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,	)	
	)	
Defendant.	)	

PUBLIC REDACTED REPLY IN SUPPORT OF PLAINTIFFS' SECOND MOTION TO COMPEL

The quick peek review Plaintiffs propose for a limited universe of documents the Government is still withholding for privilege could be completed in roughly one month and would ensure that Plaintiffs receive all of the documents to which they are entitled before briefing resumes on the Government's motion to dismiss. Despite the Government's arguments to the contrary, use of this procedure is both authorized by the Federal Rules and appropriate under the present circumstances.

I. The Court Has Authority To Order Use of the Quick Peek Procedure over the Government's Objection.

Nothing in the text of Federal Rule of Evidence 502(d) supports the Government's argument that the quick peek procedure cannot be used without the producing party's consent, and the Advisory Committee Note is directly to the contrary: "[t]he rule contemplates enforcement of . . . 'quick peek' arrangements," and "[u]nder the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order." FED. R. EVID. § 502, Advisory Comm. Notes, Subdivision (d). The Statement of Congressional Intent included in Rule 502's legislative history likewise makes clear that subsection (d) "is designed to enable a court to

enter an order, *whether on motion of one or more parties or on its own motion*." 154 CONG. REC. H7818-19 (Sept. 8, 2008) (emphasis added).

None of the cases cited by the Government says that a court is powerless to order use of the quick peek procedure without the producing party's consent. As the Government acknowledges, a producing party was required to use the quick peek procedure in *Summerville v. Moran*, 2016 WL 233627, at *5–*6 (S.D. Ind. Jan. 20, 2016). The Government emphasizes that in *Thermal Sols., Inc. v. Imura Int'l USA, Inc.*, No. 08-2220, slip op. at 2 (D. Kan. Mar. 4, 2010), ECF No. 194, the producing party agreed to a limited use of the quick peek procedure, but it neglects to mention that less than two months later the court in that case expanded the universe of documents that were subject to the procedure over the producing party's objection, *see Thermal Sols., Inc. v. Imura Int'l USA, Inc.*, 2010 WL 11431562, at *14 (D. Kan. Apr. 28, 2010). And although the court in *Good v. American Water Works Co.*, 2014 WL 5486827, at *3 (S.D. W. Va. Oct. 29, 2014), declined to order use of the quick peek procedure, it left open the possibility that it might do so in the future if the producing party failed to quickly review and produce all relevant and non-privileged documents.

To be sure, a Sedona Conference commentary takes the position that "Rule 502(d) does not authorize a court to require parties to engage in 'quick peek' . . . productions," The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 137 (2016), but that commentary fails to reconcile its position with Rule 502's Advisory Committee Note and legislative history. Moreover, the rationale for the Sedona Conference's disfavored treatment of compelled quick peek disclosures of material covered by the attorney-client privilege is that such disclosures "force[ ] a producing party to ring a bell that cannot be un-rung" and there is no way to "erase[ ] from [opposing] counsel's knowledge what has been disclosed." *Id.* at 139 (quotation

marks omitted). Whatever the significance of this concern in the attorney-client privilege context, it does not apply to the qualified deliberative process and bank examination privileges in a case in which the Court has already determined that Plaintiffs' need for certain materials is sufficient to overcome the Government's interest in concealing them. If anything, the possibility that the Government is still withholding documents that would "ring a bell that cannot be un-rung" is a reason to order use of the quick peek procedure under the particular circumstances of this case.

The Government also suggests that the quick peek procedure is only appropriate at the outset of discovery, before the producing party has reviewed the documents in question. But this Court deployed the procedure *after* a producing party reviewed and withheld 410 documents as privileged in *Salem Fin., Inc. v. United States*, 102 Fed. Cl. 793, 800 (2012). The Court should likewise order use of the quick peek procedure in this case.

II. The Quick Peek Procedure Is the Only Mechanism that Will Ensure that Plaintiffs Receive All Materials to Which They Are Entitled.

With the document descriptions in the Government's privilege logs providing little useful information, all Plaintiffs can do to test the Government's claims of privilege is identify a sample of the documents on its logs and ask for more information. But when Plaintiffs did that after the Government completed its most recent review of the documents it is still withholding, the Government responded to Plaintiffs' 38-item list by producing 22 additional documents. The Government attempts to cast its production of these materials as part of the normal give and take in discovery, but the Government's unwillingness to stand by such a large share of a sample of its remaining privilege claims is deeply troubling. More troubling still is the fact, demonstrated in Plaintiffs' motion, that many of the belatedly produced documents were clearly not privileged or should have been produced in light of Plaintiffs' need.

Irrespective of whether the Court views the quick peek procedure as "an alternative to imposing wholesale privilege waiver as a sanction," Government Response at 9 (Aug. 17, 2017), Doc. 386, it is the only procedure by which the Court can ensure that Plaintiffs receive all of the documents to which they are entitled. Use of the quick peek procedure Plaintiffs propose would not unduly delay this case, and Plaintiffs submit that it is appropriate under the circumstances.

CONCLUSION

Plaintiffs' Second Motion to Compel should be granted.

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Respectfully submitted,

s/ Charles J. Cooper

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