Redacted Version

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFFS' SECOND MOTION TO COMPEL

While the scope of the parties' privilege disputes has greatly narrowed in recent months, Plaintiffs submit this motion to request that the Court resolve one final issue on which the parties have been unable to agree. In this motion, Plaintiffs respectfully request that the Court order the use of the "quick peek" procedure authorized by Federal Rule of Evidence 502(d) for approximately 1500 documents from May 2012 and thereafter that the Government is still withholding under the deliberative process and bank examination privileges.

BACKGROUND

The parties had very different views about how discovery should proceed following the Federal Circuit's mandamus ruling. While the Government urged the Court to simply order that discovery was over, Plaintiffs asked the Court to narrow the parties' remaining privilege disputes by allowing Plaintiffs a "quick peek" of the documents on the Government's privilege logs. Joint Status Report at 7 (Feb. 24, 2017), Doc. 359. The Court ultimately chose a middle path, declining to order use of the quick peek procedure "[a]t this time" and directing the Government to re-review the documents on its privilege logs in light of the privilege rulings by this Court and the Federal Circuit. Order at 2 (Mar. 7, 2017), Doc. 360.

The Government ultimately produced 3500 documents after reexamining the approximately 12,000 documents on its privilege logs, and some of these newly produced documents are extremely significant. Perhaps most notably, the Government produced a Treasury memorandum revealing that on June 25, 2012, FHFA's Acting Director told Treasury Secretary Geithner that he did not "see[ ] the urgency of amending the PSPAs" in part because "the GSEs will be generating large revenues over the coming years, thereby enabling them to pay the 10% annual dividend well into the future." UST00533645, A1. This statement directly contradicts one of the central pillars of the Government's defense of the Net Worth Sweep, which is that "[t]here was concern that, under the weight of the [10%] dividend, the Enterprises would run through the remaining Treasury investment capacity, leading to insolvency." United States Motion to Dismiss at 10 (Dec. 9, 2013), Doc. 20.

The Government completed its reexamination of the documents on its privilege log on May 31, 2017. Plaintiffs subsequently asked the Government to again review 38 of the documents it was still withholding for privilege. The Government responded by producing an additional 22 documents and refused to produce some of the other documents Plaintiffs identified because they concerned topics the Government deemed "too remote from the central issues in the case" for Plaintiffs' need to overcome the Government's qualified deliberative process and bank examination privileges. Letter from Elizabeth M. Hosford, Department of Justice, to Brian Barnes, Cooper & Kirk, at 2 (July 12, 2017) (quoting *In re United States*, 2017 WL 406243, at *6–*7 (Fed. Cir. 2017)), A3. Plaintiffs responded by expressing concern about the Government's last-minute decision to abandon its privilege assertions over such a large portion of the documents on Plaintiffs' list and proposed that the parties use the quick peek procedure authorized by Federal Rule of Evidence 502(d). Letter from Brian Barnes, Cooper & Kirk, to Elizabeth M. Hosford,

Department of Justice, at 2 (July 25, 2017), A7. On August 1, the Government refused to agree to use of the quick peek procedure but said that it would voluntarily produce 17 more documents, which Plaintiffs received the next day. *See* Letter from Elizabeth M. Hosford, Department of Justice, to Brian Barnes, Cooper & Kirk, at 1 (Aug. 1, 2017), A8.

ARGUMENT

As discussed above, even after re-reviewing the documents on its privilege logs in light of the privilege rulings from this Court and the Federal Circuit, yet another re-review of 38 documents the Government continued to withhold prompted it to produce 22 additional documents. And when Plaintiffs expressed concern about the Government's apparent unwillingness to defend such a large portion of its remaining privilege assertions, the Government responded by producing 17 more documents it had previously withheld for privilege. While we do not suggest that Government counsel has failed to make a good faith effort to comply with this Court's orders, the rate at which another review led the Government to abandon its privilege assertions is troubling and highlights the inherent difficulty of advocates for the Government determining which information Plaintiffs most need in this important and factually complex case.

Also troubling is the fact that portions of these belatedly produced documents were clearly not privileged in the first place. It is well settled that neither the deliberative process privilege nor the bank examination privilege applies to segregable, purely factual information. *See* Public Redacted Motion to Compel Order at 14 (Oct. 3, 2016), Doc. 340 (observing that "factual or investigative material" is not covered by deliberative process privilege "except as necessary to avoid indirect revelation of the decision-making process"); *In re Subpoena Served Upon Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992) (bank examination privilege "shields from discovery only agency opinions or recommendations; it does not protect purely

factual material"). Yet portions of FHFA00070607, which the Government only produced after reviewing it for a third time, contain tables of information that simply describe aspects of the Companies' financial position at the beginning of 2012. *See* FHFA00070607, at 15–17, A25–27. Such factual information is not privileged and should never have been withheld.

Furthermore, Plaintiffs' need for some of the documents the Government only belatedly produced was clearly sufficient to overcome the Government's qualified deliberative process and bank examination privileges. FHFA00038592, for example, is an email an FHFA official sent three days before the Net Worth Sweep was announced that acknowledged that the Companies' "Boards had discussed" "re-recording certain deferred tax assets that had been written-off" "based on the view that they were going to be profitable going forward." A29. This email disproves the sworn declaration FHFA submitted in the D.D.C. litigation that "[a]t the time of the negotiation and execution of the Third Amendment, the Conservator and the Enterprises had not yet begun to discuss whether or when the Enterprises would be able to recognize any value to their deferred tax assets." Declaration of Mario Ugoletti ¶ 20, A38. Particularly in light of Mr. Ugoletti's declaration, Plaintiffs had a clear need for this internal FHFA email. Yet the Government initially declined to produce the email even after reexamining the documents on its privilege log. Plaintiffs finally received it on August 2, as it became clear that Plaintiffs would file this motion.

Another of the only recently produced documents is an internal FHFA email summarizing a June 13, 2012 meeting between FHFA officials and Fannie's CFO, Susan McFarland. According to the email, Ms. McFarland told FHFA officials that Fannie was projecting $5 billion in earnings for the second quarter of 2012 and that "it is possible that [Fannie] may take a negative provision of $1 to $2 billion in the reserves (this would increase income) due to lower than expected credit losses." FHFA00077771, A40. This document speaks directly to the Companies' profitability and

the anticipated effect of the Net Worth Sweep. It should have been produced in the wake of the Federal Circuit's ruling without the need for Plaintiffs to ask Government counsel to review it for a third time.

Under these circumstances, Plaintiffs submit that it would be appropriate for the Court to order the use of the "quick peek" procedure under Federal Rule of Evidence 502(d). *See Salem Fin., Inc. v. United States*, 102 Fed. Cl. 793, 800 (2012). Under the quick peek procedure, the Court would issue an order directing the Government to permit Plaintiffs' counsel to review documents without waiving its claims of privilege. Plaintiffs' counsel would then identify the subset of the reviewed documents that are most relevant to this case and that Plaintiffs' counsel believes should be produced. Any remaining document privilege disputes would then narrowly focus on the small subset of documents identified by Plaintiffs' counsel. To facilitate the speedy resolution of the parties' remaining privilege disputes, Plaintiffs propose to limit the use of this procedure to documents created in May 2012 or thereafter that the Government is still withholding under the deliberative process privilege, the bank examination privilege, or both. Plaintiffs estimate that there are only approximately 1500 such documents and that review of those documents by Plaintiffs' counsel could be completed in one month.

CONCLUSION

The Court should order the use of the "quick peek" procedure with respect to documents created in May 2012 or thereafter that the Government is withholding under the deliberative process and bank examination privileges.

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Respectfully submitted,

s/ Charles J. Cooper

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