3) identifying other cases that involved similar claims based on alleged takings by the federal government of privately held stock issued by Fannie Mae (the “**Related Cases**”), including *Fairholme Funds, Inc., et al. v. United States*, No. 13-cv-465-MMS (“*Fairholme*”).

The United States filed an omnibus motion to dismiss the Related Cases, including this one, on August 1, 2018 (ECF No. 35) and an amended omnibus motion to dismiss the related cases on

October 1, 2018 (ECF No. 37). Plaintiffs in the Related Cases, including the *Rafter* Plaintiffs, filed an omnibus response to the motion to dismiss (ECF No. 41), as well as supplemental opposition briefs dealing with issues unique to their separate claims. (*See, e.g.*, ECF No. 42).

On December 6, 2019, this Court issued a decision in *Fairholme*, granting-in-part the United States' motion to dismiss directly plead claims for either lack of standing or lack of subject matter jurisdiction, and denying the motion to dismiss shareholder' derivative claim. *See Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1 (2019). On January 28, 2020, this Court entered an order (ECF No. 53) staying consideration of the motion to dismiss in this action "pending the determination of further proceedings" in *Fairholme*. On March 30, 2020, the Court entered a follow-on order (ECF No. 57) extending the stay until twenty-one days following the final resolution of the interlocutory appeals in *Fairholme*.

On February 22, 2022, the Federal Circuit affirmed this Court's dismissal of the *Fairholme* plaintiffs' direct claims, but reversed-in-part, holding that "the Claims Court improperly failed to dismiss the derivative claims. *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274, 1305 (Fed. Cir. 2022). On January 9, 2023, the Supreme Court denied a petition for a writ of certiorari. *See Fairholme Funds, Inc. v. United States*, No. 22-100, 2023 WL 124023 (U.S. Jan. 9, 2023).

The *Rafter* Plaintiffs' derivative claims are substantially similar to the derivative claims of the *Fairholme* plaintiffs that the Federal Court dismissed. *Compare* SAC, Claim I (derivative takings claim), *with Fairholme*, 26 F.4th at 1303 ("the Claims Court erred in failing to dismiss [plaintiff's] derivative takings claim"); SAC, Claim III (derivative illegal exactions claim, alleging among other things that Treasury and FHFA acted beyond their authority under the Housing and Economic Recovery Act of 2008 ("HERA")), *with Fairholme*, 26 F.4th at 1304 ("We, thus, reverse the Claims Court's refusal to dismiss [plaintiff's] illegal exaction claim to the extent that that claim is predicated on his contention that the net worth sweep was beyond the scope of the FHFA's authority under HERA."); SAC, Claim IV (non-constitutional derivative claim), *with Fairholme*, 26

F.4th at 1300 (holding that decision of the D.C. Circuit “affirmatively answer[ing] the question of whether HERA’s Succession Clause bars non-constitutional derivative ... suits” collaterally estopped binding all shareholders from bringing non-constitutional derivative claims).¹

The *Rafter* Plaintiffs now move to voluntarily dismiss the above-captioned action with prejudice and with each party to bear their own costs, fees, and expenses.

Rule 23.1 provides that “[a] derivative action may be ... voluntarily dismissed ... only with the court’s approval,” and “[n]otice of a ... voluntary dismissal ... must be given to shareholders or members in the manner that the court orders.” Plaintiffs respectfully submit that notice is not necessary in this matter because, to the extent this action asserts derivative claims: (1) the Federal Circuit held that substantially similar derivative claims should be dismissed by the Federal Circuit in *Fairholme*, 26 F.4th 1274, which is a published decision and which provided notice to stockholders that derivative claims brought in this Court would be dismissed; (2) there has been no settlement or compromise; (3) there has been no collusion among the parties; and (4) neither Plaintiffs nor their counsel have received or will receive any consideration from Defendant for the dismissal.

Courts have held that notice is not required under Federal Rule of Civil Procedure 23.1—on which Rule 23.1 is modelled—under similar circumstances. *See, e.g., Ind. State Dist. Council of Laborers & HOD Carriers Pension Fund ex rel. Elecs. for Imaging, Inc. v. Gecht*, 2007 WL 9822669, at *1 (N.D. Cal. Apr. 3, 2007) (granting motion for voluntary dismissal without notice and explaining “notice may be obviated if the corporation will not suffer prejudice and there is no trace of collusion between the plaintiff(s) and the defendant(s)”; Order, *Nakata v. Greene*, No. 5:11-cv-

¹ The *Rafter* Plaintiffs note that some of the direct claims they seek to voluntarily dismiss are not substantially similar to the claims addressed in the *Fairholme* decision. *See, e.g.,* SAC Claim V (asserting breach of Fannie Mae’s Charter, By-Laws and the Delaware General Corporations Law), Claims VI and VII (asserting breach of the covenant of good faith and fair dealing implied in Fannie Mae’s and Freddie Mac’s Charter).

90-RS-EMT (N.D. Fla. Sept. 5, 2013), ECF No. 37 (granting motion for voluntary dismissal without notice after Eleventh Circuit affirmed dismissal of related securities class action); *see also Stadnicki ex rel. LendingClub Corp. v. Laplanche*, 2018 WL 4110553, at *5 (N.D. Cal. Aug. 29, 2018) (“While the language of Rule 23.1(c) suggests that notice is mandatory, courts have exercised their discretion to allow parties to dispense with the notice requirement”) (quotation omitted), *aff’d*, 804 F. App’x 519 (9th Cir. 2020).

Counsel for Plaintiffs has conferred with counsel for Defendant regarding this motion, and Defendant does not oppose the relief requested in this motion.

CONCLUSION

Plaintiffs respectfully request that the Court enter an order approving the voluntary dismissal of the above-captioned action with prejudice, pursuant to Rules 23.1(c) and 41(a)(2), as follows:

1. The above-captioned action is dismissed with prejudice.
2. For the reasons stated above, notice of said dismissal is not required.
3. Each party shall bear its own costs, fees, and expenses.
4. The Clerk is directed to close this case.

Dated: February 28, 2023

Respectfully submitted,

s/ Gregory P. Joseph
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