Redacted Version

No. 13-465C
(Judge Sweeney)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., *et al*.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFFS' SECOND MOTION TO COMPEL

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August 17, 2017

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	)	(Judge Sweeney)
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS' SECOND MOTION TO COMPEL

Defendant, the United States, respectfully submits this response to Plaintiffs' Second Motion to Compel (Pls. Mot., ECF No. 384), which was filed by plaintiffs Fairholme Funds, Inc., *et al*. on August 2, 2017. In their motion, plaintiffs request that the Court order that the United States submit to the use of the quick-peek procedure authorized by Federal Rule of Evidence 502(d) "with respect to documents created in May 2012 or thereafter that the Government is withholding under the deliberative process and bank examination privileges." Pls. Mot. 5.[1] Earlier this year, the Court determined that plaintiffs' request for use of the quick-peek procedure was not appropriate; as we demonstrate below, plaintiffs' request is even less appropriate now following our comprehensive re-review of our privilege assertions, as directed by the Court. Accordingly, the Court should deny plaintiffs' second motion to compel and instead enter an order directing the parties to resume briefing on the Government's motion to dismiss.

[1] Plaintiffs estimate that "approximately 1,500 documents" are covered by their current request for a quick peek. Pls. Mot. 1. Although we have identified 1,079 documents, dated after May 1, 2012, that were withheld on the basis of deliberative process and/or bank examination privileges, the precise number is not important for the purposes of our response to plaintiffs' motion.

BACKGROUND

In their first motion to compel, plaintiffs sought, in addition to other relief, an order that would require that the Government produce 58 documents of the more than 11,000 documents identified in the Government's privilege logs. In its September 20, 2016 opinion and order, this Court ordered the Government to produce 56 of the documents at issue. Subsequently, the Government sought a writ of mandamus from the Court of Appeals for the Federal Circuit, and, in January 2017, the Federal Circuit granted the Government's petition, in part, overruling this Court's decisions on eight documents. On January 31, 2017—the same day that it vacated the portions of the September 20 opinion and order that had been overruled by the Federal Circuit—the Court ordered the parties to submit a joint status report proposing a schedule for completion of "jurisdictional" discovery and the completion of briefing on the Government's long-pending motion to dismiss.

On February 24, 2017, the parties filed the requested joint status report (ECF No. 359), and reported that they were unable to agree upon a schedule for the completion of jurisdictional discovery. For the most part, the status report consisted of the parties' competing arguments relating to plaintiffs' request that the Court impose a quick-peek procedure that would, over the Government's objection, permit plaintiffs' counsel to review all of the documents withheld for Government privilege. Joint Status Report at 7, ECF No. 359. In its order issued on March 7, 2017 (March 7 Order, ECF No. 360), the Court declined plaintiffs' quick-peek request, stating that the Court was not convinced that the procedure was appropriate. March 7 Order at 2. Instead, the Court instructed the Government to "review its privilege log and, based on the court's September 20, 2016 ruling on plaintiffs' motion to compel as well as the Federal Circuit's ruling on defendant's petition for a writ of mandamus, produce any additional

documents listed on its privilege log that are either (1) no longer privileged in light of both courts' rulings or (2) despite being privileged must nevertheless be produced in light of both courts' rulings." *Id.*[2]

Over the next two-and-one-half months, the Government re-reviewed those documents it continued to withhold as protected by Government privileges. Pursuant to the Court's March 7 Order, the Government applied this Court's and the Federal's Circuit's rulings regarding the 58 documents that were the subject of plaintiffs' first motion to compel to a much broader universe of privileged materials. As a result of our re-review, we produced to plaintiffs an additional 3,500 documents, many of which plaintiffs characterize as "extremely significant" to their case. Pls. Mot. at 2 (citing UST00533645).[3]

On June 26, 2017, plaintiffs initiated a meet-and-confer process regarding 38 documents that plaintiffs believed "may be sufficiently related to the central issues in the case that [plaintiffs'] need overcomes the qualified privilege[s]." Response Appendix (RA) 1. Four days later, the parties filed a joint status report in which plaintiffs reported that the "Government's response concerning [those] 38 documents Plaintiffs identified on June 26" will determine whether plaintiffs "will seek assistance from the Court to resolve any remaining privilege disputes[.]" Joint Status Report at ¶ 3, June 30, 2017, ECF No. 382. The parties stated that they were hopeful that they could "resolve any remaining privilege disputes without the need for

[2] Indeed, a re-review of the Government's privilege log was the precise relief that plaintiffs requested in their first motion to compel. *See* Pls. Mot. to Compel at 37, Nov. 23, 2015, ECF No. 270 (seeking an order requiring the Government "to re-assess all of its privilege claims in light of the Court's decision and to produce all documents that are not genuinely privileged").

[3] Although we disagree with the factual inferences and conclusions that plaintiffs draw from the Government documents cited in their motion, Pls. Mot. at 2, 4, we agree that we made significant efforts to identify and provide plaintiffs with privileged documents that "must nevertheless be produced in light of both courts' rulings." March 7 Order at 2.

further involvement from the Court." *Id.* ¶ 4. Accordingly, we understood these 38 documents to comprise the last set of materials requiring resolution before the close of jurisdictional discovery. *Compare id.* ¶ 3, *with* Pls. Mot. at 5.

In an effort to resolve any remaining privilege disputes without further Court involvement, on July 12, 2017, we agreed to produce, in full or redacted form, 22 of the 38 documents identified by plaintiffs: two Department of the Treasury (Treasury) documents and 20 Federal Housing Finance Agency (FHFA) documents. Pls. Mot., A2-A5 (July 12, 2017 Letter from Elizabeth M. Hosford to Brian W. Barnes). In our July 12 response to plaintiffs' meet-and-confer request, and consistent with this Court's and the Federal Circuit's rulings, we also provided plaintiffs with additional explanation regarding the 16 (of 38) documents that we continued to withhold as privileged. *Id*., A2-A5.

In response, plaintiffs acknowledged that our July 12 letter and our previous discussions "greatly narrowed the scope of the parties' privilege disputes." *Id*., A6. Plaintiffs accepted our explanations for most of the 16 documents we continued to withhold, but asked that the Government reconsider plaintiffs' request regarding documents that reference Fannie Mae's and Freddie Mac's (the Companies) loan loss reserves and/or deferred tax assets. *Id*, A6. Plaintiffs also renewed their request for a quick peek of two categories of documents protected by the deliberative process and/or bank examination privileges: (1) all privileged documents, dated after May 1, 2012; and (2) privileged documents referring to the Companies' loan loss reserves and/or deferred tax assets, dated after June 1, 2011. *Compare id*, A7, *with* March 7, 2017 Order at 2.

With respect to plaintiffs' request that we reconsider our position regarding certain documents concerning the Companies' loan loss reserves and/or deferred tax assets, we agreed to produce two additional documents. Pls. Mot., A8-9 (Aug. 1, 2017 Letter from Elizabeth M.

Hosford to Brian W. Barnes). Further, pursuant to Rule 26(e), we endeavored to identify additional documents relating to the Companies' deferred tax assets and/or loan loss reserves that plaintiffs had not questioned, and produced another 13 such documents. *Id*., A8. However, with respect to plaintiffs' renewed request for a quick peek of documents protected by the deliberative process and bank examination privileges, we confirmed that our previous objection remained unchanged. *Id*., A9. We also expressed concern that "our production of documents—rather than moving the litigation forward as the meet-and-confer process anticipates—instead seems to invite more delay and increased demands." *Id*., A9.

Two days later, notwithstanding our efforts to resolve any outstanding disputes through the meet-and-confer process, plaintiffs filed their motion seeking an order compelling the Government to permit plaintiffs' counsel to review approximately 1,500 privileged documents over the Government's objection. Plaintiffs, apparently, seek to prolong this process indefinitely; we ask the Court to reject plaintiffs' motion and bring jurisdictional discovery to a close.

ARGUMENT

In compliance with the Court's March 7 Order, we engaged in a meaningful re-review of the documents that we had withheld as privileged. Whether produced as part of our initial re-review or in connection with the parties' later meet-and-confer negotiations, that process resulted in our producing more than 3,500 additional documents, including numerous documents that plaintiffs characterize as being "extremely significant" to their case. Pls. Mot. at 2, 4-5. Nonetheless, rather than welcoming our willingness to cooperate and resolve privilege challenges without Court intervention, plaintiffs characterize our cooperation as "troubling." *Id*. at 3.

Apparently, no mechanism other than providing plaintiffs with unrestricted access to approximately 1,500 additional privileged documents will satisfy plaintiffs' seemingly limitless appetite for jurisdictional discovery. But the forced, quick-peek procedure that plaintiffs seek extends far beyond any mechanism for facilitating discovery contemplated by the Rules of this Court (RCFC) or the Federal Rules of Evidence. In fact, this Court has already rejected plaintiffs' previous, similar request for a quick peek of documents protected by Government privileges. March 7 Order at 2. In its March 7 Order, the Court determined that plaintiffs' proposed quick-peek procedure was inappropriate at that time. Given our subsequent re-review and production of more than 3,500 additional documents, and our continued objection to the procedure, the quick-peek procedure is even less appropriate now. Accordingly, the Court should deny plaintiffs' motion, declare jurisdictional discovery "closed," and enter an order directing the parties to resume briefing on the Government's motion to dismiss.

I. Plaintiffs Offer No Valid Basis For The Court To Provide Plaintiffs With A Quick Peek Of Approximately 1,500 Privileged Documents Over The Government's Objection

A quick-peek procedure is inappropriate in this case because (1) the Government does not consent to its imposition, and (2) such a procedure has limited utility when the Government has completed a comprehensive review—and re-review—of its privileged materials.

Rule 26(b)(5) sets forth the general rule regarding a producing party's responsibility to identify documents withheld for privilege: "When a party withholds information otherwise discoverable by claiming that the information is privileged . . . the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." RCFC 26(b)(5). A quick-peek procedure constitutes a narrow exception to Rule 26(b)(5), which typically allows a

producing party to provide never-reviewed, never-logged documents to the requesting party under a court order that the producing party's production will not constitute waiver of any privileges. *See* Fed. R. Civ. P. 26(f), Advisory Committee Notes (2006); Fed. R. Evid. 502(d). The procedure seeks to lessen the producing party's burden to review voluminous electronically stored information (ESI) for privilege and invest the resources necessary to comply with the strictures of Rule 26(b)(5). *See* Rule 26(f), Advisory Committee Notes (2006). Should the producing party voluntarily agree to adopt a quick-peek procedure, courts ensure that it does not waive privilege by entering a clawback order pursuant to Federal Rule of Evidence 502(d). *See* Fed. R. Evid. 502(d).

However, Federal Rule of Evidence "502(d) does not authorize a court to require parties to engage in 'quick peek' . . . productions and should not be used directly or indirectly to do so." The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 Sedona Conf. J. 99, 140 (2016). "Rule 502 was designed to protect producing parties, not to be used as a weapon impeding a producing parties' right to protect privileged material. Compelled disclosure of privileged information, even with a right to later claw back the information, forces a producing party to ring a bell that cannot be un-rung." *Id.* Even if no waiver exists with respect to a particular document, a forced, quick-peek protocol imposes significant prejudice on the producing party because the opposing party may still obtain protected information contained in the document by "submit[ting] a request for admission to elicit the material or tailor[ing] a deposition question to do the same." *Id.* at 139.

Given these considerations, courts approve quick-peek procedures in limited cases when (1) the *producing party voluntarily agrees* to adopt such a procedure, and (2) the procedure will minimize the producing party's burden associated with a document-by-document privilege

review and preparation of a privilege log. *See, e.g., Salem Fin., Inc. v. United States*, 102 Fed. Cl. 793, 800 (2012) (permitting Government counsel to obtain a quick peek of plaintiff's documents when plaintiff's counsel consented to such a procedure); *Voter Verified, Inc. v. Premier Election Sols., Inc.*, No. 09-cv-1968, 2010 WL 11474689, *2 (M.D. Fla. June 9, 2010) (adopting plaintiff's proposal to allow defendant's counsel a quick peek of plaintiff's responsive documents). Neither factor is present here.

First, the Government opposes the imposition of a forced quick-peek procedure. Inherent in the Court's authority to approve a quick-peek procedure is the producing party's consent to it. *See Salem Fin., Inc.*, 102 Fed. Cl. at 800; *Voter Verified, Inc.*, 2010 WL 11474689, *2; *Radiant Asset Assurance, Inc. v. College of the Christian Bros. of N.M.*, No. 09-885, 2010 WL 4928866, *2 (D.N.M. Oct. 22, 2010) (ordering defendant to produce unreviewed ESI subject to Rule 502(d) order after defendant consented to such an order); *Thermal Sols., Inc. v. Imura Int'l USA, Inc.*, No. 08-2220, slip op. at 2 (D. Kan. Mar. 4, 2010) (ECF No. 194). *See also* The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 Sedona Conf. J. at 135 (Sedona Conference Comment 2(d): "Rule 502(d) orders should be considered to facilitate *consensual* 'quick peek' . . . productions in order to promote judicial economy without fear of any later claim of waiver") (emphasis added). Absent such consent, courts have denied a requesting party's motion to force a producing party to turn over its privileged materials under the guise of a quick-peek procedure. *See, e.g., Mgmt. Compensation Group Lee, Inc. v. Okla. State Univ.*, No. Civ-11-967-D, 2011 WL 5326262, *4 n.6 (W.D. Okla. Nov. 3, 2011) (declining to impose a quick peek procedure on an objecting party); *Good v. Am. Water Works Co.*, No. 2:14-01374, 2014 WL 5486827, *3 (S.D. W. Va. Oct. 29, 2014) (rejecting plaintiffs' proposal to compel defendants to produce documents to plaintiffs without an initial privilege review by defendants'

attorneys); *see also* Martin R. Leuck & Patrick M. Arenz, *Federal Rule of Evidence 502(d) and Compelled Quick Peek Productions,* 10 Sedona Conf. J. 229, 232-34 (2009).

We are aware of only one case in which a court compelled a quick peek over a producing party's objection. *See Summerville v. Moran*, No. 14-cv-2099, 2016 WL 233627, at *5-6 (S.D. Ind. Jan. 20, 2016). In *Summerville*, the defendant provided an inadequate privilege log and refused to cooperate with plaintiff regarding discovery. *Id.* at *5. As an alternative to imposing wholesale privilege waiver as a sanction, the district court permitted the plaintiff to review a sample of 12 documents withheld for attorney-client privilege. *Id.* at *5-6; *see also* Leuck & Arenz, 10 Sedona Conf. J. at 235 (suggesting that courts may compel quick-peek productions "*as a sanction* on parties that are found to egregiously violate their discovery obligations") (emphasis added). Plaintiffs acknowledge that no such conduct is present here. Pls. Mot. at 3.

Second, the quick-peek procedure will not minimize the burden of a document-by-document privilege review and preparation of a privilege log because the Government has already invested the "substantial costs . . . and the time required for the privilege review" that a quick peek is designed to avoid. *See* Rule 26(f), Advisory Committee Notes (2006); *see also* March 7 Order at 2. Plaintiffs' proposed quick peek would require the Government to absorb the burden of a full-scale privilege review, along with the harm associated with handing over the precise documents the Government already determined were properly withheld as privileged in accordance with the Courts' rulings. Moreover, notwithstanding plaintiffs' representation in their July 25 letter that the quick-peek procedure would "eliminate further privilege disputes," plaintiffs' motion contemplates that the quick peek will generate additional privilege disputes, requiring ongoing Court intervention. *Compare* Pls. Mot. at 5, *with id.*, A7.

Nonetheless, plaintiffs argue that the Court should force the Government to provide plaintiffs with a quick peek of privileged documents because the Government reconsidered certain privilege assertions as part of the meet-and-confer process. *Id*. at 3-5. In this regard, plaintiffs erroneously conflate our reconsideration and withdrawal of a privilege assertion with an admission that the document was not properly withheld as privileged in the first place. *Id.* at 4-5. However, our decision to produce specific documents stemmed from both prudential concerns and a meaningful effort on our part to finally move forward to adjudicate our motion to dismiss—not because we agree that plaintiffs needed any such documents.

Indeed, plaintiffs fail to adequately explain their need for the two exemplar documents cited in their motion. *See id*., A40 (FHFA00077771), A29 (FHFA00038592). FHFA0007771 briefly mentions Fannie Mae's expected profitability for the quarter ending June 30, 2012, but Fannie Mae's actual earnings for that quarter are publicly available in its SEC filing. *Compare id.*, A40, *with* Fannie Mae Form 10-Q at 3 (Aug. 8, 2012). *See In re United States*, 678 F. App'x 981, 990 (Fed. Cir. 2017) (where information is available to plaintiffs "in public filings, there is no sufficient showing of need"). In addition, plaintiffs erroneously contend that they need FHFA00038592 because it allegedly contradicts a statement contained in a declaration submitted by a former FHFA official in a separate litigation. Pls. Mot. at 4 and A29. Putting aside that no such contradiction is apparent, we note that plaintiffs obtained substantively similar information from the deposition of Fannie Mae's former chief financial officer. RA8-9. Thus, given that the information was available from other sources, plaintiffs' alleged need for this undisputedly privileged document is questionable, at best. *See Fairholme Funds, Inc. v. United States*, 128 Fed. Cl. 410, 434 (2016) (explaining that the Court must consider the availability of evidence from other sources when weighing a party's need for information protected by Government

privileges). In any event, we *produced* FHFA00038592 when plaintiffs brought it to our attention during the course of the meet-and-confer process.

In addition, plaintiffs' argument that we should have produced three pages of segregable, factual information from a Fannie Mae presentation prepared for FHFA—which the Government produced in full as part of the meet-and-confer process—does not provide a basis to permit plaintiffs a quick peek of approximately 1,500 additional privileged documents. *Id.*, A25-27. The Government did its best to segregate and produce purely factual information as part of its re-review. When plaintiffs identified this document as part of the meet-and-confer process, we withdrew our privilege assertion and provided plaintiffs with an unredacted version. *See In re United States*, 321 F. App'x 953, 958-61 (Fed. Cir. 2009) ("[T]he division between factual and deliberative content is not exact, and merely because the content of a particular document involves factual information, that does not mean that the deliberative-process privilege does not apply").

Given the Government's re-review of its privilege log, production of approximately 3,500 additional documents, and cooperation in the meet-and-confer process, plaintiffs identify no valid basis for the Court to force the Government to provide plaintiffs with a quick peek of approximately 1,500 documents that the Government determined were properly withheld as privileged.

II. The Parties Should Resume Briefing On The Government's Motion To Dismiss

Consistent with the Court's March 7 Order, we have produced over 3,500 additional documents to plaintiffs, and met and conferred with plaintiffs regarding 38 documents that they questioned. We understood from the joint status report that our response with respect to those 38 documents would determine whether plaintiffs would seek Court intervention regarding any of

those documents, not whether plaintiffs would seek a Court order compelling a quick peek of 1,500 documents that the Government already determined were properly withheld as privileged consistent with this Court's and the Federal Circuit's rulings. Accordingly, we understand all document-specific privilege challenges to be resolved. Thus, jurisdictional discovery should conclude and briefing on the Government's motion to dismiss should resume.

CONCLUSION

For these reasons, plaintiffs' second motion to compel should be denied and the Court should enter an order directing the parties to resume briefing on the Government's motion to dismiss.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

s/Robert E. Kirschman, Jr.
ROBERT E. KIRSCHMAN, JR.
Director

s/Kenneth M. Dintzer
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Attorneys for Defendant

August 17, 2017

RESPONSE APPENDIX

Index to Response Appendix

From: Brian Barnes
To: Hosford, Elizabeth (CIV)
Cc: Bezak, Reta E. (CIV); Koprowski, Agatha M. (CIV); Schiavetti, Anthony F. (CIV); Laufgraben, Eric E. (CIV)
Subject: RE: Fairholme Question
Date: Monday, June 26, 2017 9:04:46 AM

Hi Liz,

Many thanks for clarifying the standard the Government used when re-reviewing the documents on the privilege logs. I'm writing to request that you take another look at the documents I've listed below. Based on the privilege log descriptions and other materials the Government produced, we think these documents may be sufficiently related to the central issues in the case that Fairholme's need overcomes the qualified privilege. As you'll see, most of the documents we have questions about come from FHFA. To the extent the government will not be producing any of these documents, please let us know when you are available to meet and confer.

Best regards,

Brian W. Barnes
Cooper & Kirk, PLLC
(202) 220-9623

FHFA Documents:

FHFA00031716
FHFA00031718
FHFA00038592
FHFA00038593
FHFA00043777
FHFA00043797
FHFA00045470
FHFA00050858
FHFA00050887
FHFA00051264
FHFA00068184
FHFA00070475
FHFA00070477
FHFA00070607
FHFA00072773
FHFA00072775
FHFA00072776
FHFA00077677
FHFA00073824
FHFA00073836
FHFA00073922
FHFA00073923

FHFA00075629
FHFA00077749
FHFA00077751
FHFA00077771
FHFA00097400
FHFA00097403
FHFA00103555
FHFA00103576
FHFA00105865
FHFA00106289

Treasury Documents:

UST00377912
UST00378962
UST00081727
UST00061151
UST00061154
UST00384425

From: Hosford, Elizabeth (CIV) [mailto:Elizabeth.Hosford@usdoj.gov]
Sent: Friday, June 16, 2017 1:45 PM
To: Brian Barnes <BBarnes@cooperkirk.com>
Cc: Bezak, Reta E. (CIV) <Reta.E.Bezak@usdoj.gov>; Koprowski, Agatha M. (CIV) <Agatha.M.Koprowski@usdoj.gov>; Schiavetti, Anthony F. (CIV) <Anthony.F.Schiavetti@usdoj.gov>; Laufgraben, Eric E. (CIV) <Eric.E.Laufgraben@usdoj.gov>
Subject: RE: Fairholme Question

Brian – Thanks for getting back to me. Any internal discussions about the production are privileged, but we, of course, used our best judgment and good faith. We note, however, that the Federal Circuit, in its mandamus opinion, identified two factors on the issue of need: (1) the proximity between the information contained in the document and the central issues in the case; and (2) whether the information was available from other sources. To the extent the plaintiffs expected us to apply a specific (or possibly even a different) standard - and wished to consult about it - we respectfully suggest that you should have raised the issue earlier, given that you were well aware that we were pursuing the review. As noted previously, we have complied with the court's order and produced an additional 3500 documents. Should plaintiffs choose to initiate a meet and confer process with respect to other documents on the log, we stand ready to respond.

Liz

From: Brian Barnes [mailto:BBarnes@cooperkirk.com]
Sent: Wednesday, June 14, 2017 4:50 PM
To: Hosford, Elizabeth (CIV) <EHosford@CIV.USDOJ.GOV>
Cc: Bezak, Reta E. (CIV) <rbezak@CIV.USDOJ.GOV>; Koprowski, Agatha M. (CIV) <akoprows@CIV.USDOJ.GOV>; Schiavetti, Anthony F. (CIV) <aschiave@CIV.USDOJ.GOV>; Laufgraben, Eric E. (CIV) <elaufgra@CIV.USDOJ.GOV>
Subject: RE: Fairholme Question

Hi Liz,

I hope that the Government will reconsider its refusal to provide any clarification on its understanding of the standard to be applied when determining whether Fairholme's need for a particular document is sufficient to overcome the Government's qualified privileges. We can't tell what standard the Government applied from the documents it produced (a task made even more difficult by your suggestion that the Government could have properly withheld some of these documents but nevertheless decided to voluntarily withdraw its claims of privilege). In the absence of clarification, we may need to go back to the Court.

With respect to the second issue you raise, we don't believe that the Government can unilaterally determine that "the parties' discovery disputes" have been "resol[ved]." We're still reviewing the documents the Government previously withheld for privilege, many of which were only produced two weeks ago. Once we've had an opportunity to assess these documents and the remaining items on the Government's privilege logs, we'll either seek to meet and confer with you about our remaining concerns or file a notice with the Court starting the 45-day clock by stating that we don't plan to raise any additional privilege issues during this phase of discovery.

Best regards,

Brian W. Barnes
Cooper & Kirk, PLLC

From: Hosford, Elizabeth (CIV) [mailto:Elizabeth.Hosford@usdoj.gov]
Sent: Monday, June 12, 2017 9:02 PM
To: Brian Barnes <BBarnes@cooperkirk.com>
Cc: Bezak, Reta E. (CIV) <Reta.E.Bezak@usdoj.gov>; Koprowski, Agatha M. (CIV) <Agatha.M.Koprowski@usdoj.gov>; Schiavetti, Anthony F. (CIV) <Anthony.F.Schiavetti@usdoj.gov>; Laufgraben, Eric E. (CIV) <Eric.E.Laufgraben@usdoj.gov>
Subject: RE: Fairholme Question

Brian,

As we stated in our status report, we produced all documents listed on the privilege logs that are either (1) no longer privileged in light of both courts' rulings, or (2) despite being privileged must

nevertheless be produced in light of both courts' rulings, as well as documents over which the United States has withdrawn its assertion of privilege. In doing so, we applied the standards announced or evidenced by the courts' rulings and the documents examined therein.

We also note that, with respect to completing discovery, the Court of Federal Claims instructed the Government to re-review its privilege log in accordance with the court's and the Federal Circuit's privilege rulings by May 30, 2017 (as amended), and directed plaintiffs to file their amended complaint within 45 days after "resolution of the parties' discovery disputes." *See* Order, March 7, 2017, ECF No. 360 at 2-3; *see also* Order Granting Extension of Time, Apr. 13, 2017, ECF No. 371. In response to the court's March 7 order, we produced an additional 3,500 documents that were previously withheld pursuant to governmental privileges. *See* Mot. for Leave to File Corrected Status Report, May 31, 2017, ECF No. 377.

Given that we produced the last portion of those documents on May 31, 2017, we understand the "parties' discovery disputes" to have been resolved as of that date.

Liz

From: Brian Barnes [mailto:BBarnes@cooperkirk.com]
Sent: Friday, June 09, 2017 12:05 PM
To: Hosford, Elizabeth (CIV) <EHosford@CIV.USDOJ.GOV>
Cc: Bezak, Reta E. (CIV) <rbezak@CIV.USDOJ.GOV>; Koprowski, Agatha M. (CIV) <akoprows@CIV.USDOJ.GOV>; Schiavetti, Anthony F. (CIV) <aschiave@CIV.USDOJ.GOV>
Subject: Fairholme Question

Hi Liz,

We're still working our way through the additional documents the Government recently produced, but one question we have is what standard the Government used when assessing whether Fairholme's need for a particular document was sufficient to overcome the deliberative process privilege. Any insight you can provide on that would be very much appreciated.

Best regards,

Brian W. Barnes
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a client, co-counsel or retained expert of C&K, you should maintain its contents in confidence in order to preserve any attorney-client or work product privilege that may be available to protect confidentiality. _____

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
NO. 13-465 C
(FILED FEBRUARY 26, 2014)

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FAIRHOLME FUNDS, INC., ET AL

VS. RCFC 12(b); RCFC 12(b)(6); RCFC 56(d)

THE UNITED STATES
----------x

PROTECTED INFORMATION ONLY TO BE DISCLOSED

IN ACCORDANCE WITH PROTECTIVE ORDER

ORAL DEPOSITION OF MS. SUSAN MCFARLAND

HOUSTON, TEXAS

JULY 15TH, 2015

10:01 A.M.

Reported By:
SAMANTHA DOWNING, CSR
JOB NO. 39652

ORAL DEPOSITION of MS SUSAN MCFARLAND, produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and numbered cause on the 15TH of JULY, 2015, from 10:01 a m to 5:31 p m , before Samantha Downing, CSR, CLR, in and for the State of Texas, reported by machine shorthand, at the DOUBLETREE BY HILTON, 8181 AIRPORT BOULEVARD, HOUSTON, TEXAS 77061 pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto

A P P E A R A N C E S

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ALSO PRESENT:

RITA BEZAK, ESQ (APPEARING BY PHONE)
JOE ORLANDO, ESQ (APPEARING BY PHONE)
KATIE BRANDES, ESQ (APPEARING BY PHONE)

THE REPORTER: I have 10:01 a m.
Will the witness read and sign?
MR. BARTOLOMUCCI: Sure.
MS. SUSAN MCFARLAND,
was called as a witness and, being first duly sworn, testified as follows:

EXAMINATION

BY MR. THOMPSON:

Q. Good morning.

Would you please state your full name for the record?

A. Susan McFarland.

Q. I am David Thompson with the firm of Cooper & Kirk, and I represent the plaintiffs in this matter. With me is my colleague, Shelby Baird.

MR. THOMPSON: And it might make sense for counsel to identify themselves for the record.

MR. ZAGAR: Good morning.

My name is Eric Zagar. I represent the class plaintiffs in the Court of Federal Claims.

MS. VARMA: Asim Varma from Arnold & Porter. I represent the Federal Housing Finance Agency.

MS. HOSFORD: Elizabeth Hosford from the Department of Justice representing the United States.

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A. Not that I was aware of, no.
Q. Okay. Was anyone from FHFA at this meeting?
A. I don't recollect. I don't remember.
Q. Okay. And you said there was an Analyst who had been at FHFA and --
A. No, had been at Fannie --
Q. Sorry.
A. -- and had gone to work for the U.S. Treasury.
Q. Mr. Goldstein?
A. Yes. Thank you.
Q. Okay.
A. Thank you. Yes.
Q. Allen Goldstein?
A. I said that if you refresh my memory on the name, I could confirm it.
Yes, it was Allen.
Q. And he was there at the meeting?
A. I believe he was at the meeting.
Q. Okay. Very good.
Did you ever have any similar type of conversation with anyone at the FHFA about the deferred tax asset prior to the Third Amendment?
A. Yes.
Q. Okay. And tell me about that meeting.
A. Well --

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MR. LAUFGRABEN: Object to the form of the question; vague.
A. I don't -- so just as we -- you know, we had a formal quarterly sit-down with Treasury. We had more regular interactions with individuals at FHFA. So one either Jeff Spohn and/or Brad Martin would attend our Executive Committee meetings.
And so generally anything I was going to say at Treasury, I was already telling the Executive Committee, and Brad or Jeff would have been present at those meetings.
And as such, my reviews of actuals and forecasts and even the -- the -- the raising of the potential that that allowance might be reversed in the not-so-distant future I would have mentioned at an Executive Committee meeting, and Jeff and/or Brad would have been present to hear that.
Q. (BY MR. THOMPSON) And just to be clear on that, that would have been within a month of the Third Amendment?
A. It would have been prior to that --
Q. Yes.
A. -- because it's all part of the discussions we have through the quarter-end-close process and forecast preparation and Board prep and all that kind of stuff

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that takes place in that cycle.
Q. Just so the record is clear, when you say, "prior to that," what period would that have been?
A. Well, it would have been probably -- I would suspect it was -- something that occurred in July would be my -- because of the timing.
You know, you're closing the books for the second quarter. We're prepping for the upcoming Board meetings, getting the forecasts done, letting the team know when the results are coming out for the quarter, all of those kinds of conversations that would happen internal at Fannie Mae before we would ever have that conversation with Treasury.
Q. Okay. And I am sorry I interrupted you.
You described these --
A. And then with the -- we also provide -- so we cannot file our Q unless DeMarco gave us permission to file the Q.
So drafts of our filings were also provided to FHFA first. They had the opportunity to provide feedback, and then we could incorporate that feedback and then got approval for the final filings.
We also had a press release that would go along with -- when we filed a Q, we would go out with a press release. There is where you might see a little

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more color.
There would normally be a quote for the CEO like Tim and a quote from me, and we would also kind of preclear that press release with FHFA before issuing the press release.
As far as -- I believe during 2012, I began to signal -- there began to be some public communication as to our view that things were starting to look good and starting to head in a positive direction.
I would have to refresh my memory through documents as to the timing of what I said and when. But I know through the course of early 2012 and then throughout that summer, the messaging was getting a bit more and more positive that we were sending out. And certainly FHFA was aware of our communications, our external communications in that regard.
As far as the deferred tax asset, I -- I don't recollect that we had some big formal meeting to break the news to them, okay? I believe that it was just something that we talked about in the normal course of keeping them informed about kind of what we're seeing.
And also, Jeff Spohn and/or Brad Martin would attend our Board meetings, so they would also

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hear that the same comments I was making to Treasury, I was making to the Board.

Q. Okay. In the same timetable?

A. I don't remember exactly when the Board meetings were within that window, but it would have been Board meetings shortly before that that I would have reviewed this very same information.

Q. Okay. And when you say that you would have had dialogue with people at FHFA about the deferred tax assets, with who would you have had the dialogue?

Would that have been Mario Ugoletti?

MR. LAUFGRABEN: Object to the form of the question; vagueness as to time period.

A. Yeah.

So early on, it's probably through the Chief Accountant's office of the FHFA, because it is a technical accounting matter.

Q. And do you happen to recall --

A. I can pick him out of a lineup.

Q. Okay. We'll show you some names later on.

A. I tell you, I -- ask me a number, I can probably give it to you. People's names...

It would have started there. Eventually there were conversations with Director DeMarco and key direct reports of his, but that -- the -- those -- the

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DeMarco conversations occurred when we were actually in the serious mode of potentially -- we were looking -- we did a full analysis at the end of the second quarter; no release. We did a full analysis at the end of the third quarter; no release.

When we were doing the analysis for the fourth quarter of 2012, we started to get to a point where we were tipping towards release, and that's when I began to have conversations with more senior folks at FHFA on it. But they were already aware of the statement that I made to Treasury. I mean, in general, I put it on people's radar screens that it's something that could happen in the not-so-distant future.

I will say that I believe Mary Miller asked me in this meeting about how large would it be and did I have any idea of when.

Q. Yeah.

A. And I believe my response was around 50 billion, but that could be larger or smaller depending upon when. The further out in time it is, the smaller it probably would be. It is part of the evidence that it might be good.

So the further out in time that it would be released, the smaller the release size would be.

But I said probably in the

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50-billion-dollar range and probably sometime mid 2013 at that time when I met with them late July, early August 2012.

But I said we had not done a real in-depth analysis, so I was just kind of giving her kind of my off-the-cuff perspective in the moment.

Q. And FHFA was on notice that you had sent this message to Treasury?

A. Yes.

MR. LAUFGRABEN: Object to the form of the question.

A. Yes.

Q. (BY MR. THOMPSON) And they were on notice of that fact before the Third Amendment; is that right?

MR. LAUFGRABEN: Same objection.

A. Yes.

Q. (BY MR. THOMPSON) Okay. Now, if we look for -- let's look at some of these Board minutes, and we've actually -- we've been going -- well, that's fine.

Does -- do you need a break, or --

A. I am fine right now.

Q. Okay.

A. I am fine right now. If I need water, then I will need a break.

Q. Okay. Very good.

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Okay. So we're going to have the court reporter mark as McFarland 2 a document that bears the Bates number FM3153 through 3159.

(McFarland Exhibit No. 2 was marked.)

Q. (BY MR. THOMPSON) And if we look, these are minutes of the meeting of the Board of Directors from August 22, 2011. And if we look at the last sentence of the second paragraph, it indicates Jeff Spohn from the Federal Housing Finance Agency also participated.

Is this a piece of what you were saying earlier, that typically there was an FHFA member at your Board meetings?

A. Yes.

Q. Okay. And if we turn to page 4 of this document, there's a heading that says, "Bank of America Countrywide and Bank of New York Mellon Proposed Settlement."

Do you see that?

A. Yes.

Q. And do you recall that Fannie Mae had initiated a series of litigations against major financial institutions?

A. Yes.

MR. LAUFGRABEN: Object to the form of the question.