No. 13-465C
(Judge Sweeney)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., et al.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

**DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS WITHHELD FOR PRIVILEGE**

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January 21, 2016

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**DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS WITHHELD FOR PRIVILEGE**

Defendant, the United States, respectfully submits this response in opposition to the motion to compel the production of documents (Pls. Mot., Nov. 23, 2015, ECF No. 270) filed by plaintiffs, Fairholme Funds, Inc., *et al.* (collectively, Fairholme). For the reasons stated below, we respectfully request that the Court deny Fairholme's motion.

## INTRODUCTION

In connection with the limited jurisdictional discovery ordered by the Court, the United States has produced approximately 48,000 documents, comprising more than 500,000 pages, in response to Fairholme's document production requests. In addition, the Government has withheld (and logged) approximately 12,000 privileged documents. Given the highly sensitive matters of national housing policy involved in this case, it should not be surprising that many of the documents identified on the privilege logs were withheld upon the basis of governmental privileges, including the deliberative process privilege, the bank examination privilege, and the presidential communications privilege.

By "picking the lint" off the Government's massive document production in this case—and even criticizing actions that demonstrate the Government's good faith efforts to work with

Fairholme to resolve privilege disputes — Fairholme essentially argues that the Court should require a Government "do-over." In its motion to compel, Fairholme urges the Court to "direct [the Government] to re-review all of the documents it has withheld for privilege, applying the *proper legal standards* as clarified by the Court in response to this motion." Pls. Mot. 10 (emphasis added). The words "proper legal standards" are important here, because, in reviewing Fairholme's motion, it is apparent that, notwithstanding its largely trivial complaints regarding the Government's having revised its privilege logs or reconsidered initial privilege determinations, Fairholme's arguments *generally* involve *categorical* legal issues—particularly relating to the *scope* of various governmental privileges. Because Fairholme could have briefed those issues months ago, instead of deferring them to the eleventh hour of the jurisdictional discovery period, its unduly burdensome and unjustified demand for the Government to redo its privilege review should be rejected.

With respect to the substantive privilege issues, Fairholme's objections to the Government's assertions of privilege are unfounded. Fairholme's broad arguments relating to the procedures for asserting governmental privileges and the scope of those privileges are contrary to the weight of authority. Further, in those instances where Fairholme's arguments concern specifically identified documents, we establish below that the Government has properly applied the privileges to the particular documents in question.

The Court should also reject Fairholme's request that the Government produce otherwise privileged documents based upon Fairholme's asserted evidentiary "need" for the documents. Fairholme focuses this request on documents that reveal the "purposes, intentions, and motivations for imposing the Net Worth Sweep." Pls. Mot. 22. In support of this request, Fairholme argues that the Government's reasons for executing the Third Amendment are "central

to issues in this litigation." This argument demonstrates a deep misunderstanding of the law governing Fairholme's takings claims. Properly pled takings claims are predicated on authorized actions of the Government that eliminate or diminish a cognizable property interest to an extent that requires the Government to pay just compensation. Thus, takings law does not concern itself with the subjective motivation issues that Fairholme insists are central to this case; certainly, those issues are not relevant to the specific topics of jurisdictional discovery authorized by the Court. Accordingly, Fairholme cannot lay the foundation necessary to overcome the deliberative process privilege, the bank examination privilege, or the presidential communications privilege, and the Court therefore should deny Fairholme's motion.

## BACKGROUND

Many of the issues raised in Fairholme's motion could have been raised at an earlier stage of jurisdictional discovery. Early last year, the Court, having been warned of the possibility of extensive motions practice in connection with the Government's privilege assertions, encouraged the parties to take a *categorical* approach in addressing privilege disputes. *See* Transcript of Proceedings at 18:10-13, Feb. 25, 2015, ECF No. 135 ("THE COURT: Well, so, what we will do, then, what you all will do by the end of March is you will take a macro, not micro, a macro approach to the various categories of documents where privileges may be asserted."). Pursuant to the Court's instructions, in March 2015, the parties discussed potential categories of privilege disputes.

Although it initially appeared that the parties might reach agreement to brief a significant number of disputed, categorical legal issues, several of the issues Fairholme suggested required an inefficient, document-by-document analysis. In a March 27, 2015 e-mail to Fairholme, the Government agreed that two categorical issues – (1) whether the FHFA may assert the bank

examination privilege, and (2) whether the Government may assert the deliberative process privilege with respect to post-decisional communications recounting views of the proposed decision before it was adopted – could be briefed immediately. *See* A1[1] (E-mail from Gregg M. Schwind, U.S. Dep't of Justice, to Vincent J. Colatriano, Cooper & Kirk, PLLC (Mar. 27, 2015, 15:28 EST)). At that time, Fairholme declined to pursue court resolution of those issues.

Throughout jurisdictional discovery, the Government has sought to work with Fairholme to resolve privilege disputes without involving the court. On August 12, 2015, Fairholme made its first particularized challenges to the Government's privilege assertions, identifying approximately 170 documents. Following careful, good-faith consideration of the documents, the Government responded in a detailed, September 1, 2015 letter. *See* Pls. App. A068-74[2] (Letter from Elizabeth M. Hosford. U.S. Dep't of Justice, to Vincent J. Colatriano, (Sept. 1, 2015)). Although insisting that its privilege log entries satisfied the obligations imposed by Rule 26 of the Rules of the United States Court of Federal Claims (RCFC), the Government provided additional information justifying the privileges asserted, and, where appropriate, withdrew certain provisional assertions of privilege, permitting production of documents (or portions of documents) that had been withheld. Apparently satisfied, Fairholme did not pursue its challenges. *See* Pls. App. A018 (Letter from Elizabeth M. Hosford to Brian W. Barnes, Cooper & Kirk, PLLC, at 6 n.3 (Nov. 13, 2015) (Nov. 13, 2015 letter)).

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[1] "A__" refers to the page of the appendix to this brief.

[2] "Pls. App. __" refers to the page of plaintiffs' appendix attached to its motion to compel.

In an October 21, 2015 e-mail, Fairholme identified approximately 60 additional documents that it contended should not have been withheld on the basis of privilege. *See* A6 (Email from Brian W. Barnes to Elizabeth M. Hosford, (Oct. 21, 2015; 11:57 EST) (Oct. 21, 2015 email)). The October 21, 2015 e-mail addressed the categorical issues the parties had previously discussed in March 2015. *Id.* (attaching letter from Vincent J. Colatriano, PLLC, to Gregg M. Schwind, (Feb. 5, 2015). On November 13, 2015, again after careful good faith consideration of Fairholme's positions, the Government responded in a detailed 14-page letter that reiterated the Government's positions on the categorical legal issues and specifically addressed challenges to individually identified documents. Again, while maintaining its privilege assertions over the vast majority of documents challenged, the Government withdrew certain provisional assertions of privilege, permitting production of documents (or portions of documents) that had been withheld. *See* Pls. App. A018-22 (Nov. 13, 2015 letter at 6-10). Fairholme has apparently abandoned its challenges to numerous documents discussed in the Government's November 13, 2015 letter (because they were not challenged in Fairholme's motion).

## ARGUMENT

### I. The Government Properly Asserted The Deliberative Process Privilege

The Court should reject Fairholme's challenge to the Government's deliberative process claims (*see* Pls. Mot. 11-12). Procedurally, the Government followed well-established precedent governing the *formal* assertion of the deliberative process and other governmental privileges. Substantively, there is no support for Fairholme's arguments that the United States' (including, for these purposes, FHFA) privilege assertions are "overbroad or without a legal basis."

### A. The Scope Of The Deliberative Process Privilege

Executive privileges, including the deliberative process privilege, promote the quality of the Government decision-making processes because public disclosure of agency deliberations may inhibit "frank discussion of legal or policy matters." *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975); *In re United States*, 321 F. App'x 953, 958 (Fed. Cir. Mar. 5, 2009) (per curiam) ("The deliberative-process privilege . . . was created to encourage open, frank discussion between subordinate and chief concerning administrative action . . . and to prevent injury to the quality of agency decisions.") (internal quotation marks and citations omitted). "The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." *U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001). When the information within the document is predecisional and deliberative, the deliberative process privilege exempts a document from disclosure. *In re United States*, 321 F. App'x at 958.

Generally, information is predecisional if "it was generated before the adoption of an agency policy." *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The deliberative process privilege protects both the documents that reflect deliberations that do not "ripen into agency decisions," *Sears, Roebuck*, 421 U.S. at 151 n.18, and the documents created *after* a decision that recount predecisional deliberations, when, for example, "they reveal the authors' respective views on the proposed guidance prior to its completion and publication." *Ford Motor Co. v. United States*, 94 Fed. Cl. 211, 223 (2010).

Documents are deliberative when they reflect "the give-and-take of the consultative process"; thus, the privilege "covers recommendations, draft documents, proposals, suggestions,

and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States*, 617 F.2d at 866. In addition, the privilege protects factual material that is "inextricably intertwined with policy making processes" is protected. *EPA v. Mink*, 410 U.S. 73, 92 (1973) (superseded on other grounds by statute). Likewise, analysis and evaluation of facts are within the scope of the privilege because they reveal the process by which an agency makes a decision. *See, e.g., In re United States*, 321 F. App'x at 960.

### B. The Government Has Satisfied The Procedural Requirements To Formally Assert The Deliberative Process Privilege

The Court should conclude that the Government followed the proper, judicially recognized procedure for asserting the deliberative process privilege. Fairholme argues that case law required the Government to provide, contemporaneously with service of the privilege log, declarations supporting the privilege assertions. Pls. Mot. 11–13. Fairholme, however, misunderstands the case law – both as it applies to the Government's responsibilities and to Fairholme's burden as well.

By identifying documents on a privilege log, the Government satisfied its obligations under the Court's Rules, which require timely objections to the production of documents. *See, e.g., In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (Government satisfied the rules when it timely objected to the subpoena for documents and stated the claim of privilege). Only a motion to compel the production of unproduced documents triggers the Government's obligation to provide a declaration formally asserting the deliberative process privilege. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953) (reversing and remanding decision compelling the production of documents subject to governmental privilege when formal claim of privilege was not submitted until after initial ruling on motion to compel); *Huntleigh USA Corp. v. United States*, 71 Fed. Cl. 726, 727 (2006) (holding that the "timing of defendant's formal

invocation of the [deliberative process] privilege was proper" because the procedural requirements of invoking the privilege are satisfied through the production of a declaration or affidavit in response to a motion to compel); *Abramson v. United States*, 39 Fed. Cl. 290, 294 n.3 (1997) ("[P]rocedural requirements generally are satisfied through the production of a declaration or affidavit by the agency head . . . in response to a motion to compel."); *see also In re Sealed Case*, 121 F.3d at 741.

Fairholme argues that formal invocation of the deliberative process privilege in response to its motion to compel would be a "belated attempt . . . to satisfy the agency affidavit requirement." Pls. Mot. 12. Fairholme's reliance on *Pac. Gas & Elec. Co. v. United States*, 71 Fed. Cl. 205 (2006), however, is misplaced for two reasons: (1) the case represents a nonbinding, minority interpretation of the law, and (2) Fairholme itself failed to follow the approach identified in that case. First, the *Pacific Gas* court adopted a minority position that the Government's practice of providing an affidavit following a motion to compel was "procedurally deficient" and "erod[ed]" the privilege claims' "credibility." *Id.* at 208-09. Of course, the *Pacific Gas* decision is not binding (as Fairholme concedes, Pls. Mot. 12), and its broader application would create an enormous, unnecessary burden on Government employees. Under the approach advocated by Fairholme, the Government would need to provide a declaration for its assertion of the deliberative process privilege at the privilege-log stage, even when the opposing party had no interest in pursuing a motion to compel. When there is no disagreement about the Government's decision not to produce documents, no declaration should be necessary.

Even applying the *Pacific Gas* minority view, the Court should hold that the Government's privilege assertions are proper. The *Pacific Gas* court merely concluded that, when an agency affidavit is filed following a motion to compel, the court may apply a

"heightened scrutiny" to the Government's assertions. *Id.* at 208. The Court should reject Fairholme's request for such heightened scrutiny, as nothing has happened to reduce the credibility of the Government's deliberative process claims—the Government has properly followed the majority position, and should not be penalized for the divergence in the case law.

Indeed, the Court should also reject the *Pacific Gas* approach because Fairholme has failed to satisfy a predicate for that approach. The *Pacific Gas* court acknowledged that parties can resolve disputes consensually "without need to resort to obtaining a formal affidavit to support all preliminary assertions of the deliberative process privilege." *Id.* at 209. The court recognized that only "[a]s to those documents about which the parties are unable to agree," need the Government "support that assertion with an affidavit from an agency official." *Id.*

Fairholme, however, never stated its final disagreement with the Government's privilege assertions. As envisioned under the Court's Rules, the Government and Fairholme met and conferred regarding Fairholme's concerns with some of the documents on our privilege log. *See* RCFC 37. We provided detailed explanations of the rationale underlying our privilege assertions, and Fairholme subsequently abandoned a number of its challenges. *E.g.*, Pls. App. A018 (Nov. 13, 2015 letter at 6 n.3). Before filing its motion, however, Fairholme did not notify us which specific documents it planned to pursue in its motion. In other words, we were not provided any opportunity to obtain an affidavit "[a]s to those documents about which the parties are unable to agree" before responding to Fairholme's motion because Fairholme did not previously identify the documents, if any, about which the parties ultimately disagreed.

Because Fairholme did not comply with *Pacific Gas*, Fairholme cannot demand that the Government do so unilaterally. Certainly, no efficiency is gained in insisting that a high-ranking agency employee personally review thousands of documents before the challenging party has

attempted to narrow the dispute by identifying with particularity the documents that will be the subject of a motion to compel. In this situation, the Government's formal assertion of governmental privileges through declarations filed simultaneously with this response is entirely appropriate and the Court should reject any argument that the Government's privilege assertions are untimely or should be subject to heightened scrutiny.

### C. The Government's Intent Is Irrelevant To Fairholme's Takings Claim And To The Jurisdictional Issue Of Whether FHFA Was Treasury's Agent

The Court should reject Fairholme's argument that documents revealing the Government's "subjective motivation" are not entitled to protection under the deliberative process privilege. *See* Pls. Mot. 11-16. Fairholme misunderstands the deliberative process privilege, and, more broadly, improperly suggests that the success of a takings claim depends on the Government's subjective motivation.

First, the Federal Circuit does not recognize an exception to the deliberative process privilege in cases involving the Government's subjective intent. *First Heights Bank, FSB v. United States*, 46 Fed. Cl. 312, 321-22 (2000) (rejecting rule barring assertion of deliberative process privilege "in any case where the Government's intent is potentially relevant" because such an approach was inconsistent with Federal Circuit precedent). Accordingly, the deliberative process privilege properly protects documents purportedly evidencing the Government's purpose for "imposing the Net Worth Sweep." Pls. Mot. 13-16. Moreover, even if the Federal Circuit recognized an exception to the privilege when "'a cause of action is directed at the government's intent,'" Pls. Mot. 15 (quoting *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998)), that exception would have no application here

because the Government's subjective motivation for agreeing to the Third Amendment is ***irrelevant*** to Fairholme's takings claim and not at issue in the Government's motion to dismiss.[3]

Although the Supreme Court's three-pronged *Penn Central* test for determining whether a regulatory taking has occurred requires the Court to examine "the character of the governmental action," that analysis is unconcerned with the Government's subjective intent. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). To the contrary, the *objective* character of the Government's action and the actual burden that action imposes on a party's property rights underpin the Fifth Amendment right to just compensation. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001) ("The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed.").

The takings clause compensates private parties for unfairly bearing burdens that "should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Demonstrating that the Government *intended* to usurp plaintiffs' purported rights out of concern for taxpayers or a desire to unjustly burden shareholders "tells us nothing about the actual burden imposed" on their shareholder rights or whether justice "require[s] that the burden be spread among taxpayers." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005). Thus, Fairholme's contention that the Government's "decision [to enter into the Third Amendment] was driven by

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[3] Fairholme contends, without citation, that the Government "has made its alleged purposes and motivation in adopting the Net Worth Sweep central to its defense." Pls. Mot. 16. Even a cursory review of our motion to dismiss refutes the suggestion. The only mention of the purpose of the Third Amendment is a quotation from plaintiffs' complaint. Def. Mot. to Dismiss at 17 (quoting Compl. ¶ 73), ECF No. 20.

the fact that Fannie and Freddie were poised to generate tens of billions of dollars in profit" has no bearing on the Court's analysis of Fairholme's takings claim. Pls. Mot. 14.

Moreover, to the extent that Fairholme claims that subjective intent is relevant to the jurisdictional issue of whether FHFA was "an agent and arm" of Treasury, that contention is equally unavailing. First, Treasury's internal deliberations have no bearing on the issue of whether FHFA was acting as an agent of Treasury. That issue is more properly resolved through analysis of communications *between* Treasury and FHFA, and we declined to assert the deliberative process privilege with respect to such communications, notwithstanding Fairholme's insistence that FHFA, acting as conservator, is the United States. *See, e.g.*, A13-20 (FHFA00025815, UST00060055, UST00504231).

Finally, even assuming that the Government's intent was relevant to any of Fairholme's claims, a position with which we disagree, Fairholme's current complaint is already replete with assertions regarding the Government's intent. *See, e.g.*, Compl. ¶¶ 10-12, 14, 64-65, 73, 80, 83. When considering whether to dismiss an action for failure to state a claim, the court accepts all factual allegations in the complaint as true and "indulges all reasonable inferences in favor of the non-movant." *Hutchens v. United States*, 89 Fed. Cl. 553, 562 (2009). Therefore, the Court can properly rule on our motion to dismiss without reviewing or compelling the production of documents that Fairholme has identified as relating to the Government's motivation.

**D. FHFA Properly Asserted The Deliberative Process Privilege**

The Court should conclude that FHFA's deliberations are properly covered by the deliberative process privilege. Fairholme argues that the United States is "precluded from asserting the deliberative process privilege" over FHFA documents because the Government has

argued that FHFA is not the United States for purposes of the Tucker Act. Pls. Mot. 16-17. The Court should reject that argument.

As an initial matter, Fairholme's argument that FHFA cannot assert governmental privileges is wholly untenable in these circumstances. When it filed this action against the United States, Fairholme explicitly alleged that FHFA was the United States. Compl. ¶ 29. If the Court were to conclude that FHFA was *not* the United States when FHFA entered into the Third Amendment as conservator, the Court would be required to dismiss Fairholme's complaint for lack of subject matter jurisdiction. 28 U.S.C. § 1491; *Souders v. S.C. Pub. Serv. Auth.*, 497 F.3d 1303, 1307-08 (Fed. Cir. 2007) (This Court has jurisdiction "to hear cases in which a plaintiff seeks just compensation for a taking under the Fifth Amendment as such a claim is 'against the United States founded . . . upon the Constitution.'"). Given that Fairholme bears the burden of establishing jurisdiction, *e.g.*, *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011), the Court should reject Fairholme's attempt to use the unusual posture of the case – i.e., the Court's consideration of a motion to compel in advance of determining whether subject matter jurisdiction exists – as a means to advance positions that are inconsistent with Fairholme's complaint.

In any event, the Government's position that the United States cannot be sued in the Court of Federal Claims for the actions of FHFA as conservator does not conflict with FHFA's privilege assertions. The Court should hold that FHFA may assert the deliberative process privilege regardless of whether FHFA, acting as conservator, is the United States.

FHFA is, of course, a Government agency, and Fairholme apparently does not dispute that FHFA acts as the United States when the agency acts as the GSEs' regulator. Still, Fairholme argues that a Government agency acting in its capacity as conservator cannot assert

the deliberative process privilege. Nothing in the Housing and Economic Recovery Act (HERA), however, provides that conservatorship strips FHFA of the protections of the deliberative process (or bank examination) privileges that normally apply to Government agencies.

In our pending motion to dismiss, we have explained that – for purposes of a takings claim – FHFA "is not the United States *when it acts as conservator*." Def. Mot. to Dismiss at 12, ECF No. 20 (emphasis added). It is well established that an entity may be deemed to be the Government for one purpose but not another. *See, e.g.*, *Hall v. Am. Nat'l Red Cross*, 86 F.3d 919, 922-23 (9th Cir. 1996) (whether an entity is deemed part of the Government depends on the context). The policies underlying the deliberative process privilege are different from those underlying the Tucker Act. The Tucker Act serves as a waiver of sovereign immunity for takings claims. *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359, 1361-62 (Fed. Cir. 2009). The primary rationale behind the deliberative process privilege is to avoid the "chilling" of frank discussions among Government employees that would occur "if the personal opinions and ideas of government personnel involved in the decision-making process were subject to public scrutiny." *Pac. Gas & Elec. Co. v. United States*, 70 Fed. Cl. 128, 133 (2006) (citation omitted).

This rationale applies with equal force whether FHFA acts as conservator or as regulator. Even when FHFA's employees are performing conservatorship-related functions, they remain "government personnel," employed by an agency of the Government.[4] *Cf. Stevens v. FDIC*,

[4] The Government does not assert the deliberative process privilege with respect to any FHFA communications with Fannie Mae or Freddie Mac.

No. 11-CV-00841, 2011 WL 3925087, at *3 & n.3 (C.D. Cal. Aug. 25, 2011) ("Although the FDIC as receiver steps into the shoes of the failed bank . . . this does not make the FDIC as a whole any less a government agency.") (citations and internal quotation marks omitted). Certainly, FHFA's actions in its capacity as conservator have ramifications for national housing policy and are likely to be the subject of substantial public interest, as are its actions as regulator. Thus, the concern that public disclosure will chill the discussions of Government personnel and adversely affect the quality of agency decisionmaking applies equally to FHFA's decisions as conservator and as regulator.

Although FHFA has not previously litigated the issue, courts have permitted the FDIC and Resolution Trust Corporation ("RTC") to assert the deliberative process privilege in their capacities as conservator and receiver.[5] *See Romacorp, Inc. v. Prescient, Inc.*, No. 10-22872-Civ., 2011 WL 2312563, at *3 (S.D. Fla. June 8, 2011) (allowing the FDIC to assert the deliberative process privilege, which the FDIC asserted "as a governmental agency *and its receivership capacity*" (emphasis added)); *Resolution Trust Corp. v. Commerce Partners*, 132 F.R.D. 443, 447-48 (W.D. La. 1990) (deliberative process privilege bars "discovery relative to the propriety of the RTC's decisions" in its capacity as conservator). The Court should reach the same conclusion in this case and reject Fairholme's motion to compel documents created during the conservatorships.

[5] When interpreting FHFA's authority, courts often rely on cases analyzing the authority of the FDIC and RTC under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989), "whose provisions regarding the powers of federal bank receivers and conservators are substantially identical to those of HERA." *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 795 (E.D. Va. 2009).

## II. FHFA May Properly Assert The Bank Examination Privilege

### A. The Bank Examination Privilege Applies To FHFA's Regulation Of The GSEs

The Court should conclude that the bank examination privilege applies to FHFA regardless of whether the GSEs are banks. Fairholme argues that the bank examination privilege is limited solely to documents and information created when regulating traditional banking institutions; both case law and policy considerations undermine Fairholme's position.

In *FHFA v. JPMorgan Chase*, the only published decision addressing the issue, the United States District Court for the Southern District of New York rejected the exact argument asserted by Fairholme and held that FHFA may assert the bank examination privilege, even though the GSEs are not traditional banks. 978 F. Supp. 2d 267, 273-74 (S.D.N.Y. 2013) ("FHFA regulation of the GSEs implicates the same two concerns present in the banking regulatory sphere which justify the bank examination privilege."); *see also* A21 (Memorandum Opinion at 8, *Syron v. Federal Housing Finance Agency*, No. 14-mc-359 (D.D.C. Dec. 31, 2014), ECF No. 18). Fairholme has provided no authority to the contrary, and its semantic argument relying on the name of privilege, Pls. Mot. 28-30, is meritless.

The cases that Fairholme cites have nothing to do with the GSEs, and contain no analysis that supports Fairholme's position. *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 239 F.R.D. 508, 514 n.5 (N.D. Ill. 2006), states in a footnote, without any analysis, that the bank examination privilege did not apply because the lenders in that case were not "banks." *In re Putnam Inv. Mgmt., LLC*, 2004 WL 885245 (S.E.C. Apr. 7, 2014), is an administrative opinion declining to recognize an "SEC Examination Privilege" because the SEC had not weighed in on the existence and scope of the privilege. *Id.* at *4. And the statement that Fairholme quotes from *Merchants Bank v. Vescio*, 205 B.R. 37, 42 (D. Vt. 1997), Pl. Mot. 29,

merely recognized that the bank examination privilege belongs to the regulators and "may not be asserted by third parties on behalf of the banking agencies"; the court did not consider whether other financial regulatory agencies could assert the privilege.

The bank examination privilege encompasses two objectives: (1) ensuring candor in communications between regulated entities and the regulator, thereby promoting effective supervision, and (2) maintaining public confidence in financial institutions. *JPMorgan*, 978 F. Supp. 2d at 273. Both objectives apply here. The "candor" objective is present because FHFA, like other financial regulators, regulates the entities through "an iterative and collaborative regulatory process." *Id.* at 274. Preserving the confidentiality of communications ensures candor between FHFA and their regulated parties. The "public confidence" objective is also present. As the *JPMorgan* court recognized, FHFA's regulation of the GSEs is profoundly important to the United States economy, much more than any single bank or credit union. *Id.* ("Given that 'in 2008 the GSEs financed about 40% of all American mortgages and owed debt in excess of $5.3 trillion, their failure would be catastrophic for the American economy in a way that, with few exceptions, the failure of a single bank or credit union would not be.'") (citation omitted). Because of their significant market share and importance to the economy, the financial condition of the United States necessarily depends on the public's confidence in the GSEs.

Fairholme insists that the GSEs "are not banks" and are more like "insurance companies." Pls. Mot. 29. But "[bank] activities overlap considerably with GSE core mortgage activities." *JPMorgan*, 978 F. Supp. 2d at 275. FHFA's supervision of the GSEs is virtually identical to – and clearly modeled on – Federal bank regulators' supervision of banks, not state

regulators' supervision of insurance companies.[6] *See id.* at 274. Specifically, FHFA is charged with, among other things, ensuring the GSEs' "maintenance of adequate capital and internal controls," 12 U.S.C. § 4513(a)(1)(B)(i), and has the duty to "foster liquid, efficient, competitive, and resilient national housing finance markets." *Id.* § 4513(a)(1)(B)(ii). These mandates overlap considerably with those of Federal banking regulators. *See JPMorgan*, 978 F. Supp. 2d at 274 (comparing FHFA's statutory duties with the FDIC's statutory duties). Indeed, Congress virtually duplicated the examination regime applicable to banks when it designed the examination regime for the GSEs. *See, e.g.*, 12 U.S.C. § 4517(a) (FHFA must conduct annual examinations of financial condition of the GSEs); *id.* § 4517(c) (FHFA Director has the same authority as various bank regulators); *id.* § 4517(e) ("The Director and each examiner shall have the same authority and each examiner shall be subject to the same disclosures, prohibition, obligations, and penalties as are applicable to the examiners employed by the Federal Reserve Banks"). Thus, "it accords with 'reason and experience' for courts to permit FHFA the same common law privilege tool available to the banks to accomplish its mandate." *JPMorgan*, 978 F. Supp. 2d at 275.

There is also no merit to Fairholme's argument that FHFA's annual reports to Congress eliminate the rationale for the privilege. Pursuant to 12 U.S.C. § 4521(a), FHFA must make a "[g]eneral report" to Congress with "a description of the actions taken [by FHFA]," and "the results and conclusions of the annual examinations of the regulated entities." *JPMorgan*,

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[6] Even were the Court to consider Fairholme's contention that the GSEs are more like insurance companies, insurance regulators are commonly permitted, pursuant to state law, to protect from disclosure their communications with the companies they regulate. *See, e.g.*, Cal. Ins. Code § 735.5(c); D.C. Code 31-1404(f) NAIC Model Law on Examinations Section 5(F)(1)(a) (1999), available at http://www.naic.org/store/free/MDL-390.pdf.

978 F. Supp. 2d at 276. This does not change the likelihood of a chilling effect if important, individual communications, were revealed. Although traditional-bank regulators provide the public with their opinions and findings, the regulators' communications with the banks are properly protected by the privilege. *Id.* FHFA's role is no different.

This Court should follow the well-reasoned case law applying the bank examination privilege to FHFA, and reject Fairholme's invitation to reject this case law based on semantics.

**B. The Bank Examination Privilege Applies During The Conservatorship**

FHFA may likewise assert the bank examination privilege over documents created during the conservatorship, including communications with the GSEs.[7] FHFA seeks to assert bank examination privilege only with respect to documents created pursuant to its supervisory and regulatory activities. A61 (Declaration of Christopher H. Dickerson ¶ 12). Fairholme argues, again without any legal support, that the "candor" rationale no longer applies to communications between FHFA and the GSEs while they are in conservatorship because the GSEs are under FHFA's complete control and therefore are obliged to be candid with FHFA. Pls. Mot. 30-31.

As an initial matter, Fairholme simply ignores the second objective for the bank examination privilege — maintaining public confidence in the financial institutions. *JPMorgan*, 978 F. Supp. 2d at 274. Conservatorship has no effect on this objective, which is independently

[7] The only substantive argument concerning the bank examination privilege in Fairholme's motion to compel is the application of the privilege to agency communications made with the GSEs during the conservatorships. Pls. Mot. 28–31. Of the eleven FHFA documents Fairholme identifies, only one involves a communication with a GSE. *See* Pls. App. A011. Fairholme has presented no arguments challenging *internal* agency documents created during the conservatorships. Moreover, four of the eleven documents withheld pursuant to the bank examination privilege identified in Fairholme's motion (*i.e.*, FHFA00031960, FHFA00031962, FHFA00031964, FHFA00056237) were created before the conservatorship started. A63 (Declaration of Christopher H. Dickerson ¶ 16).

sufficient to justify FHFA's withholding its communications with the GSEs pursuant to the bank examination privilege. Similarly, the Court should reject as meritless Fairholme's argument that the conservator's "control" of the GSEs eliminates concerns that their communications will be candid. Bank employees are generally obligated by law to provide bank examiners with requested information, *e.g.*, 12 U.S.C. § 161(a), but their regulators unquestionably may assert the bank examination privilege. Courts have recognized that legal control does not preclude the assertion of the bank examination privilege by allowing regulators of traditional banks to assert the privilege over materials collected from an institution in receivership, a situation analogous to FHFA's current conservatorship of the GSEs. *See, e.g.*, *Schoenmann v. FDIC*, No. C-10-3989-CRB (MEJ), 2012 WL 2589891, at *1 (N.D. Cal. July 3, 2012) (FDIC could invoke bank examination privilege when sued in both its corporate and receivership capacities).

"Bank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank in expressing their concerns about the bank. These conditions simply could not be met as well if communications between the bank and its regulators were not privileged." *In re Subpoena Served Upon Comptroller of Currency, & the Sec'y of the Bd. Of Governors of the Fed. Res. Sys.*, 967 F.2d 630, 634 (D.C. Cir. 1992); *see also Klamath Water Users*, 532 U.S. at 8-9. Fairholme provides no rationale for treating communications made by entities in conservatorship with their regulators differently. Based on this proper assertion of the bank examination privilege, the Court should reject Fairholme's efforts to obtain documents created either before or during the GSE conservatorships.

## III. Fairholme's Document-Specific Challenges Are All Meritless

The Court should reject Fairholme's document-specific challenges (*i.e.*, 58 of the approximate 12,000 privileged documents)[8] as each is undermined by the case law supporting the Government's claims of executive privilege.

### A. The Deliberative Process Privilege Protects The Documents Sought By Fairholme That Were Created After The Execution Of The Third Amendment

Fairholme challenges our deliberative process privilege assertions with respect to two documents on the basis that the documents post-date the Third Amendment. Pls. Mot. 18-20. Fairholme contends that redacted portions of UST00061067 and UST000385562 have been improperly withheld and should be produced because those documents were transmitted by e-mail on August 20, 2012, after the Third Amendment was adopted. Pls. Mot. 18. However, the redacted portions of UST00061067 and UST000385562 contain communications between a Treasury official and a White House advisor regarding [redacted]. In other words, the documents are predecisional with respect to decisions other than the decision to enter into the Third Amendment. The redacted portions have been properly withheld pursuant to the deliberative

[8] After Fairholme filed its motion to compel, the Government produced document UST00418517 (Pls. App. A007) in redacted form. Document UST00418517 is a large compilation of briefing materials periodically prepared by Treasury staff for the Secretary, and was produced pursuant to an agreement between the parties stipulating that non-responsive materials would be redacted and that responsive memoranda would be produced in full. In addition, the Government has withdrawn its initial assertion of deliberative process privilege over document UST00061011, and will produce that document in full.

process privilege because they reflect deliberations regarding future policy decisions.[9] Because these documents contain predecisional deliberations, and were properly withheld under the deliberative process privilege, the Court should reject Fairholme's motion to compel their production.[10]

### B. Fairholme Erroneously Labels Documents Containing Predecisional Deliberations As Purely Factual

Fairholme challenges the Government's assertion of privilege over several documents, including "financial models and other assessments of the Companies' financial performance," arguing that these types of documents are not "deliberative" for purposes of the deliberative process privilege. Pls. Mot. 20. Fairholme is wrong in both its characterization of these documents and the law.

#### 1. Financial Projections Are Protected By The Deliberative Process Privilege

As an initial matter, financial projections, because they reflect agency analysis, are not "factual" in nature. *See, e.g.*, *Am. Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 269-70 (D.D.C. 2013) (slides depicting financial projections of "Stress" and "Expected case[s]," "on its face," reflected the Government's "culling and performing its own analysis . . . as part of the deliberative process" and "fall[s] squarely within the privilege afforded to documents reflecting an agency's 'exercise of discretion and judgment calls'") (quoting

[9] Prior to the filing of Fairholme's motion, we produced portions of these documents that merely explained the Third Amendment.

[10] In any event, deliberative documents *created* before the relevant decision do not lose their privileged status merely because agency staff circulated or recirculated those documents following a decision. *Fed. Open Mkt. Comm. Of the Fed. Reserve Sys. v. Merril*, 443 U.S. 340, 359-60 (1979).

*Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011)). Financial projections are regularly prepared by agencies to analyze an entity's ability to respond to economic conditions. A65-65 (Dickerson Decl. ¶ 20). These projections include subjective decisions in the form of assumptions made in modeling the projections and the organization of facts substantiating those assumptions. The assumptions underlying the proposed economic conditions reflect subjective choices made by agency staff. *Id.* Arbitrary disclosure of projections "would expose [the] agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *See In re United States*, 321 F. App'x at 960. Because this agency analysis is not "factual" in nature, Fairholme's challenge to the Government's privilege assertions can be rejected for this reason alone.

The cases relied upon by Fairholme, Pls. Mot. 21, are inapposite because they do not address *financial projections* of the kind used by Treasury, or FHFA. *See Lahr v. Nat'l Trans. Safety Bd.*, 453 F. Supp. 2d 1153, 1188 (C.D. Cal. 2006), *rev'd in part on other grounds*, 569 F.3d 969 (9th Cir. 2009) (graphs containing purely factual radar data); *Reilly v. United States Envtl. Prot. Agency*, 429 F. Supp. 2d 335, 352 (D. Mass. 2006) (computer models "that generate raw data or empirical evidence" and used in agency investigations).

Moreover, the deliberative process privilege protects Treasury's and FHFA's financial projections, even if they could be considered factual materials, because the factual material cannot be separated from the deliberations inherent in the assumptions reflected in the projections. *See Am. Petroleum Tankers Parent*, 952 F. Supp. 2d at 269. As the United States District Court for the District of Columbia explained, "[T]he applicability of the privilege 'does not turn on whether the material is purely factual in nature or whether it is already in the public

domain, but rather on whether the selection or organization of facts is part of an agency's deliberative process.'" *Id.* (quoting *Ancient Coin Collectors*, 641 F.3d at 513). "The distinction between whether the nature of the material is factual or opinion is thus not dispositive of whether the material is deliberative." *In re United States*, 321 F. App'x at 959. Fairholme seeks to compel the production of projections [redacted] *See e.g.*, UST00407182, UST00407342, UST00472229, and UST00472232. A65, 73-76 (Dickerson Decl. ¶ 22; Declaration of David R. Pearl ¶¶ 26-28, 30-32, 36-37).

Similarly, Fairholme seeks to compel production of forecasts – FHFA00093706 and FHFA00100594 – withheld by FHFA pursuant to the bank examination privilege. Fairholme argues these documents are producible because they are "factual." Pls. Mot. 32. This challenge is equally meritless. As part of the examination process, regulators routinely ask regulated entities to prepare stress tests, which measure the entities' ability to deal with a hypothetical economic crisis. A64-65 (Dickerson Decl. ¶ 20). FHFA00093706 contains [redacted] A64-65 (Dickerson Decl. ¶ 20). Routinely, FHFA makes its own projections as to Fannie Mae's and Freddie Mac's expected performance. A65 (Dickerson Decl. ¶ 21). In FHFA00100594, [redacted] *Id.* Because (1) the facts selected by the agencies drive the financial projections made as part of

their deliberative process, and (2) the facts and the projections cannot be separated, the Court should reject Fairholme's challenge to the Government's deliberative process privilege assertions.

**2. Additional Documents Identified By Fairholme Contain Non-Segregable Factual Information**

The Court should reject Fairholme's motion to compel production of two policy memoranda prepared for Treasury Secretary Timothy Geithner (UST00389662 and UST00389678), a draft policy paper (UST00490551), and an October 29, 2008 email (FHFA00031520); these documents cannot be broken into privileged and non-privileged parts. Pls. Mot. 21.

Treasury Under Secretary for Domestic Finance Mary Miller sent Secretary Geithner a memorandum (UST00389662) on December 14, 2011, [redacted] Pls. App. A023 (Nov. 13, 2015 letter at 11). Michael Stegman, Counselor to the Treasury Secretary for Housing Finance Policy, sent Secretary Geithner a memorandum (UST00389678) on January 25, 2012, [redacted] *Id.* Both documents provided the Secretary with the views of Treasury officials and staff on multiple policy options. *Id.* To the extent the memoranda contain factual information, the information is so "inextricably intertwined with the policy making processes" as to be protected by the deliberative process privilege. *See Mink*, 410 U.S. at 92. Both UST00389662 and UST00389678 proposed potential policies, evaluated various options, and made recommendations.

The policy-making process revolves around memoranda such as these, which contain or facilitate the back and forth discussions that precede important executive decisions. A71-72 (Pearl Decl. ¶¶ 20-21). Although this type of memorandum may include factual material, such

as a recitation of past events, courts properly protect that information because of its role in influencing decision makers. *Sikorsky Aircraft Corp. v. United States*, 106 Fed. Cl. 571, 578-79 (2012) (document was deliberative because "the recounting of the past occurrence is subjective and was recited specifically to influence [the agency's] handling of an ongoing audit[]").

Similarly, Fairholme challenges the Government's privilege assertion regarding UST00490551 – a draft policy paper on housing finance reform. Pls. Mot. 21. UST00490551 articulates a plan for comprehensive housing finance reform on which no final decision has been reached. A71-72 (Pearl Decl. ¶ 20(d)). Again, any factual information in this predecisional policy paper is "inextricably intertwined with the policy making processes" and protected by the deliberative process privilege. *Mink*, 410 U.S. at 92. Courts have recognized (and Fairholme does not dispute) that draft documents are almost always privileged because, by their very nature, (1) they are deliberative, and (2) the opinions stated in drafts are likely to be altered or amended before the decision-maker comes to a final position regarding the agency's position. *See In re United States*, 321 F. App'x at 960-61 (collecting cases considering draft documents).

Finally, in prior correspondence, Fairholme alleged that the Government improperly redacted portions of an e-mail (FHFA00031520; the "DeLeo e-mail") sent by Wanda DeLeo to James Lockhart and Edward DeMarco on October 29, 2008. Fairholme speculates that the redacted material is "factual" material not protected by the deliberative process privilege. *See* Pls. App. A025. The DeLeo e-mail contains predecisional and deliberative statements about how FHFA should respond to a press inquiry about the treatment of the GSE's deferred tax assets ("DTA"). A66 (Dickerson Decl. ¶ 24). [redacted]

[redacted] Because Fairholme has not identified the "non-deliberative, factual material" they expect to find in an e-mail that expressly asks employees to discuss the deliberative process, the Court should reject Fairholme's motion to compel production of the DeLeo email.

### C. The Bank Examination Privilege Protects Information In The Documents Identified By Fairholme

Fairholme argues that the bank examination privilege should not apply to several FHFA documents because they "include factual information that should have been produced." Pls. Mot. 32. The Court should reject Fairholme's efforts to compel the production of the following FHFA documents based on Fairholme's allegation that they contain segregable factual information.

- Before placing the GSEs into conservatorship, FHFA retained BlackRock Solutions (BlackRock) as a consultant. A63 (Dickerson Decl. ¶ 16). BlackRock prepared FHFA00031960 and FHFA00031962 before the conservatorships. These documents contain deliberative loss and capital projections.[11] A58-59, 63 (Dickerson Decl. ¶¶ 4(a)-(d), 16).
- FHFA00096631, FHFA00096634, FHFA00096636, and FHFA00096638 are draft risk assessment memoranda created on March 31, 2012. These memoranda, prepared as part of the examination process, contain analysis and opinions regarding the GSEs' outlook for earnings and solvency as of that date. A59-60, 65-66 (Dickerson Decl. ¶¶ 5(a)-(d), 23).
- FHFA employees prepared FHFA00100594, wherein the agency's employees analyzed both GSEs' projected remaining Treasury funding commitments under FHFA-designed scenarios. A65 (Dickerson Decl. ¶ 21).

These memoranda and projections, prepared by or on behalf of FHFA in its regulatory—not conservatorship—capacity, necessarily involve deliberation and analysis of future financial

[11] FHFA00056237, a similar document prepared by BlackRock and identified in the exhibit attached to Fairholme's motion, is not addressed in their motion to compel. A59 (Dickerson Decl. ¶ 4(d)).

performance, not purely factual discussions of past performance. The risk assessment memoranda (FHFA00096631, FHFA00096634, FHFA00096636, and FHFA00096638) contain forecasts about future performance, and they support these projections in part by citing certain selected facts about past performance. These facts are not segregable from the agency's deliberations because the selection of these facts—as well as the way they are organized in the memoranda—would reveal the thought process of the drafter. The BlackRock documents (FHFA00031960, FHFA00031962, and FHFA00100594) are projections of future performance under different scenarios. The few statements about past performance in these documents are cited as support for the projections, and disclosing such statements would reveal FHFA's and/or BlackRock's thought process. *See* Section III.B.1 (discussing contents of FHFA00100594). In short, the "selection or organization of facts" in all of these documents "is part of [FHFA's or BlackRock's] deliberative process." *Am. Petroleum Tankers Parent, LLC*, 952 F. Supp. 2d at 269. Accordingly, the bank examination privilege properly protects these documents from disclosure.

## IV. Fairholme Has Failed To Articulate Any Need For The Documents Identified In Its Motion

Fairholme argues that its "urgent need" outweighs the Government's interest in protecting the following categories of privileged documents: (1) "materials revealing the Defendant's purposes, intentions, and motivations for imposing the Net Worth Sweep;" (2) materials "concern[ing] the Net Worth Sweep created after it was imposed"; and (3) "financial data, projections, and models [relating] to the Companies' condition and future profitability." Pls. Mot. 3, 22. The Court should reject this argument because Fairholme has failed to demonstrate that any of these materials are needed to determine whether the Court possesses jurisdiction to hear the complaint.

Courts generally consider five factors in balancing (a) a litigant's need, against (b) the Government's interest in protecting privileged information:

> (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

*In re Subpoena Served upon Comptroller of Currency*, 967 F.2d at 634; *Sikorsky Aircraft Corp.*, 106 Fed. Cl. at 579 (same); *Dairyland Power Coop. v. United States*, 77 Fed. Cl. 330, 338 (2007) (same). These factors weigh against Fairholme's motion to compel because the information sought is (1) wholly irrelevant, (2) cumulative of information Fairholme already possesses, and (3) likely to cause harm to the Government if produced.[12]

### A. Fairholme Cannot Establish A Need For Documents Concerning The Government's Subjective Intent

Fairholme first claims that its need for "materials revealing the Defendant's purposes, intentions, and motivations for imposing the Net Worth Sweep" outweighs the Government's interest in protecting its predecisional deliberations from disclosure. As established above, the Government's subjective intent in entering into the Third Amendment is not relevant to Fairholme's takings claim, much less to the jurisdictional issues before the Court. Absent a showing that the documents sought are relevant, Fairholme cannot, as a matter of law, demonstrate that it needs the documents properly withheld pursuant to a Government privilege. *See, e.g., U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 12 (1988) (Freedom of Information Act exemption incorporating Governmental privileges considers "whether the documents would be

[12] The Government does not contest that this litigation is serious and that the Government is a litigant, rather than a disinterested third party.

'routinely' or 'normally' disclosed *upon a showing of relevance*") (emphasis added) (quoting *Fed. Trade Commn. v. Grolier Inc.*, 462 U.S. 19, 26 (1983)).[13]

Fairholme, moreover, fails to establish that evidence reflecting the Government's motivation is unavailable from other sources. Instead, Fairholme asserts, without explanation or support, that "no other available evidence would equally serve the same purpose." Pls. Mot. 24. This assertion ignores the ample evidence, already in Fairholme's possession, detailing the Government's reasons for entering into the Third Amendment. *See, e.g.*, A87-94 (UST00005740, UST0013402, UST00536438). Fairholme acknowledges this evidence, but asks the Court to disregard it based upon speculation that the Government is shielding its "actual reasons" for entering into the Third Amendment. Pls. Mot. 25. This speculation about the Government's allegedly improper motives lacks any evidentiary support. Because Fairholme already possesses documents detailing the Government's reasons for entering into the Third Amendment, the alleged need cannot outweigh the Government's legitimate need to protect its predecisional deliberations from disclosure.

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[13] *See also, e.g.*, *Dairyland*, 77 Fed. Cl. at 342 ("Plaintiff does not explain the relevance of this document or articulate an evidentiary need for any unique information it may contain. . . . Plaintiff's meager evidentiary need does not outweigh the Government's interest in confidentiality."); *Martin Operative P'ship, L.P. v. United States*, 616 F. App'x 688, 699 (5th Cir. 2015) ("[A]lthough these documents might have been relevant to the merits at later stages of litigation, they are not relevant at this stage. We therefore conclude that the district court did not err by excluding them [pursuant to the deliberative process privilege]."); *United States v. Farley*, 11 F.3d 1385, 1391 (7th Cir. 1993) ("[A]s the documents are as a matter of law not relevant to the present controversy, a showing of sufficient need is not possible.").

### B. Fairholme Cannot Establish That "Materials That Concern the Net Worth Sweep Created After It Was Imposed" Have Been Withheld, Much Less That Fairholme Has A Need For Such Documents

Fairholme next argues that its need for "materials that concern the net worth sweep created after it was imposed" outweighs the Government's need to protect such documents from disclosure. As demonstrated above, however, Fairholme incorrectly assumes that the Government withheld post-decisional documents addressing the Third Amendment. *See* Section III.A. Thus, Fairholme cannot establish that such documents have been withheld, much less that its need for the documents outweighs the Government's need to shield predecisional deliberations from disclosure.

### C. Fairholme Cannot Establish A Need For Documents Relating To The Companies' Condition And Future Profitability

Fairholme argues that its need for documents containing "financial data, projections, and models [relating] to the Companies' condition and future profitability" outweighs the Government's need to protect such documents from disclosure. Pls. Mot. 22. Specifically, Fairholme contends that the documents are relevant to the issue of "the reasonableness of expectations about [Fannie and Freddie's] future profitability." *Id*. at 23 (citing Order at 4, Feb. 26, 2014, ECF No. 32). Like the Government's subjective motivation, however, the Government's internal analyses of the GSEs' profitability do not provide any evidence or indications of investors' expectations regarding their profitability.

Attempting to identify "financial data, projections, and models" that have been withheld, Fairholme points to documents prepared by Treasury or a consultant on its behalf. Pls. Mot. 22; *see also* A75 (Pearl Decl. ¶¶ 30-32). These internal, draft projections were never released publicly, and thus could not have been considered by investors.

To the extent that such analyses were never shared with the public and investors never considered them in making decisions, it would be impossible for the analyses to inform any investor expectations. *See, e.g.*, *Chancellor Manor v. United States*, 331 F.3d 891, 906, n.8 (Fed. Cir. 2003) ("We do not suggest that the United States's internal memoranda are pertinent to the reasonable expectations of the project owners since they were unaware of these memoranda."). Indeed, reasonable investors could not have relied on unreleased documents to inform their expectations of a return on their investment.[14] *See, e.g.*, *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 12 (1988); *Dairyland*, 77 Fed. Cl. at 342; *Martin Operative P'ship, L.P. v. United States*, 616 F. App'x 688, 699 (5th Cir. 2015); *Brathwaite v. Dep't of Homeland Security*, 473 F. App'x 405, 415 (6th Cir. 2012). Thus, internal documents addressing the GSEs' profitability cannot be relevant to the issue of Fairholme's investment-backed expectations.

Similarly, to the extent Fairholme points to internal financial documents and projections as relevant to the issue of the Government's expectations of future profitability, Pls. Mot. 33, Fairholme's need for such documents does not outweigh the Government's need to protect predecisional deliberative materials from disclosure because the Government has produced ample evidence of its expectations regarding the GSEs' future profitability. *See, e.g.*, A95-103, 104-07 (UST00517853, UST00005853).

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[14] For instance, Fairholme baldly asserts that a document Bates-numbered FHFA00092209 is "critical to this case" and "highly relevant to this dispute" because it is [redacted]. Pls. Mot. 33-34. It defies logic to conclude that [redacted] could reveal anything about the expectations of Fairholme, a GSE investor that purchased its shares after the execution of the Third Amendment on August 17, 2012, or otherwise establish this Court's jurisdiction.

Moreover, Fairholme does not assert, let alone demonstrate, that the financial data it seeks is unavailable from other sources. FHFA publishes, on an annual basis, forecasts of GSE profitability, http//www.fhfa.gov/AboutUs/Reports/Pages/Projections-of-the-Enterprises-Financial-Performance-October-2011.aspx, and Treasury has already produced, during the course of this litigation, documents revealing its views regarding the future profitability of the GSEs. *See, e.g.*, A87-90, 95-103 (UST00005740, UST00517853). Fairholme claims that such material is inadequate, but its sole basis for this claim is, again, Fairholme's speculation that the Government's veracity is at issue because it is concealing its "actual reasons" for entering into the Third Amendment. Pls. Mot. 25. Both Treasury and FHFA publicly disclosed their reasons for adopting the Third Amendment; there is no basis upon which to conclude that the Government's public statements, or its final decision documents detailing the reasons for the Third Amendment, which have been produced, were a subterfuge for undisclosed, subjective motivations that would aid Fairholme in proving its takings claim. *Parsons v. United States*, 670 F.2d 164, 166 (Ct. Cl. 1982) ("It is well established that there is a presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations, and the burden is on the plaintiff to prove otherwise.").

### D. Fairholme Cannot Establish That Its Need For Any Of The Documents It Seeks Outweighs The Risk That Such Disclosure Would Chill Open And Independent Discussion About Future Governmental Policies And Decisions

Even if Fairholme could establish a particularized and relevant need for the admittedly privileged documents it seeks, this need could not outweigh the potential harm to the Government if the documents were disclosed. The documents Fairholme seeks relate to sensitive discussions regarding the Government's national housing policies and concern the administration of billions of dollars of taxpayer money. A69-70 (Pearl Decl. ¶ 9). The documents include,

among other things, policy decisions and analyses regarding systemic financial risks.[15] Specifically, the documents reflect discussions about the nature and extent of the Government's ability to (1) assist the GSEs, and (2) mitigate the effect of the GSEs' financial collapse on the country. *Id.* The magnitude of these important policy decisions, many of which are the subject of current debate, underscores the importance for maintaining the confidentiality of deliberative agency discussions.

Fairholme repeatedly emphasizes the "public interest," *e.g.*, Pls. Mot. 22, in the subject matter of this litigation. Public interest, however, has no role in a party's rights in litigation before this Court; accordingly, the public's interest cannot affect the Court's ultimate conclusions as to whether it has jurisdiction over Fairholme's claims, or (if jurisdiction is found) whether an uncompensated taking under the Fifth Amendment occurred. Fairholme's repeated reference to the public's curiosity seeks to misdirect the court from what is properly at issue in our pending motion to dismiss, and in the case more broadly. Fairholme, moreover, fails to explain how its role as a hedge fund makes it the proper representative of the public's interest. Conversely, the public has a strong interest in a properly functioning policy process, which the deliberative process privilege safeguards by protecting predecisional materials.

This interest in a properly functioning policy process must outweigh any curiosity the public may have about these proceedings. *See, e.g.*, *Klamath Water Users*, 532 U.S. at 8-9. Consequently, Fairholme's purported need for the documents it seeks is slight when weighed

[15] The Government withdraws its initial assertion of deliberative process privilege over the final version of UST00492699 ( Pls. App. A005), and will produce that document in full.

against the Government's need to maintain the confidentiality of its predecisional deliberations regarding policy discussions that, if disclosed, could seriously harm the housing market.

### E. Fairholme Has Not Met The Heightened Standard To Demonstrate A Compelling Need For Documents Subject To The Presidential Communications Privilege

The Court should reject Fairholme's motion seeking to compel the production of documents protected by the presidential communications privilege. Fairholme both misstates and fails to overcome the heightened standard protecting the Government's assertion of this privilege. Pls. Mot. 35. Indeed, Fairholme's perfunctory attempt to demonstrate need cannot overcome the presumption that presidential communications are privileged and, therefore, neither a declaration from the White House formally asserting privilege nor *in camera* review of these documents is warranted.

There is "a presumptive privilege for Presidential communications," ensuring that the "President and those who assist him [are] free to explore alternatives in the process of shaping policies and making decisions . . . in a way many would be unwilling to express except privately." *United States v. Nixon*, 418 U.S. 683, 708 (1974); *Sealed Case*, 121 F.3d at 750 ("If presidential advisers must assume they will be held to account publicly for all approaches that were advanced, considered but ultimately rejected, they will almost inevitably be inclined to avoid serious consideration of novel or controversial approaches to presidential problems."). Although the presidential communications privilege, like other executive privileges, is qualified, "the presidential communications privilege is more difficult to surmount" because "a party seeking to overcome the presidential privilege seemingly must always provide a focused demonstration of need." *Id.* at 746. Indeed, the party requesting presumptively privileged presidential communications must submit a particularized statement of need ***before*** the

Government's obligation to *formally* invoke the privilege is even triggered. *See Dairyland Power Coop. v. United States*, 79 Fed. Cl. 659, 661-62 (2007) (*Dairyland II*). Moreover, *in camera* review is not appropriate in the absence of such a formal invocation. *Id.* at 669.

Fairholme cites *Sealed Case* and *Dairyland II* to support its assertion that, to overcome the presumptive privilege for presidential communications, Fairholme need only demonstrate that the documents it seeks "'likely contain important evidence' that 'is not available with due diligence elsewhere.'" Pls. Mot. 35. This recitation of the standard, however, ignores the critical difference between the criminal grand jury subpoena at issue in *Sealed Case* and the jurisdictional civil discovery process that provides the context for Fairholme's requests.

"The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*." *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 384 (2004). As this Court has recognized, the Supreme Court in *Cheney* "opined that the test should be stricter in civil cases than in criminal cases," noting that "*Sealed Case* was a criminal case." *Dairyland II*, 79 Fed. Cl. at 667. As such, the Court should demand a greater showing of need here than that required by the *Sealed Case* court. *See Cheney*, 542 U.S. at 384-86 (concluding that the "exacting standards" of relevancy, admissibility, and specificity necessary to overcome the privilege in the context of a *criminal* subpoena apply *a fortiori* in the *civil* discovery context).

Even were this Court to apply the *Sealed Case* test without augmentation, however, Fairholme cannot meet the standard for demonstrating need. Fairholme fails to identify the particular evidence it seeks and how that evidence is "directly relevant to issues that are expected to be central to the trial," as opposed to "evidence that would be only tangentially relevant or would relate to side issues." *Sealed Case*, 121 F.3d at 754-55.

Rather, Fairholme has merely alleged that "[i]t is apparent . . . that White House officials communicated with Treasury about the Net Worth Sweep and played an important role in the decision to impose it." Pls. Mot. 35-36. Even assuming the truth of this allegation, Fairholme fails to articulate, much less demonstrate, its direct and central relevance to topics on which this Court has authorized discovery.

Moreover, "presidential communications should not be treated as just another source of information." *Sealed Case*, 121 F.3d at 755. Fairholme fails to make the required showing that it has engaged in "efforts [to obtain evidence elsewhere], and explain why evidence covered by the presidential privilege is still needed." *Id*. Indeed, the five documents attached to Fairholme's motion demonstrate that Fairholme has been afforded ample opportunity to explore the involvement of White House officials through extensive document and deposition discovery. Pls. Mot. 35-36, Ex. 32-36. We have produced various communications between White House and Treasury officials, and Fairholme has deposed Treasury officials on the involvement of White House advisors with the Third Amendment. *See, e.g.*, *id*. The documents upon which Fairholme relies make plain that *Treasury* conducted negotiations with FHFA relating to the Third Amendment. Pls. Mot. 36, Ex. 36, A271 [redacted]. Consequently, Fairholme cannot meet its burden of showing that it expects the four documents it seeks to be the only source of information directly relevant and central to issues within the scope of this Court's discovery order.

Finally, *in camera* review of the four privileged documents identified in the attachment to Fairholme's motion would be premature. First and foremost, Fairholme's failure to meet the heightened standard for demonstrating need cannot overcome the presumption that these

presidential communications are privileged. Unlike agencies invoking executive privileges, "the White House need not formally invoke the presidential communications privilege until the party making the discovery request has shown a heightened need for the information sought." *Dairyland II*, 79 Fed. Cl. at 662. Even if the Court were to conclude that Fairholme has shown such a heightened need, "the White House must [then] be allowed the opportunity to submit an affidavit formally invoking the privilege and stating the reasons for the invocation, in the context of which the Court can review the subject documents in camera to determine if the privilege actually applies here." *Id*. at 669. Only after such an affidavit is produced, therefore, would it be appropriate for the Court to examine the documents *in camera*. Because Fairholme has failed to demonstrate a heightened need for these four documents, however, neither a declaration from the White House formally asserting privilege nor *in camera* review is warranted at this time.

## V. The Government's Good Faith Attempts To Resolve Privilege Disputes Out Of Court Do Not Call Into Question The Government's Privilege Assertions

Finally, Fairholme inappropriately "calls into question [the Government's] entire approach to asserting privilege," Pls. Mot. 9, and makes the extraordinary request that the Court "direct [the Government] to re-review" thousands of documents the United States has withheld on claims of privilege, Pls. Mot. 4, 10, even though Fairholme no longer challenges a number of the Government's privilege assertions. *E.g.*, Pls. App. A018 (Nov. 13, 2015 letter at 6 n.3). Fairholme's contentions lack merit.

The Government's approach reflects the realities of high-volume document productions. On June 30, 2015, the Government's document production was 99 percent complete. Subsequent supplementation or correction of the production demonstrates only the Government's good faith efforts to ensure that Fairholme received the documents to which it was entitled. Throughout the discovery process, we have re-assessed our initial determinations of privilege

and have withdrawn our preliminary assertions of privilege over a small number of documents. Inexplicably, these efforts have merely raised Fairholme's suspicions.

For example, Fairholme laments that the Government reconsidered its provisional assertion of privilege over 41 documents following a challenge by Fairholme. Pls. Mot. 7. But the majority (30 of the 41) of the documents over which the Government withdrew its provisional assertion of privilege were iterations of only two e-mail chains concerning internal lists of legal and administrative tasks. Pls. App. A073 (Sept. 1, 2015 letter at 4). Fairholme also asserts that it is "deeply troubling" the Government initially withheld a "Q&A" that Fairholme contends [redacted] Pls. Mot. 7. Putting aside Fairholme's dubious contentions concerning the substance of the Q&A,[16] the Government withdrew its assertion of privilege over the last-in-time Q&A (of the 69 versions identified by Fairholme) as part of the RCFC 37 meet and confer process. *See* Pls. App. A070-71 (Sept. 1, 2015 letter at 2-3); *see also* RCFC 37(a)(1) (movant must certify it has in good faith conferred with the party failing to make disclosure or discovery

[16] Fairholme's argument that the Q&A "contradicts" the Government's position on the merits is not relevant to the Court's determination of whether the Government may properly assert privilege. In any event, there is no contradiction. *Compare, e.g.*, A11 (*Perry Capital LLC v. LEW*, D.D.C. Civil No. 13-1025, ECF No. 26-14 at Treasury-3899) ("Longer term, the GSEs will not generate enough income to meet their dividend requirement *due to the enterprises being wound down*.") *with* Pls. App. A078 (UST00554590) [redacted] Moreover, [redacted] was justifiably initially withheld as privileged because it reflects internal, staff-level opinions rather than the policy of the agency. *Coastal States*, 617 F.2d at 866.

in an effort to obtain discovery without court action). Fairholme then abandoned its challenges to the 68 additional versions of the Q&A and the redacted portions of the 30 emails and attachments produced regarding internal lists of tasks. Pls. App. A018 (Nov. 13, 2015 letter at 6 n.3).

As Fairholme identified additional specific documents, the Government re-reviewed and produced some of those documents. As to each document, the Government properly considered Fairholme's questions regarding particular privilege assertions, and, when appropriate, the Government waived its assertion of privilege or re-assessed documents that were inadvertently marked as privileged. We even endeavored to find and identify similar documents Fairholme had not challenged to produce them pursuant to our RCFC 26(e) obligations. *See, e.g.*, Pls. App. A018 (Nov. 13, 2015 letter at 6). This obviated the need for Court intervention, *see id.* at 6 n.3, and is the very outcome that the RCFC 37 meet-and-confer process is meant to facilitate.

The United States produced more than 48,000 documents (comprising more than 500,000 pages) to Fairholme, and asserted privilege over approximately 12,000 documents. Fairholme complains that a handful of documents were ultimately reclassified *and produced*. This is not a "[h]aphazard, [i]nconsistent, and [o]verbroad" production as alleged in Fairholme's motion. Pls. Mot. 4. The Court should deny its motion to compel.

## CONCLUSION

For the foregoing reasons, the United States respectfully requests the Court deny Fairholme's motion.

Respectfully submitted,

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January 21, 2016