Redacted Version

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., et al., *Plaintiffs*, v. THE UNITED STATES, *Defendant.*	No. 13-465C (Judge Sweeney)

PLAINTIFFS' PUBLIC REDACTED REPLY IN SUPPORT OF THEIR MOTION TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS WITHHELD FOR PRIVILEGE

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INTRODUCTION

Defendant's response to Plaintiffs' Motion to Compel accuses Plaintiffs of " 'picking the lint' off the Government's massive document production in this case," Def.'s Resp. in Opp'n to Pls.' Mot. to Compel Prod. of Certain Documents Withheld for Privilege at 1 (Jan. 21, 2016), Doc. 284 ("U.S. Br."), but what Defendant does not mention is that a large portion of its "massive" production is comprised of lengthy news compilations, SEC filings, and other publicly available documents, many of which Defendant produced in duplicate, in some instances dozens of times. Setting aside Defendant's misleading raw numbers, Defendant has produced a far smaller universe of nonpublic materials that genuinely speak to the issues in this case, and Defendant only turned over some of the most damaging documents it has produced to date after it became clear that those documents would otherwise be the subject of a motion to compel. Thus, while Defendant dismisses Plaintiffs' concerns as insubstantial, there is every reason to believe that Defendant has used overbroad and otherwise improper claims of privilege to withhold some of the most important documents in this case. The disputed privilege issues identified in Plaintiffs' motion are important, and they deserve a more careful treatment than Defendant has given them.

ARGUMENT

I. The Court Should Order Defendant To Re-review the Documents It Has Withheld for Privilege Under the Appropriate Legal Standards.

Each time Plaintiffs have asked Defendant to reexamine a sample of the documents listed on its privilege logs, Defendant has responded by producing a significant fraction of the documents in question. In September, Defendant responded to a 170-item list by producing 41 documents; in November, Defendant responded to an 88-item list by producing 17 documents. *See* Pls.' Mot. to Compel Prod. of Certain Documents Withheld for Privilege at 6–10 (Nov. 23,

2015), Doc. 270 ("Pls.' Mot."). That trend continued after Plaintiffs filed their motion to compel, with Defendant producing an additional eight documents in light of Plaintiffs' motion. Letter from Elizabeth M. Hosford to Vincent J. Colatriano (Jan. 27, 2016), Exhibit 1 at A002; Letter from Elizabeth M. Hosford to Vincent J. Colatriano (Dec. 8, 2015), Exhibit 2 at A004–05. These supplemental productions of previously withheld documents strongly suggest that if Defendant reexamined all of the documents it has withheld for privilege, it would conclude that many of those documents should be produced.

Defendant argues that its supplemental productions show only that it has sought in good faith to withdraw improper privilege assertions when Plaintiffs have specifically asked it to reexamine particular documents. U.S. Br. 38–40. But Defendant is obliged to carefully review *all* of the documents it withholds for privilege, not just a small sampling of such documents selected from Defendant's highly generic privilege logs. Those logs do not provide enough information to enable Plaintiffs to identify all of the documents Defendant has improperly refused to produce, and Defendant should not be permitted to withhold non-privileged documents because Plaintiffs cannot guess where they appear on Defendant's voluminous and often vague privilege logs.

Reexamination of the documents Defendant has withheld is appropriate in light of the haphazard and overbroad approach that Defendant appears to have taken to its privilege assertions in this case, and two of the documents produced in recent weeks further underscore why re-review is necessary. UST00061067 includes [redacted] Exhibit 3 at A006–08. Plaintiffs had no way of knowing that this document included emails sent and received by non-governmental third parties because the names of those

third parties appear nowhere on Defendant's privilege logs. *See* App. to Pls.' Mot. to Compel Prod. of Certain Documents Withheld for Privilege Volume 1 at A007 (Nov. 23, 2015), Doc. 270-1 ("App. to Pls.' Mot.") (privilege log entry for UST00061067). But for the happenstance of Plaintiffs including this document on the illustrative list of privilege log entries appended to their motion to compel, Plaintiffs would still not have this obviously responsive and non-privileged document. Another document, UST00522062, is [redacted] Exhibit 4 at A010–29. Defendant's privilege log mischaracterized this document as a "predecisional" "draft," Exhibit 5 at A031, but Defendant now concedes that it is the final version of a speech that was publicly delivered, Exhibit 1 at A002. A public speech plainly cannot be privileged, but Defendant nevertheless withheld this speech until after Plaintiffs filed their motion to compel.[1] As these examples and the many other documents Defendant produced in anticipation of Plaintiffs' motion illustrate, Defendant's privilege logs are riddled with factual errors that make improperly withheld documents appear privileged. Because Defendant's logs are inherently unreliable, Defendant should be required to reexamine *all* of the documents that appear on them with the same care that it reexamined the small subset of documents that Plaintiffs specifically identified.

Quite apart from the fact that Defendant appears to have withheld materials that ought to be produced even under Defendant's *own* understanding of the law, Defendant should be compelled to reexamine the documents it has withheld for privilege so that it can apply the correct legal standards as set out in the Court's ruling on Plaintiffs' motion to compel.

[1] Plaintiffs' motion specifically identified what Defendant now represents was an earlier draft of this speech, UST00492699. *See* U.S. Br. 34 n.15; App. to Pls.' Mot. Volume 1 at A005.

Defendant resists such relief, arguing that Plaintiffs' motion comes too late and should have been filed after the parties discussed various privilege issues last March. U.S. Br. 2–4. But as the email correspondence Defendant attached to its response shows, **Defendant's** position in March was that it was premature for Plaintiffs to raise the vast majority of the issues identified in their motion to compel until after Defendant completed its initial document productions and sent Plaintiffs final privilege logs. App. to Def.'s Resp. in Opp'n to Pls.' Mot. to Compel Prod. of Certain Documents Withheld for Privilege at A1–A5 (Jan. 21, 2016), Doc. 284-1 ("App. to U.S. Br."). The Court expressed sympathy for Defendant's position on the timing of any motion to compel at the February 25, 2015 status conference, and Plaintiffs ultimately acceded to Defendant's preferred approach. *See* Transcript of Feb. 25, 2015 Status Conference at 13:21–25 (THE COURT: "[G]iven the breadth of this litigation, given the voluminous nature of the production, I don't think a motion to compel is wise at this stage. I think the Government should be given more time."). It comes with extremely poor grace, and a not inconsiderable measure of chutzpah, for Defendant to now argue that Plaintiffs filed their motion too late. The Court should reject out of hand Defendant's suggestion that it should be permitted to withhold documents it failed to produce under an improper legal standard.

II. The Court Should Order Defendant To Produce Materials It Has Improperly Withheld Under the Deliberative Process Privilege.

A. Heightened Scrutiny of Defendant's Deliberative Process Privilege Claims Is Required Because Defendant Failed To Prepare Timely Supporting Agency Affidavits.

The requirement that an agency asserting the deliberative process privilege do so through a formal affidavit from a senior agency official is an important check on the abuse of a privilege that is only supposed to be invoked after a careful weighing of competing values. *See Marriott Int'l Resorts, LP v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006) (noting importance of

"actual personal involvement" by agency official "in the complex process of invoking the privilege"). Defendant's approach to this requirement—having trial counsel unilaterally decide what to withhold and then asking agency officials to bless counsel's decision after the fact in response to a motion to compel—transforms this important check into a meaningless formality. It is thus *Defendant's* understanding of the law that makes the affidavit requirement "an enormous, unnecessary burden on Government employees," U.S. Br. 8, for the requirement serves no purpose if agency officials need not exercise their independent judgment about when to assert the deliberative process privilege. Indeed, Defendant's approach to the affidavit requirement is especially problematic in a case like this one, where the vague and unreliable nature of its privilege logs make it impossible for Plaintiffs to identify every improperly withheld document in a comprehensive motion to compel.

In light of the affidavit requirement's purpose, the better view is that Defendant's belated production of declarations in response to Plaintiffs' motion "erod[es] the credibility of [the government's] claim of the privilege" and justifies the application of "heightened scrutiny to [its] assertion." *Pacific Gas & Elec. Co. v. United States*, 71 Fed. Cl. 205, 208 (2006) (hereinafter "*Pacific Gas II*"). Defendant derides this approach as "the *Pacific Gas* minority view," U.S. Br. 8, but it makes no attempt to reconcile its preferred legal rule with the basic function that agency deliberative process privilege affidavits are supposed to serve. As this Court and others have explained under similar circumstances, "the time to make the showing that certain information is privileged is at the time the privilege is asserted, not months later when the matter is before the Court on a motion to compel." *Confidential Informant 59-05071 v. United States*, 108 Fed. Cl. 121, 135 (2012) (quoting *Anderson v. Marion Cnty. Sheriff's Dep't*, 220 F.R.D. 555, 562 n.5 (S.D. Ind. 2004)). Given Defendant's failure to follow that basic procedural requirement, the

Court should examine its assertions of the deliberative process privilege with particular skepticism.

Defendant's suggestion that Plaintiffs did not give them a fair opportunity to provide the necessary affidavits before filing their motion ignores one important fact: Defendant categorically refused to furnish the required affidavits in the absence of a motion to compel. *See* App. to Pls.' Mot. Volume 1 at A013–A014 ("If plaintiffs ultimately file a motion to compel challenging the applicability of [the deliberative process privilege] to specific documents, we will provide declarations in support of our privilege assertions with respect to those documents."). Plaintiffs were justified in filing their motion with that written refusal in hand, and Defendant never suggests that it would have produced the affidavits sooner had Plaintiffs alerted it to their decision not to specifically identify in their motion a handful of documents the parties had previously discussed.[2]

B. Documents That Reveal Defendant's Purposes, Intentions, and Motivations for Imposing the Net Worth Sweep Are Relevant to this Litigation and May Not Be Withheld Under the Deliberative Process Privilege.

Plaintiffs explained in their motion that Judge Wheeler's carefully reasoned opinion in *Starr* and the decisions of numerous other courts establish that the deliberative process privilege may not be used to shield materials that are relevant to a dispute over the government's purposes, intentions, and motivations. Pls.' Mot. 15 (citing, *inter alia*, *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998); Discovery Order No. 6, *Starr Int'l Co. v. United States*, 11-779C (Fed. Cl. Nov. 6, 2013), ECF No. 182, App. to Pls.' Mot. Volume 2 at A163). Ignoring *Starr* and without citing any Federal Circuit

[2] Defendant responded to Plaintiffs' original 88-item list by producing 17 documents, and Plaintiffs' motion to compel specifically identifies 58 documents. *See* App. to Pls.' Mot. Volume 1 at A001–A026.

authority, Defendant responds by baldly asserting that "the Federal Circuit does not recognize an exception to the deliberative process privilege in cases involving the Government's subjective intent." U.S. Br. 10. The lone case that Defendant identifies to support this proposition is *First Heights Bank, FSB v. United States*, 46 Fed. Cl. 312, 321–22 (2000). But as Plaintiffs explained in a passage of their motion to which Defendant never responds, *First Heights Bank* concluded that a dispute over the government's intentions weighs heavily in favor of finding that a litigant has made the necessary showing of need to overcome the qualified deliberative process privilege. *See* Pls.' Mot. 15 n.6; *First Heights Bank*, 46 Fed. Cl. at 322. And in any event, the *First Heights Bank* Court's decision to treat this issue under the rubric of need rather than applying a categorical exception to the deliberative process privilege where the government's intent is in dispute is at odds with the overwhelming weight of authority. The Court should follow Judge Wheeler's opinion in *Starr* and rule that Defendant cannot withhold documents under the deliberative process privilege that are relevant to the parties' dispute over Defendant's purposes, intentions, and motivations for imposing the Net Worth Sweep.

Defendant seeks to relitigate the terms of this Court's discovery order when it argues that its purposes, intentions, and motivations are irrelevant to the issues raised in its motion to dismiss. *See* U.S. Br. 10–12. The parties have spent the better part of two years engaged in discovery into topics that include "each party's assessment of future profitability," Discovery Order at 3 (Feb. 26, 2014), Doc. 32 ("Discovery Order"), "the purposes of FHFA's actions," *id.*, "the reasonableness of expectations about [the Companies'] future profitability," *id.* at 4, and "why the government allowed the preexisting capital structure and stockholders to remain in place." *id.* Under the present circumstances, it is much too late for Defendant to argue that Plaintiffs have no basis for taking discovery into its reasons for imposing the Net Worth Sweep.

In any event, Defendant's arguments as to relevance are unpersuasive for the same reasons that this Court did not find them convincing when it identified topics for discovery in February 2014. Thus, while Defendant claims in its response to Plaintiffs' motion that the government's motives have no bearing on the reasonableness of investment-backed expectations, U.S. Br. 11–12, its Motion to Dismiss argued that Plaintiffs could not have a reasonable expectation of a return on their investment where government regulators take action that they believe to be necessary to save a heavily regulated financial institution from insolvency. *See* Defendant's Mot. to Dismiss at 9–10 (Dec. 9, 2013), Doc. 20 (arguing that the Net Worth Sweep was imposed out of "concern that, under the weight of the fixed dividend, the Enterprises would run through the remaining Treasury investment capacity, leading to insolvency"); *id.* at 35 (urging Court to follow Federal Circuit precedent that concluded there was no taking where regulator "became satisfied that the Bank was insolvent and chose to place it in receivership").

Defendant does not appear to dispute that *FHFA's* reasons for agreeing to the Net Worth Sweep are relevant to whether that agency should be treated as the United States for purposes of the Tucker Act, *see* U.S. Br. 12, and the Court should at a minimum issue an order making clear that such documents may not be withheld under the deliberative process privilege. And despite Defendant's arguments to the contrary, Treasury's purposes, intentions, and motivations are likewise relevant. If internal Treasury documents reveal that Treasury agreed to the Net Worth Sweep to obtain a massive financial windfall at the Companies' expense without any concern that FHFA might object, that would provide compelling evidence to support the conclusion that FHFA acted as an agent or arm of Treasury when it agreed to the Net Worth Sweep. Such documents are clearly relevant to issues raised in Defendant's motion to dismiss, and under well-established precedent they cannot be withheld under the deliberative process privilege.

C. FHFA May Not Invoke a Privilege that Exclusively Belongs to the Government While Simultaneously Arguing That It Is Not the Government.

Defendant's response to Plaintiffs' motion only underscores the fact that it proposes what this Court has previously described as a "schizophrenic approach" to FHFA's assertion of the deliberative process privilege. Transcript of June 19, 2014 Status Conference at 24, App. to Pls.' Mot. Volume 3 at A175. Under Defendant's approach, the Court would assume for purposes of Plaintiffs' motion that FHFA is the United States, thereby allowing Defendant to withhold materials that Plaintiffs need to prove that very proposition. This makes no sense. It is Defendant's burden to show that FHFA is entitled to invoke the deliberative process privilege—a privilege that belongs exclusively to the government—and Defendant cannot meet that burden while simultaneously arguing that FHFA is not the United States.

Defendant resists this conclusion by arguing that "an entity may be deemed to be the Government for one purpose but not another." U.S. Br. 14. But the lone case that Defendant cites for this proposition, *Hall v. American Nat'l Red Cross*, 86 F.3d 919, 922–23 (9th Cir. 1996), said only that the Red Cross's immunity from state tax liability did not mean that it was bound by the Free Exercise Clause of the First Amendment. That is very far afield from the question here: whether a litigant may simultaneously invoke the sovereign federal government's deliberative process privilege while maintaining that it is not the federal government for purposes of the Tucker Act. Both of those issues turn on whether FHFA should be treated as an arm of the federal government for purposes of this litigation, and FHFA should not be able to shield information from discovery that could bear on the question whether it should be treated as an agency of the federal government by invoking a privilege reserved for such agencies.

Defendant argues that FHFA is entitled to invoke the deliberative process privilege because its decisions "have ramifications for national housing policy." U.S. Br. 15. But that

argument ignores the key question: whether those decisions are being made by an agency of the federal government, which is precisely what FHFA denies. Private entities, such as Fannie and Freddie themselves, make decisions that have ramifications for federal housing policy, but that does not entitle them to invoke the deliberative process privilege. And while Defendant is correct that the FDIC and Resolution Trust Corporation have successfully asserted the deliberative process privilege in other contexts, Defendant fails to cite any case in which either agency did so while at the same time arguing that it was immune from suit under the Tucker Act.

The Court should reject Defendant's incoherent approach and rule that FHFA may not withhold materials under the deliberative process privilege in this litigation.

D. Defendant Cannot Use the Deliberative Process Privilege To Shield Post-Decisional Documents That It Acknowledged Withholding.

A long line of cases from this Court and others establishes that documents created after a decision was made may not be withheld under the deliberative process privilege. Pls.' Mot. 18–20 (citing, *inter alia*, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975); *Abramson v. United States*, 39 Fed. Cl. 290, 294 (1997)). Defendant's privilege logs nevertheless include numerous entries for documents that appear to discuss the Third Amendment that are dated after that amendment was signed on August 16, 2012. Plaintiffs raised this issue with Defendant before filing their motion to compel, and this is what Defendant said: "[T]he Government may assert the deliberative process privilege with respect to communications that post-date a decision if the communications recount Government employees' views of the proposed decision before the decision was adopted . . . . *We have withheld documents falling into this category pursuant to this rule.*" App. to Pls.' Mot. Volume 1 at A015 (emphasis added) (citations omitted). As Plaintiffs explained in their motion to compel, Defendant's understanding of the law is contrary

to the overwhelming weight of precedent and would do nothing to further the deliberative process privilege's ultimate purpose.

Puzzlingly, despite having previously acknowledged that it "withheld documents falling into this category," *id*., Defendant now contends that "Fairholme cannot establish that such documents have been withheld," U.S. Br. 31. Defendant's argument is difficult to follow, but its position appears to be that the Court should not compel production of improperly withheld post-decisional documents because, of the three examples of such documents identified in Plaintiffs' motion, two are not truly post-decisional and the third has now been belatedly produced. *See id.* at 21–22. But Defendant is not free to withhold documents under an improper legal standard to the extent that Plaintiffs are unable to guess which items on its Delphic, 11,000-entry privilege logs were withheld under that standard. Defendant has admitted that it asserted the deliberative process privilege over post-decisional documents that discuss the Third Amendment, and the Court should order Defendant to identify and produce those documents to the extent that they are not covered by any other claim of privilege.

E. The Court Should Compel Production of Financial Projections, Models, and Other Purely Factual Materials that Defendant Improperly Withheld Under the Deliberative Process Privilege.

Courts that consider the application of the deliberative process privilege to an agency's analysis of data take a commonsense approach, asking, as a practical matter, whether the materials at issue would reveal anything about an agency's deliberations. Accordingly, numerous courts have held that where a data analysis produces "facts which then serve[d] as the grist for the agency's decisionmaking," the privilege does not apply. *Reilly v. United States EPA*, 429 F. Supp. 2d 335, 352–53 (D. Mass. 2006); *see also Lahr v. National Transp. Safety Bd.*, 453 F. Supp. 2d 1153, 1189 (C.D. Cal. 2006), *rev'd and remanded in part on other grounds*,

569 F.3d 964 (9th Cir. 2009); *Carter v. United States Dep't of Commerce*, 186 F. Supp. 2d 1147, 1154–57 (D. Or. 2001). Defendant dismisses those cases as irrelevant because they did not involve the analysis of *financial* data, U.S. Br. 23, but it is unable to offer any reason why modeling of a company's finances is deliberative when similar modeling of a plane crash, mercury emissions, or census results is not. The financial projections and models that Plaintiffs seek were the factual inputs for agency deliberations over the Net Worth Sweep, not products of the deliberative process, and the Court should issue an order making clear that such materials may not be withheld under the deliberative process privilege.

Defendant urges the Court to take a different approach on the strength of *American Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 269–70 (D.D.C. 2013), but the court in that case held that financial projections could be withheld under the deliberative process privilege in part because there was no concern that the defendant agency had "cherry-pick[ed]" the materials it disclosed. Here, in contrast, Defendant appears to have selectively disclosed financial projections that support its theory of the case while withholding others that do not. *See* Pls.' Mot. 25. In view of that troubling approach, the Court should construe the deliberative process privilege narrowly and hold that Defendant's financial projections and models are non-deliberative. *See Army Times Publ'g Co. v. Department of the Air Force*, 998 F.2d 1067, 1070–72 (D.C. Cir. 1993) (where agency had already released information similar to that sought by plaintiff, it was required to make showing that further disclosures "would actually inhibit candor in the decision-making process").

For similar reasons, the Court should not accept at face value Defendant's arguments that the factual information in other documents identified in Plaintiffs' motion cannot be segregated from any deliberative information these documents may also contain. While Plaintiffs do not

quarrel with Defendant's position that truly non-segregable factual information may be withheld under the privilege, Defendants' sweeping understanding of what materials qualify as "deliberative" justifies *in camera* review of the limited number of documents identified in Plaintiffs' motion.

F. Plaintiffs Have Made a Sufficient Showing To Overcome the Qualified Deliberative Process Privilege.

Courts deciding whether to order production of documents covered by the qualified deliberative process privilege balance a variety of considerations, including the relevance of the materials to the litigation, the availability of other evidence, the government's role in the litigation, the seriousness of the litigation, and the degree to which disclosure would chill future government deliberations. *See Pacific Gas II*, 71 Fed. Cl. at 210 n.6. Defendant concedes the seriousness of this litigation and that the government is a litigant, U.S. Br. 29 n.12, both of which factors weigh heavily against the assertion of the privilege here, but it nevertheless argues that Plaintiffs cannot overcome the qualified privilege because the materials they seek are: (1) irrelevant; (2) cumulative; and (3) likely to cause harm to future government deliberations if disclosed. U.S. Br. 28–35. Defendant is wrong on all three counts.

First, it is rather late in the day for Defendant to argue that its reasons for imposing the Net Worth Sweep and evidence in its sole possession concerning the Companies' future profitability is irrelevant to the issues before the Court. The Court authorized discovery into those topics almost two years ago, after considering and rejecting many of the same arguments Defendant renews in its opposition to Plaintiffs' motion. *See* Discovery Order; Def.'s Opp'n to Pls.' Mot. for Discovery at 17 (Feb. 12, 2014), Doc. 30 (arguing that "[n]either the purpose of the Third Amendment nor the voluntariness of the Third Amendment is relevant" to Plaintiffs' takings claims and that "the character of the alleged Government action – in rescuing the

Enterprises in a time of financial crisis – weighs against finding a regulatory taking"). Defendant's reasons for imposing the Net Worth Sweep and the Companies' future profitability were central to the jurisdictional arguments in its motion to dismiss, and its assertion that documents relating to those topics are "wholly irrelevant" has already been considered and rejected. U.S. Br. 29.

Second, while Defendant contends that Plaintiffs do not need the materials at issue here because it has already explained its basis for imposing the Net Worth Sweep, there is reason to seriously doubt the veracity of the materials to which it directs the Court, all of which come from the D.D.C. administrative record that was already in the public domain when this Court authorized discovery. To take just one example, Defendant points to an August 8, 2012 Treasury presentation that purports to show that the Companies would not be able to afford to pay their dividends in cash absent the Net Worth Sweep. App. to U.S. Br. at A96–A103. But [redacted] *See* Pls.' Mot. 6 (citing App. to Pls.' Mot. Volume 1 at A057, A061, A063, A066). And as Plaintiffs explained in their motion, [redacted] *See* Pls.' Mot. 7 (citing App. to Pls.' Mot. Volume 1 at A078). As that evidence shows, it is clear that many of the materials in Defendants' possession contradict the public, made-for-litigation explanation for the Net Worth Sweep that Defendant has promoted in this Court and elsewhere. There is no adequate substitute for deliberative materials that would reveal Defendant's true

reasons for imposing the Net Worth Sweep and its honest assessment of the Companies' future profitability. *See* U.S. Br. 24 (acknowledging that "FHFA makes its own projections as to Fannie Mae's and Freddie Mac's expected performance" and that such projections have been withheld).

Third, Defendant recites boilerplate arguments about the importance of avoiding disclosures that would chill future agency deliberations, U.S. Br. 33–34, but it never addresses Plaintiffs' specific arguments as to why there is little, if any, threat of such a chilling effect here. Defendant has already selectively disclosed allegedly deliberative documents in an effort to further its litigation strategy, and those disclosures show that Defendant itself is more concerned about winning this case than chilling future agency deliberations. Any materials subject to the qualified privilege that Defendant is ordered to produce will be covered by the Court's protective order to the extent that their public disclosure would actually cause cognizable harm. And the disclosure of materials created *after* the Net Worth Sweep was announced could not conceivably chill future agency deliberations over *pending* matters. Those arguments go completely unaddressed in Defendant's response to Plaintiffs' motion, and they show that the fundamental purpose of the deliberative process privilege would not be served by withholding the materials that Plaintiffs seek.

In deciding whether Plaintiffs have made the necessary showing to overcome the deliberative process privilege, the Court must give substantial weight to "the interest of the litigants, and ultimately of society, in accurate judicial fact finding." *Scott Paper Co. v. United States*, 943 F. Supp. 489, 496 (E.D. Pa. 1996). Defendant attacks a straw man when it dismisses that interest as an idle desire to satisfy "the public's curiosity." U.S. Br. 34.

III. The Court Should Order Defendant To Produce Materials It Has Improperly Withheld Under the Bank Examination Privilege.

A. The Court Should Refuse To Extend the Bank Examination Privilege to Non-Bank Participants in the Financial Industry.

Whatever the merits of the judicially-created bank examination privilege, until three years ago it was universally understood to be a unique feature of banking law that did not extend to non-bank participants in the financial industry. Then FHFA began making the argument that Defendant asserts here, urging that Fannie and Freddie are in certain respects similar to banks and that FHFA should therefore be permitted to withhold otherwise discoverable examination materials. Only one district court has endorsed this argument after full briefing,[3] and that court's decision failed to apprehend the Pandora's Box of privilege claims that its reasoning would open. *See FHFA v. JPMorgan Chase & Co.*, 978 F. Supp. 2d 267, 272–77 (S.D.N.Y. 2013). If FHFA can assert the bank examination privilege here, then why should the same privilege not also be available to agencies that regulate broker-dealers, mutual funds, insurance companies, and a host of other non-bank participants in the financial industry? Defendant has no answer to that question, and the logic of its argument would justify creation of a common law evidentiary privilege for financial regulators that is far broader than any privilege that has ever been recognized.

Courts are rightly reluctant to exercise their authority to create new evidentiary privileges, which invariably contravene the fundamental principle that "the public . . . has a right

[3] Defendant also cites an unpublished opinion in which a district court allowed FHFA to invoke the bank examination privilege, but the party that moved to compel production of documents in that case does not appear to have disputed FHFA's capacity as a non-bank regulator to invoke the bank examination privilege. *See* Mem. of Law in Supp. of Mot. to Compel the Prod. of Documents from the FHFA, *Syron v. FHFA*, No. 1:14-mc-00359-JEB (D.D.C. Apr. 10, 2014), ECF No. 1-1.

to every man's evidence." *University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (omission in original) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)). That reluctance deserves special weight where the financial industry is concerned, for it is subject to a complex web of laws and regulations that leave little room for common law innovation. Legislatures are perfectly capable of creating evidentiary privileges for financial regulators when they believe that doing so is appropriate—a fact underscored by the state statutes cited by Defendant that shield from discovery certain documents relating to insurance regulation. *See* U.S. Br. 18 n.6. Congress has not seen fit to extend the bank examination privilege to FHFA's regulation of Fannie and Freddie, and this Court should not take it upon itself to do so.

More fundamentally, Defendant is wrong when it argues that there is no meaningful distinction between the FDIC's regulation of a bank and FHFA's regulation of the Companies. Banks make long-term loans using short-term deposits, and the resulting mismatch between assetss and liabilities makes even healthy banks vulnerable to collapse when customers lose confidence and demand return of their deposits *en masse*. Worry about bank runs was key to the early development of the bank examination privilege, *see Bank of America Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100, 104 (D.C. Cir. 1939), and it has no analogue where Fannie and Freddie are concerned. To the contrary, in their essence Fannie and Freddie are insurance companies—they insure against defaults on the mortgages they securitize. Like any financial regulator, FHFA is understandably anxious to "maintain[ ] public confidence" in the industry it oversees, U.S. Br. 19, but that general point only masks the fundamental differences between bank regulators, which have traditionally been allowed to invoke the bank examination privilege, and other financial regulators, which have not. *See City of Sterling Heights Gen. Emps.' Ret. Sys. v. Prudential Fin., Inc.*, 2015 WL 1969368, at *4–*5 (D.N.J. Apr. 30, 2015) (declining to

recognize a federal common law "insurance examination privilege" and observing that party claiming privilege had been unable to identify "any case in which a federal court recognized a common law privilege similar to the one urged here").

B. The Bank Examination Privilege Does Not Shield Documents Created While a Bank Operates Subject to Its Regulator's Complete Control.

As Plaintiffs explained in their motion, even if the Court concludes that FHFA may invoke the bank examination privilege with respect to its communications with the Companies, it should not further extend the privilege to materials created during the conservatorships. *See* Pls.' Mot. 30–31. That is because the central rationale for the bank examination privilege—that it is needed to assure frank communications between a bank and its regulator—is wholly inapposite while the bank is under its regulator's total control. Defendant suggests that courts have rejected this argument when made with respect to banks in receivership. U.S. Br. 20. But the only case it cites to support this proposition is *Shoenmann v. FDIC*, which held the bank examination privilege inapplicable to certain information that *had already been produced* and that FDIC sought to keep under seal. *See* 2012 WL 2589891, at *4 (N.D. Cal. July 3, 2012) ("[T]he bank examination privilege . . . that the FDIC invokes do[es] not directly apply to this situation."). FHFA selected the Companies' current management, who have declared that during conservatorship their sole allegiance is to FHFA. *See* Pls.' Mot. 31. Under these circumstances, there is no need for an evidentiary privilege to promote open communications between FHFA and the Companies.

Unable to justify the bank examination privilege as a means of promoting openness between FHFA and companies that it controls, Defendant shifts the focus to a second rationale for the bank examination privilege: promoting public confidence in banks. U.S. Br. 19 (citing *JPMorgan*, 978 F. Supp. 2d at 274). Setting aside the fact that this rationale for the privilege

makes little sense when applied to financial institutions not susceptible to bank runs, any concern over how production of documents could affect public confidence in Fannie and Freddie is fully addressed by the protective order in this case. Second Amended Protective Order ¶ 2 (Nov. 9, 2015), Doc. 256. Thus, to the extent that public disclosure of any of the materials that Defendant has withheld under the bank examination privilege would truly cause disruption in the financial markets, those materials can be produced and maintained under seal.[4]

IV. Plaintiffs Have Made the Showing That Is Necessary To Overcome the Qualified Presidential Communications Privilege.

The D.C. Circuit has held that the qualified presidential communications privilege can be overcome by a showing that a document "likely contains important evidence" that "is not available with due diligence elsewhere." *In re Sealed Case*, 121 F.3d 729, 754 (D.C. Cir. 1997). Defendant insists that the Court should apply a more demanding standard here because this is a civil rather than a criminal case, U.S. Br. 36, but it never articulates the test that it would have the Court apply. In any event, Plaintiffs' specific showing of need satisfies even a more rigorous standard than the one articulated by the D.C. Circuit.

Defendant argues that Plaintiffs have not made the necessary showing of need because we are unable to provide more specific details about the contents of the four documents identified in the motion to compel. U.S. Br. 36–37. But if there is to be any judicial oversight of the application of the qualified presidential communications privilege at all, Plaintiffs cannot be required to correctly guess the contents of documents in Defendant's sole possession. Defendant

[4] As with Defendant's assertions of the deliberative process privilege over the specific documents identified in Plaintiffs' motion, to the extent that the Court rejects Plaintiffs' legal arguments regarding the bank examination privilege it should review the specifically identified bank examination documents *in camera* to confirm that they are genuinely privileged, do not contain segregable factual information, and that Plaintiffs' need for them is not enough to overcome the qualified privilege. *See* Pls.' Mot. 34–35.

also argues that Plaintiffs should be satisfied with various Treasury materials it has already produced. U.S. Br. 37. But White House officials played a unique role in the decision to impose the Net Worth Sweep, and this fact cannot be seriously disputed in light of the materials attached to Plaintiffs' motion. *See, e.g.*, App. to Pls.' Mot. Volume 4 at A258 ([redacted]); *id.* at A264 ([redacted]); *id.* at A268 ([redacted]). As this Court has already observed, "[h]igh-ranking officials within an agency, corporation, or other institution are not fungible," Order at 2 (Nov. 17, 2015), Doc. 264, and the communications of such officials are not fungible either. Plaintiffs have made the showing necessary to justify requiring Defendant to formally invoke the privilege and *in camera* review of the four documents identified in Plaintiffs' motion.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion to Compel.

Date: February 1, 2016

Respectfully submitted,

s/ Charles J. Cooper

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 1st day of February, 2016, via the Court's Electronic Case Filing system.

s/ Charles J. Cooper
Charles J. Cooper

APPENDIX

APPENDIX TABLE OF CONTENTS

EXHIBIT 1

U.S. Department of Justice

Civil Division
Telephone: (202) 616-0332
Elizabeth.Hosford@usdoj.gov

Washington, DC 20530

REK:KMD:EHosford
154-13-465

January 27, 2016

By Courier

Vincent J. Colatriano
Cooper & Kirk, PLLC
1523 New Hampshire Ave. NW
Washington, D.C. 20036
202-220-9656

Re: *Fairholme Funds, Inc. et al., v. United States*, No. 13-465C (Fed. Cl.)

Dear Mr. Colatriano,

Please find enclosed defendant's additional production replacement images. This production contains two documents, UST00061011 and UST00522062, identified at footnotes 8 and 15 of our response to your motion to compel. UST00061011 is a memorandum dated August 9, 2012. UST00522062 is the final version of UST00492699, a speech given by Michael Stegman at a conference at NYU.

The production disk bears the following Bates ranges: UST00061011 – UST00061014 and UST00522062 – UST00522081.

Very truly yours,

ELIZABETH M. HOSFORD
Assistant Director
Commercial Litigation Branch

Enclosure

EXHIBIT 2

U.S. Department of Justice

Civil Division
Telephone: (202) 616-0332
Elizabeth.Hosford@usdoj.gov

Washington, DC 20530

REK:KMD:EHosford
154-13-465

December 8, 2015

By Courier

Vincent J. Colatriano
Cooper & Kirk, PLLC
1523 New Hampshire Ave. NW
Washington, D.C. 20036
202-220-9656

Re: *Fairholme Funds, Inc. et al., v. United States*, No. 13-465C (Fed. Cl.)

Dear Mr. Colatriano,

Please find enclosed defendant's additional production replacement images. The enclosed disk contains redacted images of several documents previously withheld in full.

UST00061067 and UST00385562 are copies of an email chain between a White House official and a Treasury employee. The earlier part of this chain contains emails between the White House official and third parties. These earlier emails are not privileged; they are segregable and producible. The latter part of this chain, solely between employees of the White House and Treasury, contains information protected by the deliberative process privilege, as well as non-privileged information. We produce these documents, along with two other documents we have identified from the same chain—UST00385565 and UST00385567—in redacted form.

UST00418517 contains briefing materials for Secretary Geithner. We previously withheld it as protected by the deliberative process privilege. However, as portions of it were previously included as part of the administrative record in district court, we are withdrawing our privilege assertion over those portions. We have redacted the document for responsiveness pursuant to our previous agreement with respect to materials of this nature.

UST00549791 is a copy of an email chain between a White House official and Treasury employees that we previously withheld in full based on the presidential communications privilege. We produce it here in redacted form.

Very truly yours,

ELIZABETH M. HOSFORD
Assistant Director
Commercial Litigation Branch

Enclosure

EXHIBIT 3
REDACTED

EXHIBIT 4
REDACTED

EXHIBIT 5

Excerpt from November 19, 2015 Treasury Privilege Log

Bates Number	From	To	CC	Doc Family Date	Privileges	Description
UST00522062	Stegman, Michael^			5/31/2012	DPP	Draft speech prepared by Treasury staff containing predecisional deliberations regarding housing finance reform.